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## **RULEMAKING ISSUE**

(Commission Meeting)

**For:** The Commissioners

**From:** James R. Tourtellotte   
Chairman, Regulatory Reform Task Force

**Subject:** DRAFT REPORT OF THE REGULATORY REFORM TASK  
FORCE

**Purpose:** To transmit the draft report of the  
Regulatory Reform Task Force to the  
Commission for appropriate action.

**Discussion:** Attached is the Draft Report of the  
Regulatory Reform Task Force. It contains  
a legislative proposal in the form of a  
proposed Nuclear Licensing Reform Act of  
1983 and administrative proposals for rule  
changes regarding the subjects of  
backfitting, the hearing process,  
separation of functions and ex parte, and  
participation of the NRC staff in initial  
licensing proceedings.

**I. LEGISLATIVE PROPOSALS**  
Substantively, the legislative changes  
involve amendment of section 185,  
Construction Permits and Operating  
Licenses and section 189, Hearings and  
Judicial Review. The bill also calls for  
the addition of two new sections, section  
193, Early Site Review and section 194,

**Contact:**  
J. Tourtellotte, RRTF  
X-43300

Approval of Designs. Conforming changes are also provided as required. Section 185, Construction Permits and Operating Licenses, is amended to delete the requirement that the construction permit shall state the earliest and latest dates for the completion of construction or modification and that the construction permit shall expire if not completed by that date or extended by the Commission. Section 185a. also adds the reference to an operating license to the section which previously concerned construction permits only. Section 185b. authorizes the Commission to rely upon certification of need for power made by any competent Federal, regional or State governmental organization. Section 185c. authorizes the Commission to establish procedures for issuance of a combined construction permit and operating license for nuclear power plants. This authority has sometimes been referred to as one-step licensing.

Section 189a., Hearings and Judicial Review is amended to include site permits, nuclear power reactor design and combined construction permit and operating licenses as types of proceedings for which the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding and shall admit any such person as a party to that proceeding. It also deletes the requirement for mandatory construction permit hearing. Finally, it adds what is sometimes referred to as a hybrid hearing process. To implement this process, provisions are made for notice, standards for dealing with amendments to operating licenses which involve no significant hazards considerations and a two-step process for screening issues.

Section 193, Early Site Review, provides that the Commission may authorize issuance of a site permit notwithstanding the fact that no application for construction permit or combined construction permit and operating license has been filed. Other provisions concern the waiver of fees, Commission reliance upon competent



Federal, State or regional determinations of needs for power, judicial review, a ten year life for site permits with provisions for renewal for not less than five, nor more than ten years, use of the site for alternate or modified types of energy facilities and a provision to preserve the Commission's right to issue limited work authorizations as appropriate.

Section 194, Approval of Designs, parallels section 193 except where section 193 authorizes the Commission to rely on a determination of need for power made by a competent Federal, State or regional agency. The provision on need for power would be inapplicable to the section on design because the design would be approved for generic application throughout the United States. Hence, at the time the design would be approved, the precise geographic location of its construction would not be known and need ~~for power would become~~ relevant only at the time a site would be selected.

For greater detail, see the Background and Section-by-Section Analysis, Draft Bill and Comparative Draft Bill in the attached Draft Report of the Regulatory Reform Task Force.

The range of subjects addressed in the proposed legislation was established by direction of the Commission to the Chairman of the Regulatory Reform Task Force in a briefing on October 7, 1982. Because the drafting was done in an extremely short time span, less than three weeks, it was impossible to follow the ordinary review process for work products from the Regulatory Reform Task Force. This legislative proposal was reviewed by neither the Task Force as a whole, nor the Senior Advisory Group. Given the complexity of the task to be accomplished, the date of October 7, 1982 as establishing the directive of the Commission on what the bill should contain, a predetermined date of having the package before the Commission by November 15, 1982 (a date which was

subsequently moved up to November 8, necessitating the package be in the hands of the Commission by November 1 or 2) and the ultimate objective of getting the legislation to Congress by January 31, 1983, ordinary review procedures were rendered impractical if not impossible.

It should be noted that the impracticability of obtaining Task Force and Senior Advisory Group review of the legislation is at least a partial reason why the report of the Task Force is entitled Draft Report. Although the Task Force and the Senior Advisory Group review probably will not result in monumental changes to the Draft Report, it is suggested that those groups be afforded the opportunity to review the Draft Report. At the end of that period, individual members could file their comments, make suggestions for revisions or draft differing professional opinions to be included as a part of the report.

## II. ADMINISTRATIVE PROPOSALS

### A. Backfitting

The current backfit rule, 10 CFR §50.109, has been in existence for more than twelve years but has not been followed by the staff. To remedy this situation, the Task Force is proposing two approaches. The first calls for the issuance of a policy paper from the Commission to point out that 10 CFR §50.109 should be enforced in accordance with certain prescribed procedures. The second approach is more comprehensive in that it calls for the amendment not only of section 50.109 but of other sections which have either been used in the past to circumvent the intent of section 50.109 or are associated with similar issues such as the generation of information requests.

The policy statement could be issued and have an immediate effect. The more comprehensive approach would require a rulemaking proceeding which would last at least several months.

The Commission has recognized the importance of the backfit problem in its collegial discussions and by establishing the Committee to Review Generic Requirements. Most recently, it was discussed in a meeting on October 7, 1982 in association with the legislative proposal to be made to Congress in 1983. In that discussion, the Commission decided that the backfitting problem should be addressed within the context of internal administration and management rather than through the legislative process.

The suggestion has been made that undisciplined backfitting may have made nuclear plants more difficult to operate and maintain and, hence, may have had an adverse effect on the public health and safety. It has been variously suggested that backfitting leads to less than optimal design arrangements; that it compels personnel to constantly face the uncertainties associated with change and perpetual retraining; that it sometimes requires a high level of construction, creating a distraction and, therefore, a negative effect on operation; and that it can result in more frequent shutdowns and startups by increasing exposure to component failure and operator errors. Finally, it is suggested that past backfitting practices have contributed substantially to the air of uncertainty surrounding the Nuclear Regulatory Process and may have imposed unjustified economic burdens on consumers and taxpayers.

Certain principles were established to assist in the development of a new backfit rule. First, it was determined that backfit should only be required to substantially enhance public health and safety, that is, to resolve a significant safety problem. In the application of this principle, the increase in safety must also clearly exceed the direct and indirect costs of the backfit. Second, a backfit should be justified when considered over the remaining life of the plant, e.g., a plant with only a few years of remaining life should not be

significantly modified unless a substantial reason exists for doing so. Third, the backfitting rule should apply to production or utilization facilities following issuance of their construction permit or operating license. Further, a backfit should be defined as the addition of or change in plant organization and procedures as well as the addition or change in plant structures, systems or components. Fourth, backfitting rule should require the staff to analyze in a systematic and documented manner whether a proposed backfit will enhance public health and safety and is justified, particularly with regard to its costs and benefits. This analysis should be completed before the backfit is required, unless the Commission finds it is needed immediately to protect the public health and safety or common defense and security. When such a finding is made, the analysis should be made following imposition of the backfit. Fifth, the backfitting should be applied to backfits imposed by rule, regulation or order. Sixth, licensee should have the opportunity prior to the imposition of backfitting to demonstrate that the modification is not required or that its objective can be achieved by other acceptable means. Seven, the Executive Director for Operations should review staff requests to licensees for information to assure that such requests are necessary and justified.

In developing a combination of rules to effect these principles, it was determined that the essential elements of a new approach to backfit required special attention be given to the definition, the standard, the decisionmaking factors and the burden of proof associated with the rule.

The function of the definition is to establish a time for application of the backfit standard and to delineate those parts of the plant or operation to which the rule is to apply. The objective of the standard should be to move the staff away from requiring marginal safety fixes

which are "nice to have" toward requiring only those changes which are necessary to improve the overall plant operation and are cost effective. The purpose of the decisionmaking factors is to assure that the staff pursues a rational decisionmaking process in arriving at a determination as to whether a backfit is required. The purpose of the burden of proof is to make certain that the staff demonstrates the need for a backfit, rather than requiring the licensee to show that it is not required. This shift in the burden of proof will assist in assuring that the staff meets its responsibility to provide a rational basis for imposition of backfitting requirements.

In the final analysis, the new backfit proposal requires nothing more than the systematic application of reason as a condition precedent to the imposition of a backfit.

### III. HEARING PROCESS

The Regulatory Reform Task Force found that the quality of the existing hearing process can and should be improved. For the purposes of analysis, the hearing process was divided into three parts, i.e., the screening process, the actual conduct of the hearing process and the decisionmaking process. The majority of the changes in the screening process and the actual conduct of the hearing involve the tightening of discipline for both the participants and the licensing boards. Improvements in the decisionmaking process are primarily directed at eliminating layers of review but to some extent may be associated with improved procedural discipline. There are approximately twenty-five changes suggested in the three principal parts of the hearing process. Some of those changes are substantial and some are nothing more than conforming or housekeeping changes. This discussion will be limited to the suggested major revisions.



The term screening process refers to the process for determining whether a hearing should be held and, if so, what issues should be heard by the presiding officer. Three major revisions to the screening process are suggested. First, a screening Atomic Safety and Licensing Board would be established as a central clearinghouse for all requests for hearings, petitions for leave to intervene and proposed contentions. Currently, the individual Atomic Safety and Licensing Boards make separate and independent review of such matters in individual licensing proceedings. As a central clearinghouse, the screening board will add a measure of predictability to rulings on hearing requests, intervention petitions and contentions. Second, there is a standing requirement which will require a person to demonstrate an interest in the proceeding sufficient to justify his or her participation. Currently, parties may participate on a discretionary basis without showing that he or she has an interest to protect and that they are likely to suffer injury by reason of the administrative action which is to be taken. Third, the threshold for admission of contentions is raised to require the tendering of evidence to demonstrate the existence of a genuine factual dispute. This is consistent with Supreme Court precedent. See Costle v. Pacific Legal Foundation, 445 US 198, 214 (1980), citing Weinberger v. Hynson, Westcott and Running, Inc., 412 US 609 at 620-621 (1973). The purpose of this requirement is to assure that only responsible claims trigger the hearing process and that frivolous or meritless contentions are neither admitted nor litigated.

A number of improvements are proposed to improve the conduct of the hearing. Proposed changes should give stronger direction to presiding officers to more rigorously control abusive or burdensome discovery. In addition, discovery requests may not require the staff to perform additional work on matters beyond what is needed to support the staff's

position or to explain why matters not relied on by the staff were not considered.

Substantial changes are also proposed in the area of how evidence is presented at an initial license proceeding. The objective was to establish a procedure which would permit the case to be presented and decided on the basis of written material to the fullest extent possible. Special need for live testimony, including cross-examination would have to be demonstrated. Comprehensive cross-examination plans would have to be filed. In current practice although cross-examination plans may be required by the licensing boards in individual proceedings, the rules do not require it. Moreover, when they are offered, cross-examination is usually allowed even where a plan is poorly stated and insubstantial. This coupled with the fact that the value of cross-examination is often diminished by unskilled questioning can result in a cluttered, over-burdened trial record.

Another new provision would permit the screening board or presiding officer conducting a hearing to appoint a panel of technical subject matter experts. These experts could help determine in the first instance whether there is a technical basis for reaching a conclusion that a proposed contention raises a genuine issue of disputed fact. In the conduct of a hearing, these experts could assist the hearing officers in understanding the technical problems involved and in evaluating the quality of the testimony presented.

A number of miscellaneous improvements are also suggested. The sua sponte rule, which allows presiding officers to raise issues on their own motion, would be tightened so that in all but the most unusual situations the scope of the hearing would be confined to the disputed issues of fact properly placed into controversy by the parties; to encourage the use of summary

procedures to dispose of issues both prior to and during the hearing, summary disposition motions could be filed at any stage of the proceeding; motions which are not controverted by other parties must be granted; and an express provision is added to recognize that the Commission may designate a qualified hearing examiner to preside in initial licensing proceedings in lieu of a three-member licensing board.

A number of improvements are also suggested in the decisionmaking process. The most fundamental change concerns the removal of the Atomic Safety and Licensing Appeal Board as an independent, intermediate administrative appellate tribunal. Organizationally the Appeal Board would be moved to a position directly under the Commission. There it would review the licensing board decision and recommend a course of action to the Commission. It would also draft the Commission decision for the approval of the Commissioners. This should involve no appreciable increase in workload for the individual Commissioners since the record review and opinion writing will continue to be a function of the Appeal Board. Moreover, it will eliminate the responsibility of the Office of General Counsel and the Office of Policy Evaluation to perform those review and opinion writing functions under the current system. The advantage of this transfer is that important policy decisions which may arise in the course of appellate review would be addressed and decided by the Commission itself rather than by an independent appellate tribunal. This process also has the potential for eliminating the resource commitment of the Office of the General Counsel and the Office of Policy Evaluation for reviewing licensing board decisions and drafting Commission decisions.

Another major improvement concerns the proposed addition of a rule which would allow the expeditious codification into regulations of generic factual issues resolved in initial licensing proceedings.

The objective is to preclude the relitigation of generic factual issues resolved in one proceeding and subsequent proceedings involving similar facilities or reactors. The rule would apply to generic factual issues which are litigated to a conclusion rather than those dismissed on summary disposition or withdrawn by a party. Once resolved, the generic issue will be expeditiously issued as a proposed rule on the basis of the hearing record within a forty-five day period for public comment. If the Commission adopts the rule after considering the public comments, the generic issue cannot be litigated in subsequent adjudications unless special circumstances could be shown pursuant to section 2.758.

Another area of proposed improvement concerns limiting an intervening party to participation in a proceeding on only those issues placed in controversy by that party. Present practice permits an intervenor to cross-examine, file proposed findings of fact and conclusions of law and lodge appeals on any issue in the proceedings, even though such issues were not raised by that party. The value of such a practice is questionable. Moreover, it may unduly burden the record and require an unwarranted expenditure of resources to respond.

Another proposal suggests the reinstatement of the immediate effectiveness rule for all initial decisions. Following the TMI accident, the rule was substantially modified to require a limited appeal board or Commission review of initial decisions authorizing construction permits or operation at more than five percent of full power. It is questionable as to whether this restriction on effectiveness has had any significant effect on safety. It appears to be procedurally cumbersome. There is some merit to the argument that the extensive reviews which an application has undergone by the time it gets through a licensing proceeding should give the

Commission reasonable assurance that the plant is safe. At that point it has been reviewed by the licensee, its vendors and contractors, the NRC staff, the Advisory Committee on Reactor Safeguards, and the Atomic Safety and Licensing Board.

Adoption of the immediate effectiveness rule would enhance the predictability and orderliness of the licensing process and would avoid producing a needless sense of uncertainty. In this regard, see a June 2, 1982 memorandum for the Commission from Forrest J. Remick, Director, Office of Policy Evaluation on the subject of Commission Effectiveness Review of Licensing Board Decisions.

Finally, under existing practice, the Director of Nuclear Reactor Regulation or Nuclear Material Safety and Safeguards, as appropriate, issues licenses authorized by initial decisions. Under the proposed rules, responsibility for license issuance will rest with the Executive Director for Operations, the chief staff officer of the Commission. Although this may have the appearance of being a major shift in organization, it is actually little more than housekeeping. Under the current practice, the Director of Nuclear Reactor Regulation and the Director of Nuclear Material Safety and Safeguards are under the direction of the Executive Director for Operations. As such, the Executive Director for Operations routinely reviews all licenses prior to their issuance. Because the issuance of licenses is a major function, because the Executive Director for Operations has ultimate responsibility for and authority over the issuance of such licenses, and because in actual practice licenses do not issue without his prior approval, the rules should be changed to require that licenses issue directly from his office. Moreover, the change is in keeping with the strong EDO concept which has been generated in the process of revising Commission management.



#### IV. SEPARATION OF FUNCTIONS AND EX PARTE COMMUNICATIONS

Revision in the separation of functions and ex parte rules is suggested so that the Commissioners may have better access to the expertise of their staff. The concepts of separation of functions and ex parte are similar in that both are designed to minimize the possibility that a decisionmaker in an adjudicatory proceeding may be unduly influenced by off-the-record communications. They are different because, in theory, separation of functions applies only to the staff and ex parte applies to all others outside the agency. To some extent, this distinction has been lost in the past and current Commission rules and practice. The two concepts have been mixed in both the rules and in common parlance. For clarification, the following explanation is offered.

Separation of functions is precisely what the name implies. Commission operations can be divided into separate functions, such as, investigation, review, prosecution and decisionmaking. The purpose of the rule is to assure that in adjudication, the investigator or the prosecutor neither serve as nor unduly influence the decisionmaker. There is an exception to this rule for initial licensing cases.

The ex parte concept applies in adjudications to preclude communications between persons outside the agency and the decisionmaker during the time a controversy is under consideration.

The problem which has persisted for many years has centered around the fact the Commissioners and their immediate advisory staff have been regarded as decision makers in an adjudication during contested initial licensing cases. Concomitantly, the technical staff has been regarded as investigators and prosecutors. Consequently, under its own rules the Commission has been unable to receive the expert advice of its technical staff in

resolving technical problems. Some regard it as true irony that a government agency whose reason for being is to use its expertise to protect the public health and safety is prohibited by its own rules from realizing the full potential of that expertise so vital to the accomplishment of its mission.

The current Commission rule on separation of functions, 10 CFR §2.719, is based upon the Administrative Procedure Act (APA), 5 U.S.C. § 554(d). Although section 554(d) requires separation of functions be maintained in adjudications, it provides an exception for initial licensing cases under section 554(d)(A). The Commission has not taken advantage of that exception in the past. To the contrary, it has adopted more restrictive rules and its actions have been guided by legal interpretations of those more restrictive rules.

Two rulemaking options are presented to address this problem. Option one enlarges the number of staff members with whom the Commission may communicate in initial licensing proceedings by eliminating restrictions on supervisory personnel. Specifically, it permits a Commissioner or Commission level adviser to communicate off-the-record with any staff member, except those who "directly participate as investigator, witness, attorney, or administrative judge in the planning, execution, or decision of the staff case." The wording permits a Commissioner to consult off-the-record with a supervisor, director, chief, leader, or other person who directs or participates in the planning, execution or decision of the staff case, so long as that person does not participate directly as an investigator, witness or attorney. This result is accomplished through a combination of amendments to 10 CFR §§2.719(b) and 2.780(e), (f).

Option two takes full advantage of the initial license exception under the APA by simply providing like the APA, that

separation of functions rule does not apply in determining applications for initial licensing. Closely associated with option two is a proposed revision of the ex parte rule in 10 CFR § 2.780. It would provide that nothing in the rule would be interpreted in such a manner as to preclude the exercise of the initial licensing exception to the separation of functions rule.

Both options and the proposed revision to the ex parte rule are susceptible to argument. Perhaps the most novel argument concerns the interpretation of what may be a conflict within the statutory framework of the APA which creates the initial licensing exception.

Section 554(d) of the APA grants an exception in initial licensing cases to the separation of functions rule. Section 557(d) of the APA governing ex parte contains no such exception. The argument is that once the technical staff exercises its prerogative under § 554(d) to communicate with the Commission or its advisors on a matter in controversy, the staff becomes a part of the decisional process. If so, § 557(d) would prohibit them from thereafter communicating with an applicant or licensee. Since communications between the staff and applicants or licensees is absolutely essential to regulatory review and communications may be stopped in this case, regulatory review would be stopped. To say that this outcome would be undesirable would be a gross understatement.

Some doubt may be cast upon this argument by applying generally accepted rules of statutory construction. One fundamental rule is that sections of a statute should be interpreted to be consistent rather than inconsistent. This rule is related to what has been termed "the principle of harmony" in statutory law. Continuity and consistency are generally regarded as essential to stability in the regulation of human affairs.

Another rule is the plain meaning rule. It declares that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, the sole function of the courts is to enforce it according to its terms."

The plain meaning of 5 U.S.C. § 554(d)(A) is to grant an exception to the separation of functions rule. On the other hand, section 557(d) is silent about how ex parte is to be applied to initial license cases. This silence could be interpreted as not being inconsistent with § 554(d)(A) since there are no words which convey a plain meaning that ex parte considerations are to supercede the exception to the separation of functions rule.

In addition, examination of the problem in light of the underlying reason for the initial licensing exception could also lead to a result that the two rules are not inconsistent. As explained fully in the Attorney General's Manual on the APA, the initial license exception was created because the framers of the Act regarded such actions as being more like rulemaking than adjudication. In order for the ex parte rule to be applied in such a way as to negate the initial licensing exception, initial licensing must necessarily be regarded as being like adjudication rather than rulemaking. If so, the "broad and logical dichotomy between rulemaking and adjudication" upon which the Attorney General distinguishes initial licensing would be shattered. Moreover, within a single statute Congress would explicitly be giving one meaning to initial licensing while implicitly giving it another. It is at least questionable that Congress would intend such a result, particularly where the effect would be to concomitantly create a right and preclude its exercise.

This somewhat novel question aside, there are other concerns which might be raised. Fairness, impartiality and legality are also concerns which should be addressed. For example, even though the ex parte rule

would still apply to parties outside the Commission, a question may be raised as to whether those parties might try to indirectly influence the Commission on contested issues by influencing the staff, who could talk to the Commission. The question is not easily answered.

In this regard, it is worth noting that for some time Commission policy has required meetings between applicants or licensees be noticed so that the public has an opportunity to attend. This openness of communications may offer a measure of protection against undue ex parte communications. The ex parte rule also provides sanctions which would continue to serve as a deterrent against improper communications. Moreover, additional safeguards could be devised, as necessary, to minimize the likelihood of unwarranted communications.

There is an interrelationship between this proposed rule and the rule concerning "Participation of the NRC Staff in Initial Licensing Proceedings". To the extent that the staff may not be a party, neither the separation of functions rule nor the ex parte rule would come into play.

#### V. PARTICIPATION OF THE NRC STAFF IN INITIAL LICENSING PROCEEDINGS

The proposal would alter the staff's current role as a full party advocate by limiting staff participation as a party in contested initial licensing proceedings to those controverted factual issues on which it disagrees with the technical basis, rationale or conclusions of the license applicant. Should such a disagreement arise, the staff would have the discretion to enter the proceeding on its own motion or upon the request of a presiding officer. Staff's role as a full party in all other proceedings, primarily in enforcement matters, would remain unchanged by the adoption of the proposed modification.

The proposed rule change responds in large measure to suggestions made over an



extended time from a variety of sources both within and outside NRC for the Commission to re-examine staff's role in the adjudicatory licensing process.<sup>1/</sup> Those suggestions reflected a diversity of beliefs, including views that staff's participation unnecessarily slows down the hearing process, typically lends insurmountable support to the case in favor of the application, and often misplaces the focus of the proceeding which should properly be directed at disputes between applicants and intervenors who oppose the application.

The Commission has recently received a study prepared by its Office of General Counsel<sup>2/</sup> that analyzes the costs and benefits to the regulatory process of a rule change such as that proposed here. The study suggests that the chief benefit to be sought from the change would be enhancement of the public's perception of the Commission's regulatory process as a fair and neutral one that considers opposing viewpoints. Thus, the Commission may be particularly interested in learning whether in the public's view the credibility of NRC's regulatory process would be enhanced by effecting the proposed change. Specific comment on the proposed regulatory language should also be invited.

The heart of the proposal is contained in proposed §§ 2.700(a) and (b). The staff would become a party to contested proceedings involving initial licensing on

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<sup>1/</sup> Marcus A. Rowden, Report: Achieving a More Effective Licensing Process--Basic Reform Within Existing Law, Atomic Industrial Forum, 6-8, November, 1981. See also: Nuclear Regulatory Commission Office of General Counsel Study of NRC Staff's Role in Contested Nuclear Power Reactor Initial Licensing Proceedings, June 3, 1982. These reports are available for inspection and copying for a fee in the Commission's Public Document Room at 1717 H Street, N.W., Washington, D.C. 20555.

<sup>2/</sup> See footnote 1.

a discretionary basis. Should the staff disagree with a party's technical basis, rationale or conclusions, the staff may provide notice to the parties and introduce evidence at the hearing which articulates its position and its basis for disagreement. The staff would thus become a party to the proceeding, but only with respect to the particular issue(s) regarding which it elects to participate. The proposed rule also provides an opportunity for the parties to rebut the staff's evidence. Cross-examination by and of the staff would also be permitted to the extent otherwise allowed. Several other points should be emphasized.

First, § 2.700b would apply only to initial licensing proceedings. Initial licensing is defined in proposed § 2.4(r) of the Proposed Reform Amendments as including any proceeding on an application for a construction permit, operating license, or any other license for a facility or other activity, including any amendment or modification. Normally excluded from initial licensing are proceedings involving the renewal, revocation, suspension, annulment, withdrawal or agency-initiated modifications of licenses. Thus the staff will remain a full party in all agency enforcement actions as well as in license renewal and withdrawal proceedings.

Second, the proposed rule permits discretionary participation by the staff on one or more issues in a proceeding. There may be instances where the public interest would be better served through staff participation as a party. For example, the staff may take exception to a methodology, analysis or conclusion of a party and, therefore, may find it necessary to function as a formal party on selected issues in order to fully develop the record. It is anticipated that staff participation as a party in such an instance would be the exception rather than the rule, but the provision is necessary to give the staff the

flexibility to carry out the agency mission as circumstances may require.

Third, it should be emphasized that when the staff becomes a party to the proceeding it does so only with respect to the particular issue(s) as elected by the staff. Thus, while the staff may submit evidence, file proposed findings of fact, take appeals, and otherwise exercise party rights on matters relating to those elected issues the staff would not participate on other matters except to the extent it acts as an amicus pursuant to proposed §§ 2.700b(c) and (d), discussed below.

Proposed §§ 2.77b(c) and (d) permit the staff to participate in the proceeding to a limited extent as an amicus. The staff may provide on the record advice "on any matter in the proceeding" to the presiding officer, either on its own initiative or upon the request of the presiding officer. "On any matter" is intentionally broad to permit the staff and presiding officers the greatest flexibility in providing or requesting advice. The only exception is that advice may not be requested or provided on issues on which the staff is already participating as a party because of a disagreement with the license applicant.

#### Recommendations:

1. Legislative and Administrative Proposals of the Regulatory Reform Task Force should be forwarded to the Ad Hoc Committee on Regulatory Reform.
2. The Draft Report of the Regulatory Reform Task Force should be placed in the Commission's Public Document Rooms throughout the United States.
3. After the comments of the Ad Hoc Committee on Regulatory Reform have been received by the Commission, the legislation should be finalized as quickly as possible so that it may be presented to Congress in mid or late January.

4. After the comments have been received from the Ad Hoc Committee on Regulatory Reform for the Administrative Package, and revisions have been made as required by the Commission, the Administrative Proposals of the Regulatory Reform Task Force should be advanced through the rulemaking process.



James R. Tourtellotte  
Chairman,  
Regulatory Reform Task Force

Enclosure:  
Draft Regulatory Reform  
Task Force Report

This paper is tentatively scheduled for discussion at an Open Meeting on Monday, November 8, 1982.

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**UNITED STATES NUCLEAR REGULATORY COMMISSION**

**DRAFT REPORT  
of the  
REGULATORY REFORM TASK FORCE  
on  
NUCLEAR LICENSING REFORM**

**PART I**

**James R. Tourtellotte  
Chairman, RRTF  
November 1982**



**REGULATORY REFORM TASK FORCE MEMBERS**

**James R. Tourtellotte, Chairman**

**Peter G. Crane, OGC**

**Joseph R. Gray, ELD**

**Frank J. Miraglia, NRR**

**John M. Montgomery, OPE**

**Robert C. Paulus, I&E**

**Seymour Wenner, ASLBP**

**Patricia Woolley, ADM**

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## Part III - Statements of the Regulatory Reform Task Force

(To be provided)

## Chapter 1

### Introduction

## CHAPTER I

### INTRODUCTION

In November 1981 Chairman Palladino appointed senior NRC personnel to the Regulatory Reform Task Force to review the reactor licensing process of the Nuclear Regulatory Commission. Chairman Palladino set four objectives--

- to create a more effective and efficient vehicle for raising and resolving legitimate public safety and environmental issues regarding the applications under review,
- to develop means for more effective future use of NRC resources in the licensing of new plants,
- to avoid regulatory uncertainty and placing unjustifiable economic burdens on utilities that may wish to build a nuclear plant (and their rate payers),
- to accomplish the above without impairing protection of public health and safety.

The Chairman requested that the Task Force develop and make recommendations to the Commission on actions which can be taken to improve the effectiveness of the licensing process in the near term and proposals for longer range streamlining of that process. The execution of Task Force recommendations was to ultimately appear in one of four forms:

- (1) Legislative Proposals;
- (2) Regulation Changes;
- (3) Policy Papers from the Commission directing a course of conduct which the staff should follow;
- (4) Administrative remedies such as simple interoffice memoranda and orders.

The Task Force was staffed with one person each from agency divisions regularly involved in the licensing process. Those divisions included the Atomic Safety Licensing Board Panel, Office of General Counsel, Office of Policy Evaluation, Executive Legal Director, Nuclear Reactor Regulation and Inspection and Enforcement.

An extensive review system was devised for recommendations made by the Regulatory Reform Task Force. In November 1981, Chairman Palladino appointed a Senior Advisory Group to assist him in reviewing materials

presented by the Task Force. This Senior Advisory Group was made up of the General Counsel, the Director of the Office of Policy Evaluation, the Chairman of the Atomic Safety and Licensing Appeal Board, the Executive Director for Operations and the Chairman of the Regulatory Reform Task Force. In March 1982 the Ad Hoc Committee for Review of Nuclear Reactor Licensing Reform Proposals was formed. The Committee was made up of representatives from industry, public interest groups and state governments. The review process calls for the recommendations of the Task Force to be presented first to the Senior Advisory Group and then to the Commission. After presentation to the Commission, the recommendations are forwarded to the Ad Hoc Committee so that its members may review the recommendations and submit a report to the Commission. After the Ad Hoc Committee has filed its report, the Commission will determine a course of action.

Initially, NRC employees and the public at large were invited to make recommendations to the Regulatory Reform Task Force. Numerous meetings were held with various members of the NRC staff, the industry and intervenor groups.

Because of the limited resources available to the Task Force, a plan of action was developed to focus on the most important issues. Administratively, those issues were backfitting, the hearing process, separation of functions and the ex parte rule, participation of the NRC staff in initial licensing proceedings, and standardization.

The Task Force was also charged with responsibility for developing a legislative program. Although a comprehensive legislative package was developed initially, that recommendation was refined to become the proposed Nuclear Standardization Act of 1982. The Act was developed by the Regulatory Reform Task Force, reviewed by Senior Advisory Group and presented to the Commission for its consideration. The Act was placed in the Federal Register for public comment in June 1982. Concomitant with its review by the public, the Act was presented to the Ad Hoc Committee for Review of Nuclear Reactor Licensing Reform Proposals.

After review of the public comments and the report of the Ad Hoc Committee, and upon further consideration of the Commission, it was decided in October 1982 to draft a new legislative proposal which would be comprehensive in its approach and would specifically address the hearing process, combined construction permits and operating licenses, early site review and standardized designs. That proposal is in Chapter II of Part I of this report.

The following is a summary of the legislative proposals and all of the administrative proposals except standardization. Administrative proposals on standardization are not considered to be of as immediate importance as the other matters presented. Recommendations on standardization may be presented by the Task Force at a later date. The administrative proposals are in Chapters II through VI of Part I of this report.



The report is in two parts. Part I contains the current proposals for legislative and administrative changes. Part II contains the Nuclear Standardization Act of 1982 and documents related to the overall reform effort.

Although the following summary presents some of the problems addressed in the proposals along with their underlying bases, the individual proposals should be used as the primary source for both substance and justification of the suggested reform measures.

## I. LEGISLATIVE PROPOSALS

Substantively, the legislative changes involve amendment of section 185, Construction Permits and Operating Licenses and section 189, Hearings and Judicial Review. The bill also calls for the addition of two new sections, section 193, Early Site Review and section 194, Approval of Designs. Conforming changes are also provided as required. Section 185, Construction Permits and Operating Licenses, is amended to delete the requirement that the construction permit shall state the earliest and latest dates for the completion of construction or modification and that the construction permit shall expire if not completed by that date or extended by the Commission. Section 185a. also adds the reference to an operating license to the section which previously concerned construction permits only. Section 185b. authorizes the Commission to rely upon certification of need for power made by any competent Federal, regional or State governmental organization. Section 185c. authorizes the Commission to establish procedures for issuance of a combined construction permit and operating license for nuclear power plants. This authority has sometimes been referred to as one-step licensing.

Section 189a., Hearings and Judicial Review is amended to include site permits, nuclear power reactor design and combined construction permit and operating licenses as types of proceedings for which the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding and shall admit any such person as a party to that proceeding. It also deletes the requirement for mandatory construction permit hearing. Finally, it adds what is sometimes referred to as a hybrid hearing process. To implement this process, provisions are made for notice, standards for dealing with amendments to operating licenses which involve no significant hazards considerations and a two-step process for screening issues.

Section 193, Early Site Review, provides that the Commission may authorize issuance of a site permit notwithstanding the fact that no application for construction permit or combined construction permit and operating license has been filed. Other provisions concern the waiver of fees, Commission reliance upon competent Federal, State or regional determinations of needs for power, judicial review, a ten year life for site permits with provisions for renewal for not less than five, nor more than ten years, use of the site for alternate or modified types of energy facilities and a provision to preserve the Commission's right to issue limited work authorizations as appropriate.

Section 194, Approval of Designs, parallels section 193 except where section 193 authorizes the Commission to rely on a determination of need for power made by a competent Federal, State or regional agency. The provision on need for power would be inapplicable to the section on design because the design would be approved for generic application throughout the United States. Hence, at the time the design would be approved, the precise geographic location of its construction would not be known and need for power would become relevant only at the time a site would be selected.

For greater detail, see the Background and Section-by-Section Analysis, Draft Bill and Comparative Draft Bill in the attached Draft Report of the Regulatory Reform Task Force.

The range of subjects addressed in the proposed legislation was established by direction of the Commission to the Chairman of the Regulatory Reform Task Force in a briefing on October 7, 1982. Because the drafting was done in an extremely short time span, less than three weeks, it was impossible to follow the ordinary review process for work products from the Regulatory Reform Task Force. This legislative proposal was reviewed by neither the Task Force as a whole, nor the Senior Advisory Group. Given the complexity of the task to be accomplished, the date of October 7, 1982 as establishing the directive of the Commission on what the bill should contain, a predetermined date of having the package before the Commission by November 15, 1982 (a date which was subsequently moved up to November 8, necessitating the package be in the hands of the Commission by November 1 or 2) and the ultimate objective of getting the legislation to Congress by January 31, 1983, ordinary review procedures were rendered impractical if not impossible.

It should be noted that the impracticability of obtaining Task Force and Senior Advisory Group review of the legislation is at least a partial reason why the report of the Task Force is entitled Draft Report. Although the Task Force and the Senior Advisory Group review probably will not result in monumental changes to the Draft Report, it is suggested that those groups be afforded the opportunity to review the Draft Report. At the end of that period, individual members could file their comments, make suggestions for revisions or draft differing professional opinions to be included as a part of the report.

## II. ADMINISTRATIVE PROPOSALS

### A. Backfitting

The current backfit rule, 10 CFR §50.109, has been in existence for more than twelve years but has not been followed by the staff. To remedy this situation, the Task Force is proposing two approaches. The first calls for the issuance of a policy paper from the Commission to point out that 10 CFR §50.109 should be enforced in accordance with certain prescribed procedures. The second approach is more comprehensive in that it calls for the amendment not only of section 50.109 but of other sections which have either been used in the past to circumvent the

intent of section 50.109 or are associated with similar issues such as the generation of information requests.

The policy statement could be issued and have an immediate effect. The more comprehensive approach would require a rulemaking proceeding which would last at least several months.

The Commission has recognized the importance of the backfit problem in its collegial discussions and by establishing the Committee to Review Generic Requirements. Most recently, it was discussed in a meeting on October 7, 1982 in association with the legislative proposal to be made to Congress in 1983. In that discussion, the Commission decided that the backfitting problem should be addressed within the context of internal administration and management rather than through the legislative process.

The suggestion has been made that undisciplined backfitting may have made nuclear plants more difficult to operate and maintain and, hence, may have had an adverse effect on the public health and safety. It has been variously suggested that backfitting leads to less than optimal design arrangements; that it compels personnel to constantly face the uncertainties associated with change and perpetual retraining; that it sometimes requires a high level of construction, creating a distraction and, therefore, a negative effect on operation; and that it can result in more frequent shutdowns and startups by increasing exposure to component failure and operator errors. Finally, it is suggested that past backfitting practices have contributed substantially to the air of uncertainty surrounding the Nuclear Regulatory Process and may have imposed unjustified economic burdens on consumers and taxpayers.

Certain principles were established to assist in the development of a new backfit rule. First, it was determined that backfit should only be required to substantially enhance public health and safety, that is, to resolve a significant safety problem. In the application of this principle, the increase in safety must also clearly exceed the direct and indirect costs of the backfit. Second, a backfit should be justified when considered over the remaining life of the plant, e.g., a plant with only a few years of remaining life should not be significantly modified unless a substantial reason exists for doing so. Third, the backfitting rule should apply to production or utilization facilities following issuance of their construction permit or operating license. Further, a backfit should be defined as the addition of or change in plant organization and procedures as well as the addition or change in plant structures, systems or components. Fourth, backfitting rule should require the staff to analyze in a systematic and documented manner whether a proposed backfit will enhance public health and safety and is justified, particularly with regard to its costs and benefits. This analysis should be completed before the backfit is required, unless the Commission finds it is needed immediately to protect the public health and safety or common defense and security. When such a finding is made, the analysis should be made following imposition of the backfit. Fifth, the backfitting should be applied to backfits imposed

by rule, regulation or order. Sixth, licensee should have the opportunity prior to the imposition of backfitting to demonstrate that the modification is not required or that its objective can be achieved by other acceptable means. Seven, the Executive Director for Operations should review staff requests to licensees for information to assure that such requests are necessary and justified.

In developing a combination of rules to effect these principles, it was determined that the essential elements of a new approach to backfit required special attention be given to the definition, the standard, the decisionmaking factors and the burden of proof associated with the rule.

The function of the definition is to establish a time for application of the backfit standard and to delineate those parts of the plant or operation to which the rule is to apply. The objective of the standard should be to move the staff away from requiring marginal safety fixes which are "nice to have" toward requiring only those changes which are necessary to improve the overall plant operation and are cost effective. The purpose of the decisionmaking factors is to assure that the staff pursues a rational decisionmaking process in arriving at a determination as to whether a backfit is required. The purpose of the burden of proof is to make certain that the staff demonstrates the need for a backfit, rather than requiring the licensee to show that it is not required. This shift in the burden of proof will assist in assuring that the staff meets its responsibility to provide a rational basis for imposition of backfitting requirements.

In the final analysis, the new backfit proposal requires nothing more than the systematic application of reason as a condition precedent to the imposition of a backfit.

### III. HEARING PROCESS

The Regulatory Reform Task Force found that the quality of the existing hearing process can and should be improved. For the purposes of analysis, the hearing process was divided into three parts, i.e., the screening process, the actual conduct of the hearing process and the decisionmaking process. The majority of the changes in the screening process and the actual conduct of the hearing involve the tightening of discipline for both the participants and the licensing boards. Improvements in the decisionmaking process are primarily directed at eliminating layers of review but to some extent may be associated with improved procedural discipline. There are approximately twenty-five changes suggested in the three principal parts of the hearing process. Some of those changes are substantial and some are nothing more than conforming or housekeeping changes. This discussion will be limited to the suggested major revisions.

The term screening process refers to the process for determining whether a hearing should be held and, if so, what issues should be heard by the presiding officer. Three major revisions to the screening process are suggested. First, a screening Atomic Safety and Licensing Board would



be established as a central clearinghouse for all requests for hearings, petitions for leave to intervene and proposed contentions. Currently, the individual Atomic Safety and Licensing Boards make separate and independent review of such matters in individual licensing proceedings. As a central clearinghouse, the screening board will add a measure of predictability to rulings on hearing requests, intervention petitions and contentions. Second, there is a standing requirement which will require a person to demonstrate an interest in the proceeding sufficient to justify his or her participation. Currently, parties may participate on a discretionary basis without showing that he or she has an interest to protect and that they are likely to suffer injury by reason of the administrative action which is to be taken. Third, the threshold for admission of contentions is raised to require the tendering of evidence to demonstrate the existence of a genuine factual dispute. This is consistent with Supreme Court precedent. See Costle v. Pacific Legal Foundation, 445 US 198, 214 (1980), citing Weinberger v. Hynson, Westcott and Running, Inc., 412 US 609 at 620-621 (1973). The purpose of this requirement is to assure that only responsible claims trigger the hearing process and that frivolous or meritless contentions are neither admitted nor litigated.

A number of improvements are proposed to improve the conduct of the hearing. Proposed changes should give stronger direction to presiding officers to more rigorously control abusive or burdensome discovery. In addition, discovery requests may not require the staff to perform additional work on matters beyond what is needed to support the staff's position or to explain why matters not relied on by the staff were not considered.

Substantial changes are also proposed in the area of how evidence is presented at an initial license proceeding. The objective was to establish a procedure which would permit the case to be presented and decided on the basis of written material to the fullest extent possible. Special need for live testimony, including cross-examination would have to be demonstrated. Comprehensive cross-examination plans would have to be filed. In current practice although cross-examination plans may be required by the licensing boards in individual proceedings, the rules do not require it. Moreover, when they are offered, cross-examination is usually allowed even where a plan is poorly stated and insubstantial. This coupled with the fact that the value of cross-examination is often diminished by unskilled questioning can result in a cluttered, over-burdened trial record.

Another new provision would permit the screening board or presiding officer conducting a hearing to appoint a panel of technical subject matter experts. These experts could help determine in the first instance whether there is a technical basis for reaching a conclusion that a proposed contention raises a genuine issue of disputed fact. In the conduct of a hearing, these experts could assist the hearing officers in understanding the technical problems involved and in evaluating the quality of the testimony presented.

A number of miscellaneous improvements are also suggested. The sua sponte rule, which allows presiding officers to raise issues on their own motion, would be tightened so that in all but the most unusual situations the scope of the hearing would be confined to the disputed issues of fact properly placed into controversy by the parties; to encourage the use of summary procedures to dispose of issues both prior to and during the hearing, summary disposition motions could be filed at any stage of the proceeding; motions which are not controverted by other parties must be granted; and an express provision is added to recognize that the Commission may designate a qualified hearing examiner to preside in initial licensing proceedings in lieu of a three-member licensing board.

A number of improvements are also suggested in the decisionmaking process. The most fundamental change concerns the removal of the Atomic Safety and Licensing Appeal Board as an independent, intermediate administrative appellate tribunal. Organizationally the Appeal Board would be moved to a position directly under the Commission. There it would review the licensing board decision and recommend a course of action to the Commission. It would also draft the Commission decision for the approval of the Commissioners. This should involve no appreciable increase in workload for the individual Commissioners since the record review and opinion writing will continue to be a function of the Appeal Board. Moreover, it will eliminate the responsibility of the Office of General Counsel and the Office of Policy Evaluation to perform those review and opinion writing functions under the current system. The advantage of this transfer is that important policy decisions which may arise in the course of appellate review would be addressed and decided by the Commission itself rather than by an independent appellate tribunal. This process also has the potential for eliminating the resource commitment of the Office of the General Counsel and the Office of Policy Evaluation for reviewing licensing board decisions and drafting Commission decisions.

Another major improvement concerns the proposed addition of a rule which would allow the expeditious codification into regulations of generic factual issues resolved in initial licensing proceedings. The objective is to preclude the relitigation of generic factual issues resolved in one proceeding and subsequent proceedings involving similar facilities or reactors. The rule would apply to generic factual issues which are litigated to a conclusion rather than those dismissed on summary disposition or withdrawn by a party. Once resolved, the generic issue will be expeditiously issued as a proposed rule on the basis of the hearing record within a forty-five day period for public comment. If the Commission adopts the rule after considering the public comments, the generic issue cannot be litigated in subsequent adjudications unless special circumstances could be shown pursuant to section 2.758.

Another area of proposed improvement concerns limiting an intervening party to participation in a proceeding on only those issues placed in controversy by that party. Present practice permits an intervenor to cross-examine, file proposed findings of fact and conclusions of law and



lodge appeals on any issue in the proceedings, even though such issues were not raised by that party. The value of such a practice is questionable. Moreover, it may unduly burden the record and require an unwarranted expenditure of resources to respond.

Another proposal suggests the reinstatement of the immediate effectiveness rule for all initial decisions. Following the TMI accident, the rule was substantially modified to require a limited appeal board or Commission review of initial decisions authorizing construction permits or operation at more than five percent of full power. It is questionable as to whether this restriction on effectiveness has had any significant effect on safety. It appears to be procedurally cumbersome. There is some merit to the argument that the extensive reviews which an application has undergone by the time it gets through a licensing proceeding should give the Commission reasonable assurance that the plant is safe. At that point it has been reviewed by the licensee, its vendors and contractors, the NRC staff, the Advisory Committee on Reactor Safeguards, and the Atomic Safety and Licensing Board.

Adoption of the immediate effectiveness rule would enhance the predictability and orderliness of the licensing process and would avoid producing a needless sense of uncertainty. In this regard, see a June 2, 1982 memorandum for the Commission from Forrest J. Remick, Director, Office of Policy Evaluation on the subject of Commission Effectiveness Review of Licensing Board Decisions.

Finally, under existing practice, the Director of Nuclear Reactor Regulation or Nuclear Material Safety and Safeguards, as appropriate, issues licenses authorized by initial decisions. Under the proposed rules, responsibility for license issuance will rest with the Executive Director for Operations, the chief staff officer of the Commission. Although this may have the appearance of being a major shift in organization, it is actually little more than housekeeping. Under the current practice, the Director of Nuclear Reactor Regulation and the Director of Nuclear Material Safety and Safeguards are under the direction of the Executive Director for Operations. As such, the Executive Director for Operations routinely reviews all licenses prior to their issuance. Because the issuance of licenses is a major function, because the Executive Director for Operations has ultimate responsibility for and authority over the issuance of such licenses, and because in actual practice licenses do not issue without his prior approval, the rules should be changed to require that licenses issue directly from his office. Moreover, the change is in keeping with the strong EDO concept which has been generated in the process of revising Commission management.

#### IV. SEPARATION OF FUNCTIONS AND EX PARTE COMMUNICATIONS

Revision in the separation of functions and ex parte rules is suggested so that the Commissioners may have better access to the expertise of their staff. The concepts of separation of functions and ex parte are

similar in that both are designed to minimize the possibility that a decisionmaker in an adjudicatory proceeding may be unduly influenced by off-the-record communications. They are different because, in theory, separation of functions applies only to the staff and ex parte applies to all others outside the agency. To some extent, this distinction has been lost in the past and current Commission rules and practice. The two concepts have been mixed in both the rules and in common parlance. For clarification, the following explanation is offered.

Separation of functions is precisely what the name implies. Commission operations can be divided into separate functions, such as, investigation, review, prosecution and decisionmaking. The purpose of the rule is to assure that in adjudication, the investigator or the prosecutor neither serve as nor unduly influence the decisionmaker. There is an exception to this rule for initial licensing cases.

The ex parte concept applies in adjudications to preclude communications between persons outside the agency and the decisionmaker during the time a controversy is under consideration.

The problem which has persisted for many years has centered around the fact the Commissioners and their immediate advisory staff have been regarded as decision makers in an adjudication during contested initial licensing cases. Concomitantly, the technical staff has been regarded as investigators and prosecutors. Consequently, under its own rules the Commission has been unable to receive the expert advice of its technical staff in resolving technical problems. Some regard it as true irony that a government agency whose reason for being is to use its expertise to protect the public health and safety is prohibited by its own rules from realizing the full potential of that expertise so vital to the accomplishment of its mission.

The current Commission rule on separation of functions, 10 CFR §2.719, is based upon the Administrative Procedure Act (APA), 5 U.S.C. § 554(d). Although section 554(d) requires separation of functions be maintained in adjudications, it provides an exception for initial licensing cases under section 554(d)(A). The Commission has not taken advantage of that exception in the past. To the contrary, it has adopted more restrictive rules and its actions have been guided by legal interpretations of those more restrictive rules.

Two rulemaking options are presented to address this problem. Option one enlarges the number of staff members with whom the Commission may communicate in initial licensing proceedings by eliminating restrictions on supervisory personnel. Specifically, it permits a Commissioner or Commission level adviser to communicate off-the-record with any staff member, except those who "directly participate as investigator, witness, attorney, or administrative judge in the planning, execution, or decision of the staff case." The wording permits a Commissioner to consult off-the-record with a supervisor, director, chief, leader, or other person who directs or participates in the planning, execution or decision of the staff case, so long as that person does not participate

directly as an investigator, witness or attorney. This result is accomplished through a combination of amendments to 10 CFR §§2.719(b) and 2.780(e), (f).

Option two takes full advantage of the initial license exception under the APA by simply providing like the APA, that separation of functions rule does not apply in determining applications for initial licensing. Closely associated with option two is a proposed revision of the ex parte rule in 10 CFR § 2.780. It would provide that nothing in the rule would be interpreted in such a manner as to preclude the exercise of the initial licensing exception to the separation of functions rule.

Both options and the proposed revision to the ex parte rule are susceptible to argument. Perhaps the most novel argument concerns the interpretation of what may be a conflict within the statutory framework of the APA which creates the initial licensing exception.

Section 554(d) of the APA grants an exception in initial licensing cases to the separation of functions rule. Section 557(d) of the APA governing ex parte contains no such exception. The argument is that once the technical staff exercises its prerogative under § 554(d) to communicate with the Commission or its advisors on a matter in controversy, the staff becomes a part of the decisional process. If so, § 557(d) would prohibit them from thereafter communicating with an applicant or licensee. Since communications between the staff and applicants or licensees is absolutely essential to regulatory review and communications may be stopped in this case, regulatory review would be stopped. To say that this outcome would be undesirable would be a gross understatement.

Some doubt may be cast upon this argument by applying generally accepted rules of statutory construction. One fundamental rule is that sections of a statute should be interpreted to be consistent rather than inconsistent. This rule is related to what has been termed "the principle of harmony" in statutory law. Continuity and consistency are generally regarded as essential to stability in the regulation of human affairs.

Another rule is the plain meaning rule. It declares that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, the sole function of the courts is to enforce it according to its terms."

The plain meaning of 5 U.S.C. § 554(d)(A) is to grant an exception to the separation of functions rule. On the other hand, section 557(d) is silent about how ex parte is to be applied to initial license cases. This silence could be interpreted as not being inconsistent with § 554(d)(A) since there are no words which convey a plain meaning that ex parte considerations are to supercede the exception to the separation of functions rule.

In addition, examination of the problem in light of the underlying reason for the initial licensing exception could also lead to a result that the two rules are not inconsistent. As explained fully in the Attorney General's Manual on the APA, the initial license exception was created because the framers of the Act regarded such actions as being more like rulemaking than adjudication. In order for the ex parte rule to be applied in such a way as to negate the initial licensing exception, initial licensing must necessarily be regarded as being like adjudication rather than rulemaking. If so, the "broad and logical dichotomy between rulemaking and adjudication" upon which the Attorney General distinguishes initial licensing would be shattered. Moreover, within a single statute Congress would explicitly be giving one meaning to initial licensing while implicitly giving it another. It is at least questionable that Congress would intend such a result, particularly where the effect would be to concomitantly create a right and preclude its exercise.

This somewhat novel question aside, there are other concerns which might be raised. Fairness, impartiality and legality are also concerns which should be addressed. For example, even though the ex parte rule would still apply to parties outside the Commission, a question may be raised as to whether those parties might try to indirectly influence the Commission on contested issues by influencing the staff, who could talk to the Commission. The question is not easily answered.

In this regard, it is worth noting that for some time Commission policy has required meetings between applicants or licensees be noticed so that the public has an opportunity to attend. This openness of communications may offer a measure of protection against undue ex parte communications. The ex parte rule also provides sanctions which would continue to serve as a deterrent against improper communications. Moreover, additional safeguards could be devised, as necessary, to minimize the likelihood of unwarranted communications.

There is an interrelationship between this proposed rule and the rule concerning "Participation of the NRC Staff in Initial Licensing Proceedings". To the extent that the staff may not be a party, neither the separation of functions rule nor the ex parte rule would come into play.

#### V. PARTICIPATION OF THE NRC STAFF IN INITIAL LICENSING PROCEEDINGS

The proposal would alter the staff's current role as a full party advocate by limiting staff participation as a party in contested initial licensing proceedings to those controverted factual issues on which it disagrees with the technical basis, rationale or conclusions of the license applicant. Should such a disagreement arise, the staff would have the discretion to enter the proceeding on its own motion or upon the request of a presiding officer. Staff's role as a full party in all other proceedings, primarily in enforcement matters, would remain unchanged by the adoption of the proposed modification.



The proposed rule change responds in large measure to suggestions made over an extended time from a variety of sources both within and outside NRC for the Commission to re-examine staff's role in the adjudicatory licensing process.<sup>1/</sup> Those suggestions reflected a diversity of beliefs, including views that staff's participation unnecessarily slows down the hearing process, typically lends insurmountable support to the case in favor of the application, and often misplaces the focus of the proceeding which should properly be directed at disputes between applicants and intervenors who oppose the application.

The Commission has recently received a study prepared by its Office of General Counsel<sup>2/</sup> that analyzes the costs and benefits to the regulatory process of a rule change such as that proposed here. The study suggests that the chief benefit to be sought from the change would be enhancement of the public's perception of the Commission's regulatory process as a fair and neutral one that considers opposing viewpoints. Thus, the Commission may be particularly interested in learning whether in the public's view the credibility of NRC's regulatory process would be enhanced by effecting the proposed change. Specific comment on the proposed regulatory language should also be invited.

The heart of the proposal is contained in proposed §§ 2.700(a) and (b). The staff would become a party to contested proceedings involving initial licensing on a discretionary basis. Should the staff disagree with a party's technical basis, rationale or conclusions, the staff may provide notice to the parties and introduce evidence at the hearing which articulates its position and its basis for disagreement. The staff would thus become a party to the proceeding, but only with respect to the particular issue(s) regarding which it elects to participate. The proposed rule also provides an opportunity for the parties to rebut the staff's evidence. Cross-examination by and of the staff would also be permitted to the extent otherwise allowed. Several other points should be emphasized.

First, § 2.700b would apply only to initial licensing proceedings. Initial licensing is defined in proposed § 2.4(r) of the Proposed Reform Amendments as including any proceeding on an application for a construction permit, operating license, or any other license for a facility or other activity, including any amendment or modification.

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- 1/ Marcus A. Rowden, Report: Achieving a More Effective Licensing Process--Basic Reform Within Existing Law, Atomic Industrial Forum, 6-8, November, 1981. See also: Nuclear Regulatory Commission Office of General Counsel Study of NRC Staff's Role in Contested Nuclear Power Reactor Initial Licensing Proceedings, June 3, 1982. These reports are available for inspection and copying for a fee in the Commission's Public Document Room at 1717 H Street, N.W., Washington, D.C. 20555.
- 2/ See footnote 1.

Normally excluded from initial licensing are proceedings involving the renewal, revocation, suspension, annulment, withdrawal or agency-initiated modifications of licenses. Thus the staff will remain a full party in all agency enforcement actions as well as in license renewal and withdrawal proceedings.

Second, the proposed rule permits discretionary participation by the staff on one or more issues in a proceeding. There may be instances where the public interest would be better served through staff participation as a party. For example, the staff may take exception to a methodology, analysis or conclusion of a party and, therefore, may find it necessary to function as a formal party on selected issues in order to fully develop the record. It is anticipated that staff participation as a party in such an instance would be the exception rather than the rule, but the provision is necessary to give the staff the flexibility to carry out the agency mission as circumstances may require.

Third, it should be emphasized that when the staff becomes a party to the proceeding it does so only with respect to the particular issue(s) as elected by the staff. Thus, while the staff may submit evidence, file proposed findings of fact, take appeals, and otherwise exercise party rights on matters relating to those elected issues the staff would not participate on other matters except to the extent it acts as an amicus pursuant to proposed §§ 2.700b(c) and (d), discussed below.

Proposed §§ 2.77b(c) and (d) permit the staff to participate in the proceeding to a limited extent as an amicus. The staff may provide on the record advice "on any matter in the proceeding" to the presiding officer, either on its own initiative or upon the request of the presiding officer. "On any matter" is intentionally broad to permit the staff and presiding officers the greatest flexibility in providing or requesting advice. The only exception is that advice may not be requested or provided on issues on which the staff is already participating as a party because of a disagreement with the license applicant.

#### RECOMMENDATIONS

1. Legislative and Administrative Proposals of the Regulatory Reform Task Force should be forwarded to the Ad Hoc Committee on Regulatory Reform.
2. The Draft Report of the Regulatory Reform Task Force should be placed in the Commission's Public Document Rooms throughout the United States.
3. After the comments of the Ad Hoc Committee on Regulatory Reform have been received by the Commission, the legislation should be finalized as quickly as possible so that it may be presented to Congress in mid or late January.



4. After the comments have been received from the Ad Hoc Committee on Regulatory Reform for the Administrative Package, and revisions have been made as required by the Commission, the Administrative Proposals of the Regulatory Reform Task Force should be advanced through the rulemaking process.

Chapter 2

Nuclear Licensi  
Reform Act of 1

## DRAFT BILL

To amend the Atomic Energy Act of 1954, as amended, to improve the nuclear siting and licensing process, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Nuclear Licensing Reform Act of 1983".

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Sec. 301. Effective Date

## FINDINGS AND PURPOSES

SEC. 2. (a) The Congress, recognizing that a clear and coordinated energy policy consistent with public health and safety must include an effective and efficient licensing process for siting, construction, and operation of nuclear power reactors which meet applicable criteria, finds and declares that:

(1) interstate commerce is substantially affected by the siting, construction, and operation of nuclear power reactors;

(2) meaningful opportunity for public participation in siting and licensing of nuclear power reactors should be assured;

(3) it is efficient and in the public interest for the Nuclear Regulatory Commission, for purposes required by Federal law applicable to its licensing, to rely upon determinations respecting the need for new electric generating facilities made by competent Federal, State or regional authorities;

(4) the licensing and construction of nuclear power plants should be facilitated and the public health and safety enhanced by the use of previously approved standardized nuclear power reactor designs which reduce the need for individual plant reactor licensing reviews;

(5) the licensing process would be facilitated by procedures for the selection and approval of a site for a nuclear power plant to be accomplished at the earliest practicable time in advance of a commitment to construct a particular facility of a specific design at that site;



(6) the licensing process would be facilitated if licensing decisions are made at the earliest feasible phase of the process and, once made, are not subject to duplicative adjudication in the absence of a compelling showing called for by this Act and the rules and regulations of the Commission;

(7) all phases of the licensing process should be handled in a timely manner under procedures which, consistent with this Act and the rules and regulations of the Commission, assure that adjudicatory procedures are only invoked to resolve disputed questions of fact which are relevant to the ultimate licensing decision;

(8) the regulatory process should provide greater stability in licensing standards and criteria for approved designs of nuclear power plants;

(9) it is appropriate and in the public interest for the Commission to consider the economic consequences of its regulatory practices;

(10) the Nuclear Regulatory Commission should continue to exercise its independent statutory responsibilities to protect the public health and safety and the common defense and security, taking into account that perfect safety is an unattainable goal for any energy source and that the cost of safety requirements should be given consideration consistent with the public health and safety.

(b) The purposes of this Act are:

(1) to facilitate the use of pre-approved sites and designs for nuclear power plants;

(2) to provide for the issuance of a combined license to construct and to operate a nuclear power plant under conditions which assure the continued protection of the public health and safety and the common defense and security;

(3) to improve the stability of licensing standards and criteria for nuclear power plants and thus the finality of prior Commission licensing approvals;

(4) to afford a meaningful opportunity for public participation at the earliest practicable phases of the licensing process for the approvals of sites and designs for nuclear power plants; in the proceeding to approve the construction of a particular nuclear power reactor at a particular site; and by assuring that adjudicatory procedures are only invoked to resolve disputed questions of fact which are relevant to the ultimate licensing decision.

## TITLE I - SITING AND LICENSING

## CONSTRUCTION PERMITS AND OPERATING LICENSES

Sec. 101. Section 185 of the Atomic Energy Act of 1954, as amended, is amended to read as follows:

"Sec. 185. CONSTRUCTION PERMITS AND OPERATING LICENSES. --

"a. All applicants for licenses to construct or modify production or utilization facilities shall be initially granted a construction permit if the application is otherwise acceptable to the Commission. Upon the completion of the construction or modification of the facility, the filing of any additional information needed to bring the original application up to date, and upon finding that the facility authorized has been constructed and will operate in conformity with the application as amended and in conformity with the provisions of this Act and of the rules and regulations of the Commission, and in the absence of any good cause being shown to the Commission why the granting of an operating license would not be in accordance with the provisions of this Act, the Commission shall issue an operating license to the applicant. For all other purposes of this Act, a construction permit is a 'license'.

"b. In making a determination on the issuance of any permit or license, the Commission is authorized to rely upon the certification of need for power made by any competent Federal, regional, State or local governmental organization. Certification shall constitute a definitive

determination of need for the power to be provided by the facility for the purposes of any other applicable provision of Federal law which the Commission must satisfy to issue a permit or license under this section.

"c. Notwithstanding any other provision of this section, the Commission may issue to the applicant a combined construction permit and operating license for a nuclear power plant, if the application contains sufficient information to support the issuance of both a construction permit and operating license in accordance with the rules and regulations of the Commission and to enable the Commission to make the determinations relating to the common defense and security and the public health and safety required by this Act. After issuance of a combined construction permit and operating license for a nuclear power plant, the Commission shall assure, solely through inspections and tests, that construction and operation is conducted in conformity with the application and the combined construction permit and operating license is consistent with the rules and regulations of the Commission. Prior to the commencement of operation, the Commission shall find that the facility has been constructed and will operate in conformity with the combined construction permit and operating license, the provisions of this Act, and the rules and regulations of the Commission.

Sec. 102. Section 189 of the Atomic Energy Act of 1954, as amended, is amended to read as follows:

"Sec. 189. HEARINGS AND JUDICIAL REVIEW.--

"a. (1) Except as provided by section 126 of this Act, in any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, site permit, final nuclear power reactor design, combined construction permit and operating license, 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 shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

(A) The Commission shall publish notice in the Federal Register at least thirty days prior to the granting of any application: (1) under section 103 or 104b. for a construction permit or operating license for a facility, for a license to manufacture a facility; under section 193 for a site permit or a renewal thereof; under section 194 for a final nuclear power reactor design or a renewal thereof, and under section 185 for a combined construction permit and operating license; (2) under section 104c. for a construction permit or operating license and (3) for an amendment to any of the foregoing, except as otherwise provided in subsection 189a.(2).



(B) Within thirty days after the filing of any application under section 194 for the approval of a final nuclear power reactor design, or for an amendment or renewal of an approved design, the Commission shall give public notice by publishing notice twice in major newspapers having national circulation. At least sixty days prior to the granting of any application the Commission shall also give such public notice which advises that the Commission is considering granting the application.

"(2)(A) The Commission may issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this Act.

"(B) The Commission shall periodically, but not less frequently than once every thirty days, publish notice of any amendments issued or proposed to be issued as provided in subparagraph (A). Each such notice shall include all amendments issued or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment identify the facility involved and provide a brief description of such amendment.

Nothing in this subsection shall be construed to delay the effective date of any amendment.

"(C) During the one hundred-eighty day period following the effective date of this paragraph, the Commission shall promulgate regulations establishing (i) standards for determining whether any amendment to an operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located."

"b. In any Commission hearing pursuant to this section on an application for a license to construct or to operate a production or utilization facility, for the issuance of a site permit, for the approval of a final standardized nuclear power reactor design, or for the issuance of a combined construction permit and operating license, or for an amendment to or the renewal of any such license or approval filed after the date of enactment of this subsection, the Commission shall first provide the parties to the proceeding an opportunity to submit for the record such written data, views, or arguments as the hearing board may specify. At the request of any party, the hearing board shall provide an opportunity for oral argument with respect to any matter identified in the written submissions which the hearing board determines to be in controversy among the parties. The hearing shall be preceded by such discovery procedures as the rules of the Commission shall

provide, and as ordered by the hearing board. The hearing board shall require each moving party, including the NRC staff, to submit in written form, at the time the proceeding is initiated, all the facts and arguments upon which that party proposes to rely that are known at such time to that party.

"c.(1) At the conclusion of any hearing under subsection c. of this section, the hearing board shall designate any disputed question of fact, together with any remaining questions of law, for resolution in an adjudicatory hearing only if it determines that--

"(A) there is a genuine and substantial dispute of fact involving factual assumptions or methodology upon which expert opinion is based, or concerning the credibility or competence of an expert witness significantly relied upon by one or more of the parties to the proceeding, which can only be resolved with sufficient accuracy by the introduction of reliable and specifically identified evidence in an adjudicatory hearing; and

"(B) the decision of the Commission is likely to depend in whole or in part on the resolution of such dispute.

"(2) In making a determination under this subsection, the hearing board shall designate in writing the specific facts that are in genuine and substantial dispute, the reason why the decision of the agency is likely to depend on the resolution of such facts, and the reason why an adjudicatory hearing is likely to resolve the dispute.

"d. Any final order entered in any proceeding of the kind specified in this section shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950, as amended (ch. 1189,

64 Stat. 1129), and to the provisions of section 10 of the Administrative Procedure Act, as amended.

## EARLY SITE REVIEW

Sec. 103 The Atomic Energy Act of 1954, as amended, is amended by adding a new section 193 to read as follows:

"Sec. 193 EARLY SITE REVIEW.--

"a. The Commission is authorized to issue a site permit for approval of a site or sites for one or more utilization or production facilities upon the application of any utility, Federal, regional, State, or local government agency notwithstanding the fact that no application for a construction permit or a combined construction permit and operating license for such facility or facilities has been filed. For all purposes of this Act, a site permit is a 'license'.

"b. Notwithstanding section 161 w. of this Act or the Independent Offices Appropriation Act of 1952, no application filing or issuance fees shall be required for an application for a site permit, an amendment, or a renewal of a site permit under this section. The Commission is authorized to allocate the costs that would otherwise have been defrayed by fees required of applicants under this section among applicants for permits or licenses which propose to use the approved site. If no application for construction of a nuclear power plant is filed within the initial ten year approval period, the fee shall become immediately due and payable by the applicant for the site permit.

"c.(1) Each application under subsection a. shall be in writing and shall contain information required by the Commission in its rules



and regulations to determine the suitability of the site for its intended purpose.

(2) For purposes of any evaluations and determinations relating to the approval of a proposed site under this section which may be required for the purposes of any other provision of Federal law which the Commission must satisfy and applicable rules and regulations of the Commission, a finding of a generic future need for electric power, whether made by the Commission, or any competent Federal, State, or regional agency, shall constitute a definitive determination that there is a need for the power proposed to be provided at the site.

"d. (1) If, after considering all information submitted in the application, and after providing an opportunity for public hearing, the Commission determines that the proposed site is suitable for the construction and operation of the facility or facilities described in the application consistent with public health and safety, it shall approve the application and issue a site permit with appropriate conditions as necessary.

"(2) Any final determination of the Commission on an application filed pursuant to this section shall be a final order of the Commission for purposes of judicial review.

"e. (1) A site permit issued by the Commission under this section shall be valid with respect to an application for a construction permit or a combined construction permit and operating license which meets the conditions of the site permit and is filed within a period of ten years from the date of issuance of the site permit.

(2) (A) No less than twelve or more than thirty-six months prior to the expiration of the ten year period, the holder of the site permit may apply for a renewal of the site permit. Upon review by the Commission, the Commission may renew for good cause shown a site permit for an additional period of time of not less than five or more than ten years from the date of renewal, pursuant to appropriate Commission rules and regulations.

"(B) Upon application for renewal of a site permit pursuant to subparagraph (A), the Commission shall renew the site permit unless it finds that significant new information relevant to the site has become available and it is likely that the site will not comply with this Act or the Commission's rules and regulations for protection of the public health and safety or the common defense and security.

"f. Approval of a site under this section shall not preclude its use as a site for an alternate or modified type of energy facility or for any other purpose. Other uses may, however, affect the validity of the site permit or the conditions of its use for nuclear power plant siting as the Commission may determine.

g. Nothing in this section shall preclude the Commission from considering a request for a determination with respect to limited aspects of the suitability of the site for its intended purpose, under rules and regulations which the Commission considers appropriate.

## APPROVAL OF DESIGNS

Sec. 104. The Atomic Energy Act of 1954, as amended, is amended by adding a new section 194 to read as follows:

"Sec. 194. APPROVAL OF DESIGNS.--

"a. The Commission is authorized and directed to establish procedures permitting the approval of nuclear power reactor designs, notwithstanding the fact that no application for a construction permit or combined construction permit and operating license for such facility has been filed.

"b. Notwithstanding section 161 w. of this Act or the Independent Offices Appropriation Act of 1952, no application filing or issuance fees shall be required for an application for a design approval, an amendment, or a renewal of an approval of a nuclear power reactor design under this section. The Commission is authorized to allocate the costs that would otherwise have been defrayed by fees required of applicants under this section among applicants for permits or licenses which propose to use the approved standardized plant design. If no application for construction of a nuclear power plant is filed within the initial ten year approval period, the fee shall become immediately due and payable by the applicant for the design approval.

"c. Each application for an approval under subsection a. shall be in writing and shall contain information required by the Commission in its rules and regulations to determine the suitability of the design for its intended purpose.

"d. (1) If, after considering all information submitted in the application, and after providing an opportunity for public hearing, the Commission determines that the proposed nuclear power reactor design is suitable for the construction and operation of the facility or facilities described in the application consistent with public health and safety, it shall approve the application and issue an approval with appropriate conditions as necessary.

"(2) Any final determination of the Commission on an application filed pursuant to this section shall be a final order of the Commission for purposes of judicial review.

"e. (1) Any approval issued by the Commission under this section shall be valid with respect to an application for a construction permit or a combined construction permit and operating license which meets the conditions of the approval and is filed within a period of ten years from the date of approval.

"(2) (A) No less than twelve or more than thirty-six months prior to the expiration of the ten year period provided under paragraph (1), the entity to whom the approval was issued may apply for renewal of the approval. Upon review by the Commission, the Commission may renew the approval for an additional period of time of not less than five or more than ten years from the date of renewal pursuant to such rules and regulations as the Commission may deem appropriate.

"(B) Upon application for renewal of an approval issued pursuant to subsection a., the Commission shall renew the approval unless it finds that significant new information relevant to the design has become available subsequent to its approval and that as a result it



is likely that the design will not comply with this Act or the Commission's rules and regulations for the protection of the public health and safety or the common defense and security.

f. (1) The Commission may also consider, in accordance with its rules and regulations, requests under this section for the approval of the final design for any major subsystem which represents a discrete element of a nuclear power reactor.

(2) Nothing in this section shall preclude the Commission from promulgating rules in accordance with section 553 of title 5 of the United States Code which set forth standards and criteria for production or utilization facility designs, or which approve their preliminary or final designs for such facilities, or for their subsystems, as defined by the Commission.



## TITLE II --CONFORMING AMENDMENTS

## ANTITRUST PROVISIONS

Sec. 201. Subsection 105 c. of the Atomic Energy Act of 1954, as amended, is amended in the first sentence of paragraph (2) by inserting "and/" after the word "construct".

## GENERAL PROVISIONS

Sec. 202. Section 161 o. of the Atomic Energy Act of 1954, as amended, is amended by inserting the words "or approvals authorized by sections 193 and 194" after the number "104".

Sec. 203. Subsection 182 b. of the Atomic Energy Act of 1954, as amended, is amended to read as follows:

"b. The Advisory Committee on Reactor Safeguards shall review: each application under section 103 or section 104 b. for a construction permit and/or an operating license for a facility; any application under section 104 c. for a construction permit and/or operating license for a testing facility; any application under section 104 a. or c. specifically referred to it by the Commission; any application for a site permit under section 193; any proposed approval for a facility design under section 194; and any application for an amendment to a construction permit or to an operating license under section 103 or 104 a., b., or c. or an amendment or renewal of a site permit under section 193 or an amendment or renewal of an approval for a facility design under section 194 specifically referred to it by the Commission, and shall submit a report thereon which shall be made a part of the record of the application and available to the public except to the extent that security classification prevents disclosure.



## REVOCATION

Sec. 204. Section 186 a. of the Atomic Energy Act of 1954, as amended, is amended by inserting the words "sections 182, 185, 193 and 194" after the words "required under".

Sec. 205. The table of contents for the Atomic Energy Act of 1954, as amended, is amended by changing the title of Section 185 to read "Construction Permits and Operating Licenses" and by adding the following after Section 192:

"Sec. 193.      Early Site Review.

"Sec. 194.      Approval of Designs.

## TITLE III -- EFFECTIVE DATE

Sec. 301. All sections of this Act shall take effect as of the date of enactment, and shall apply to all proceedings pending as of the date of enactment or commenced on or after the date of enactment.



COMPARATIVE DRAFT BILL  
ATOMIC ENERGY ACT OF 1954, AS AMENDED

"SEC. 105. ANTITRUST PROVISIONS. -

\* \* \*

"C. \*\*\*

"(2) Paragraph (1) of this subsection shall apply to an application for a license to construct and/ or operate a utilization or production facility under section 103: Provided, however, That paragraph (1) shall not apply to an application for a license to operate a utilization or production facility for which a construction permit was issued under section 103 unless the Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility".

SEC. 161. GENERAL PROVISIONS. - In the performance of its functions the Commission is authorized to -

\* \* \*

"o. Require by rule, regulation, or order, such reports, and the keeping of such records with respect to, and to provide for such inspections of, activities and studies of types specified in section 31 and of activities under licenses issued pursuant to sections 53, 63, 81, 103, and 104, or approvals authorized by sections 193 and 194, as may be necessary to effectuate the purposes of this Act, including section 105; and"

"SEC. 185. CONSTRUCTION PERMITS AND OPERATING LICENSES. --

"a. All applicants for licenses to construct or modify production or utilization facilities shall, if the application is otherwise acceptable to the Commission, be initially granted a construction permit. [The construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless, the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date.] Upon the completion of the construction or modification of the facility, upon the filing of any additional information needed to bring the original application up to date, and upon finding that the facility authorized has been constructed and will operate in conformity with the application as amended and in conformity with the provisions of this Act and of the rules and regulations of the Commission, and in the absence of any good cause being shown to the Commission why the granting of [a] an operating license would not be in accordance with the provisions of this Act, the Commission shall

thereupon issue [a] an operating license to the applicant. For all other purposes of this Act, a construction permit is [deemed to be] a 'license'.

"b. In making a determination on the issuance of any permit or license, the Commission is authorized to rely upon the certification of need for power made by any competent Federal, regional State or local governmental organization. Certification shall constitute a definitive determination of need for the power to be provided by the facility for the purpose of any other applicable provision of Federal law which the Commission must satisfy to issue a permit or license under this section.

"c. Notwithstanding any other provision of this section, the Commission shall issue to the applicant a combined construction permit and operating license for a nuclear power plant after providing an opportunity for public hearing, if the application contains sufficient information to support the issuance of both a construction permit and operating license in accordance with the rules and regulations of the Commission and to enable the Commission to make the determinations relating to the common defense and security and the public health and safety required by this Act. After issuance of a combined construction permit and operating license for a nuclear power plant, the Commission shall assure solely through inspections and tests, that construction and operation is conducted in conformity with the application and the combined construction permit and operating license is consistent with the rules and regulations of the Commission. Prior to the commencement of operation, the Commission shall find that the facility has been constructed and will operate

in conformity with the combined construction permit and operating license, the provisions of this Act, and the rules and regulations of the Commission".

"Sec. 182. LICENSE APPLICATIONS.--

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"b. The Advisory Committee on Reactor Safeguards shall review each application under section 103 or section 104b. for a construction permit and/ or an operating license for a facility, any application under section 104c. for a construction permit and/ or an operating license for a testing facility, any application under section 104a. or c. specifically referred to it by the Commission, any application for a site permit under section 193, any proposed approval for a facility design under section 194, and any application for an amendment to a construction permit or an amendment to an operating license under section 103 or 104a., b., or c. or an amendment or renewal of a site permit under section 193 or a proposed amendment or renewal of an approval for a facility design under section 194 specifically referred to it by the Commission, and shall submit a report; which shall be made a part of the record of the application and available to the public except to the extent the security classification prevents disclosure.

"Sec. 186. REVOCATION.--

"a. Any license may be revoked for any material false statement in the application or any statement of fact required under sections 182, 185, 193 or 194, or because of conditions revealed by such application or statement of fact or any report, record, or inspection or other means which would warrant the Commission to refuse to grant a license on an original application, or for failure to construct or operate a facility in accordance with the terms of the construction permit or license or the technical specifications in the application, or for violation of, or failure to observe any of the terms and provisions of this Act or of any regulation of the Commission".



Sec. 102. Section 189 of the Atomic Energy Act of 1954, as amended, is amended to read as follows:

"Sec. 189. HEARINGS AND JUDICIAL REVIEW.--

"a. (1) Except as provided by section 126 of this Act, [i]n any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, site permit, final nuclear power reactor design, combined construction permit and operating license, 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 shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. [The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 103 or 104 b. for a construction permit for a facility, and on any application under section 104 c. for a construction permit for a testing facility. In cases where such a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication

once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.]

(A) The Commission shall publish notice in the Federal Register at least thirty days prior to the granting of any application.

With respect to each application: (1) under section 103 or 104b. for a construction permit or operating license for a facility, for a license to manufacture a facility; under section 193 for a site permit or a renewal thereof; under section 194 for a license to manufacture a facility; and under section 185 for a combined construction permit and operating license; (2) under section 104c. for a construction permit or operating license; and (3) for an amendment to any of the foregoing, except as otherwise provided in subsection 189a.(2).

(B) Within thirty days after the filing of any application under section 194 for the approval of a final nuclear power reactor design, or for an amendment or renewal of an approved design, the Commission shall give public notice by publishing notice twice in major newspapers having national circulation. At least sixty days prior to the granting of any application the Commission shall also give such public notice which advises that the Commission is considering granting the application.

"(2)(A) The Commission may issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration notwithstanding the pendency before the Commission of a

request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this Act.

"(B) The Commission shall periodically, but not less frequently than once every thirty days, publish notice of any amendments issued or proposed to be issued as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment identify the facility involved and provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

"(C) During the one hundred-eighty day period following the effective date of this paragraph, the Commission shall promulgate regulations establishing (i) standards for determining whether any amendment to an operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located."

"b. In any Commission hearing pursuant to this section on an application for a license to construct or to operate a production or utilization facility, for the issuance of a site permit, for the approval of a final nuclear power reactor design, or for the issuance of a combined construction permit and operating license, or for an amendment to or the renewal of any such license or approval filed after the date of enactment of this subsection, the Commission shall first provide the parties to the proceeding an opportunity to submit for the record such written data, views, or arguments as the hearing board may specify. At the request of any party, the hearing board shall provide an opportunity for oral argument with respect to any matter identified in the written submissions which the hearing board determines to be in controversy among the parties. The hearing shall be preceded by such discovery procedures as the rules of the Commission shall provide, and as ordered by the hearing board. The hearing board shall require each moving party, including the NRC staff, to submit in written form, at the time the proceeding is initiated, all the facts and arguments upon which that party proposes to rely that are known at such time to that party.

"c.(1) At the conclusion of any hearing under subsection c. of this section, the hearing board shall designate any disputed question of fact, together with any remaining questions of law, for resolution in an adjudicatory hearing only if it determines that--

"d. Any final order entered in any proceeding of the kind specified in this section shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950, as amended (ch. 1189,

64 Stat. 1129), and to the provisions of section 10 of the Administrative Procedure Act, as amended.

"(A) there is a genuine and substantial dispute of fact involving factual assumptions or methodology upon which expert opinion is based, or concerning the credibility or competence of an expert witness significantly relied upon by one or more of the parties to the proceeding, which can only be resolved with sufficient accuracy by the introduction of reliable and specifically identified evidence in an adjudicatory hearing; and

"(B) the decision of the Commission is likely to depend in whole or in part on the resolution of such dispute.

"(2) In making a determination under this subsection, the hearing board shall designate in writing the specific facts that are in genuine and substantial dispute, the reason why the decision of the agency is likely to depend on the resolution of such facts, and the reason why an adjudicatory hearing is likely to resolve the dispute.



## EARLY SITE REVIEW

Sec. 103 The Atomic Energy Act of 1954, as amended, is amended by adding a new section 193 to read as follows:

"Sec. 193 EARLY SITE REVIEW.--

"a. The Commission is authorized to issue a site permit for approval of a site or sites for one or more utilization or production facilities upon the application of any utility, Federal, regional, State, or local government agency notwithstanding the fact that no application for a construction permit or a combined construction permit and operating license for such facility or facilities has been filed. For all purposes of this Act, a site permit is a 'license'.

"b. Notwithstanding section 161 w. of this Act or the Independent Offices Appropriation Act of 1952, no application filing or issuance fees shall be required for an application for a site permit, an amendment, or a renewal of a site permit under this section. The Commission is authorized to allocate the costs that would otherwise have been defrayed by fees required of applicants under this section among applicants for permits or licenses which propose to use the approved site. If no application for construction of a nuclear power plant is filed within the initial ten year approval period, the fee shall become immediately due and payable by the applicant for the site permit.

"c.(1) Each application under subsection a. shall be in writing and shall contain information required by the Commission in its rules

and regulations to determine the suitability of the site for its intended purpose.

(2) For purposes of any evaluations and determinations relating to the approval of a proposed site under this section which may be required for the purposes of any other provision of Federal law which the Commission must satisfy and applicable rules and regulations of the Commission, a finding of a generic future need for electric power, whether made by the Commission, or any competent Federal, State, or regional agency, shall constitute a definitive determination that there is a need for the power proposed to be provided at the site.

"d. (1) If, after considering all information submitted in the application, and after providing an opportunity for public hearing, the Commission determines that the proposed site is suitable for the construction and operation of the facility or facilities described in the application consistent with public health and safety, it shall approve the application and issue a site permit with appropriate conditions as necessary.

"(2) Any final determination of the Commission on an application filed pursuant to this section shall be a final order of the Commission for purposes of judicial review.

"e. (1) A site permit issued by the Commission under this section shall be valid with respect to an application for a construction permit or a combined construction permit and operating license which meets the conditions of the site permit and is filed within a period of ten years from the date of issuance of the site permit.

(2) (A) No less than twelve or more than thirty-six months prior to the expiration of the ten year period, the holder of the site permit may apply for a renewal of the site permit. Upon review by the Commission, the Commission may renew for good cause shown a site permit for an additional period of time of not less than five or more than ten years from the date of renewal, pursuant to appropriate Commission rules and regulations.

"(B) Upon application for renewal of a site permit pursuant to subparagraph (A), the Commission shall renew the site permit unless it finds that significant new information relevant to the site has become available and it is likely that the site will not comply with this Act or the Commission's rules and regulations for protection of the public health and safety or the common defense and security.

"f. Approval of a site under this section shall not preclude its use as a site for an alternate or modified type of energy facility or for any other purpose. Other uses may, however, affect the validity of the site permit or the conditions of its use for nuclear power plant siting as the Commission may determine.

g. Nothing in this section shall preclude the Commission from considering a request for a determination with respect to limited aspects of the suitability of the site for its intended purpose, under rules and regulations which the Commission considers appropriate.

## APPROVAL OF DESIGNS

Sec. 104. The Atomic Energy Act of 1954, as amended, is amended by adding a new section 194 to read as follows:

"Sec. 194. APPROVAL OF DESIGNS.--

"a. The Commission is authorized and directed to establish procedures permitting the approval of nuclear power reactor designs, notwithstanding the fact that no application for a construction permit or combined construction permit and operating license for such facility has been filed.

"b. Notwithstanding section 161 w. of this Act or the Independent Offices Appropriation Act of 1952, no application filing or issuance fees shall be required for an application for a design approval, an amendment, or a renewal of an approval of a nuclear power reactor design under this section. The Commission is authorized to allocate the costs that would otherwise have been defrayed by fees required of applicants under this section among applicants for permits or licenses which propose to use the approved standardized plant design. If no application for construction of a nuclear power plant is filed within the initial ten year approval period, the fee shall become immediately due and payable by the applicant for the design approval.

"c. Each application for an approval under subsection a. shall be in writing and shall contain information required by the Commission in its rules and regulations to determine the suitability of the design for its intended purpose.

"d. (1) If, after considering all information submitted in the application, and after providing an opportunity for public hearing, the Commission determines that the proposed nuclear power reactor design is suitable for the construction and operation of the facility or facilities described in the application consistent with public health and safety, it shall approve the application and issue an approval with appropriate conditions as necessary.

"(2) Any final determination of the Commission on an application filed pursuant to this section shall be a final order of the Commission for purposes of judicial review.

"e. (1) Any approval issued by the Commission under this section shall be valid with respect to an application for a construction permit or a combined construction permit and operating license which meets the conditions of the approval and is filed within a period of ten years from the date of approval.

"(2) (A) No less than twelve or more than thirty-six months prior to the expiration of the ten year period provided under paragraph (1), the entity to whom the approval was issued may apply for renewal of the approval. Upon review by the Commission, the Commission may renew the approval for an additional period of time of not less than five or more than ten years from the date of renewal pursuant to such rules and regulations as the Commission may deem appropriate.

"(B) Upon application for renewal of an approval issued pursuant to subsection a., the Commission shall renew the approval unless it finds that significant new information relevant to the design has become available subsequent to its approval and that as a result it



is likely that the design will not comply with this Act or the Commission's rules and regulations for the protection of the public health and safety or the common defense and security.

f. (1) The Commission may also consider, in accordance with its rules and regulations, requests under this section for the approval of the final design for any major subsystem which represents a discrete element of a nuclear power reactor.

(2) Nothing in this section shall preclude the Commission from promulgating rules in accordance with section 553 of title 5 of the United States Code which set forth standards and criteria for production or utilization facility designs, or which approve their preliminary or final designs for such facilities, or for their subsystems, as defined by the Commission.

Sec. 105. The Atomic Energy Act of 1954, as amended, is amended by adding a new section 195 to read as follows:

"Sec. 195. Modification of Approved Designs

## BACKGROUND AND SECTION BY SECTION ANALYSIS

### I. BACKGROUND

#### A. The Present Licensing Process

The Atomic Energy Act of 1954 in its present form provides for a two-stage facility licensing process. First, a construction permit must be obtained from the Commission authorizing construction of the proposed facility at the site where it will be operated. This stage of review has focused on the preliminary design of the facility and the suitability of the proposed site. A public hearing must be held by the Commission prior to the issuance of any construction permit for a facility for industrial or commercial purposes, such as a nuclear power plant, or for a testing facility.

The second stage of the process concerns operating licenses. No person may operate a facility without first obtaining an operating license from the Commission. This second stage of review is focused on the final design of the facility, and a public hearing must be held before issuance of an operating license if one is requested by any person whose interest may be affected. The Commission is also authorized by the Act to issue a license to manufacture one or more facilities. Thus, in some situations the first step in the facility licensing process may be issuance of a license to manufacture, followed by issuance of a construction permit and operating license authorizing installation and operation of the facility on-site. It may be noted

that no manufacturing licenses have been issued although provision for issuance of such licenses is made in the Commission's regulations and a proceeding is in progress.

In addition, the Advisory Committee on Reactor Safeguards, a statutory committee of independent experts on nuclear facility safety, is required by the Act to review each application for a construction permit or an operating license for a nuclear facility for industrial or commercial purposes, such as a nuclear power plant, or for a testing facility, and submit a public report to the Commission.

The overall lead-time involved for this two-stage licensing process covers approximately a 12 year period consisting of three basic phases:

1. Utility Planning Phase,
2. Construction Permit Review and Hearing Phase, and
3. Construction and Preoperational Testing Phase.

The utility planning phase begins at the time the utility decides to add power to its system and continues until an application consisting of a Preliminary Safety Analysis Report (PSAR) and an Environmental Report (ER) is submitted to the NRC by the applicant and docketed for review. The construction permit review and hearing phase begins at the docketing of the application and continues until a decision is made regarding the issuance of a construction permit. This phase consists of a plant safety review, a safeguards review, an environmental review, an antitrust review by the NRC staff and public hearings on the construction permit application.

Normally, the applicant's Preliminary Safety Analysis Report and Environmental Report are tendered at about the same time and proceed on

parallel review paths, beginning with a review for completeness. If the application is reasonably complete, it is docketed. The docketing of an application launches the safety review by the Commission's technical branches, issuance of the NRC staff's Safety Evaluation Report, consideration by the Advisory Committee on Reactor Safeguards (ACRS), and issuance of supplemental Safety Evaluation Reports by the NRC staff, as required, to address any issues raised by the ACRS or any other appropriate issues. In addition, an environmental review is conducted by NRC technical specialist branches and by special teams from national laboratories, and draft and final environmental statements are published and widely distributed to municipal, State, and Federal agencies, and the general public.

Following the conclusion of the safety and environmental reviews and issuance of appropriate supplements to the Safety Evaluation Report and the Final Environmental Statement, a public hearing takes place. Under the Atomic Energy Act, hearings are mandatory for all power reactor construction permit applications. At the conclusion of these hearings a decision is made whether or not to issue the construction permit.

A Limited Work Authorization (LWA) may be granted by the Director of Nuclear Reactor Regulation for limited construction work to be carried out prior to a decision on the construction permit. Two types of LWAs are granted. One type authorizes site preparation work, installation of temporary construction support facilities, excavation, construction of service facilities and certain other construction not



subject to quality assurance requirements. The second type of LWA authorizes the installation of structural foundations.

An LWA may be granted only after the licensing board has made all of the required NEPA findings and has determined that there is reasonable assurance that the proposed site is a suitable location for a nuclear power reactor from a radiological health and safety standpoint. The second type of LWA may be granted if, in addition to the findings described above, the board determines that there are no unresolved safety issues relating to the work to be authorized.

The antitrust review and hearing process proceeds in a parallel path with the safety and environmental reviews and the hearing process, except that a hearing on antitrust matters is required only: (1) when requested by the Attorney General; (2) when any person whose interest may be affected files a timely petition requesting a hearing; or (3) when the Commission determines on its own initiative that a hearing should be held.

The construction phase continues until the plant is built, preoperationally tested, and is ready for fuel loading. While the plant is being constructed, typically when construction is about 50% completed, the applicant submits a Final Safety Analysis Report and an Environmental Report-OL Stage. Then, the NRC staff prepares its Safety Evaluation Report and updates its prior environmental review and analysis. Public hearings on the operating license are offered. If hearings are conducted, findings are made by a licensing board subject to Commission review. If no hearing is requested, findings are made by the Director of Nuclear Reactor Regulation, also subject to Commission

review. If a favorable decision is ultimately rendered, the operating license is issued.

B. One-step vs. Two-step Licensing

The two-step licensing process was a prudent course to follow when the nuclear power industry process was in its early conceptual and developmental years. In the early years there were many first-time nuclear plant applicants, designers and constructors and many unproven design concepts. The concern about the ability of a new industry to meet construction permit stage commitments for the final design was justified, as was the reevaluation for this purpose at the operating license stage.

The situation, however, has been altered substantially in the intervening 28 years since the enactment of the Atomic Energy Act of 1954.

Final designs for most plants could be described at the construction permit stage. Even though preliminary designs may be proposed for valid reasons, experience obtained in designing and licensing nuclear plants provides a sound basis for moving from the existing two-step licensing process to a one-step process.

Experience has demonstrated that the two-step process exacerbates construction scheduling problems because design of the plant, regulatory design review and the hearing process occur during construction. The one-step process would place design, design review and hearing before construction begins thereby making construction scheduling more certain. Experience also suggests that the two-step process has a negative effect on the creditability of the process, i.e., the granting of a

construction permit has been interpreted by some as being so conclusive as to render the issuance of an operating license pro forma. Under a one-step process construction and operation will be considered concomitantly.

Moreover, the two-step licensing process was put in place years before the enactment of environmental laws such as NEPA. The objectives of these laws could be better served by a one-step licensing process which encourages earlier identification and resolution of licensing issues, particularly regarding the siting of a nuclear power plant. Such a process would also accommodate participation by states on matters in which they have both an interest and responsibility.

The problems created by the two-step licensing process can best be resolved by a one-step process. The concept of a combined CP-OL reflects the fact that in a more mature technology, applicants for a license to construct and operate a commercial nuclear power plant should be able to submit the final design information at the outset. This would significantly change the principal purpose to be served by the NRC review prior to the commencement of operation. The rationale is that if the Commission can make a one-step determination on site suitability and the final design of a plant early in the licensing process, it should do so and should not be required to perform the same exercise a second time.

Early site reviews, approval of final designs, stability of plant design and one-step licensing go to the very heart of the proposed legislation.

## II. SECTION-BY-SECTION ANALYSIS

### Section 101. Construction Permits and Operating Licenses.

This amends section 185 by deleting language providing that a construction permit must specify the earliest and latest dates for completion and that failure to complete a facility by the stated date shall result in forfeiture of the permit, absent good cause shown. This section also adds two new subsections to section 185.

Subsection a. of section 185 authorizes the NRC to grant a construction permit for a production or utilization facility and, upon additional findings and absent any good cause shown to the Commission to the contrary, to grant an operating license. This subsection is also amended by deleting the requirement for specification of the earliest and latest completion dates for construction permits. This provision is not useful and tends to produce unnecessary paperwork and expenditure of resources. Presumably, the intent of such a provision is to see that construction is diligently pursued once a construction permit is granted. In fact, the large investment required to construct nuclear plants is a more substantial driving force in that same direction. By eliminating the requirement, the impetus for diligence in construction is not lost and the need to process applications for extensions of time, along with all the attendant administrative problems, is obviated.

A new subsection b. of section 185 authorizes the Commission to rely upon certification of need for power made by a competent Federal, State, regional, or local governmental agency. The importance of subsection b. is that it eliminates the necessity of the Commission to duplicate need for power studies by others whenever the Commission must take into account such need to satisfy the requirements of Federal law applicable to its licensing decisions.

Subsection c. of section 185 permits issuance of a combined construction permit and operating license for a nuclear power plant. This, in effect, is one-step licensing when the application contains sufficient information on the final design of the nuclear power reactor to permit the requisite determinations to be made under this Act and the rules and regulations of the Commission. A combined construction permit and operating license could be issued only if the application contains sufficient information to support the issuance of both the construction permit and operating license. In short, the application must include an essentially complete final design for the nuclear power plant.

Subsection c., like subsections 193d.(1) and 194d.(1), provides an opportunity for public hearing. The opportunity for hearing and the type of hearing shall be as prescribed in Section 189 of this Act and the Commission's Rules of Practice in 10 CFR Part 2.

The new subsection c. also provides that after issuance of a combined construction permit and operating license for a nuclear power plant, the Commission shall assure through inspections and tests that construction and operation are conducted in conformity with the combined construction permit and operating license. The principal purpose of



this provision is to guarantee that the conceptual design submitted is the one that is actually put in place for operation. It is anticipated that the NRC will conduct its inspections and tests during both construction and preoperational testing. Additionally, prior to full power ascension, pursuant to appropriate rules and regulations, the utility would certify to the Commission that the plant had been constructed and would operate in conformity with the combined construction permit and operating license.

Section 102. Hearings and Judicial Review.

This section amends Section 189 of the Atomic Energy Act of 1954, as amended. This is the section which historically has been the basis for the opportunity for hearings and the hearings which the Commission has conducted over the years in the licensing of nuclear power plants. This section is accompanied in the Atomic Energy Act by Section 181, the effect of which is to make the provisions of the Administrative Procedure Act, applicable to the Commissions licensing proceedings. This provision is not affected by the amendments to Section 189.

The amendments to Section 189 eliminate the present requirements for a mandatory hearing, even if no hearing is requested, for the issuance of a construction permit for a nuclear power reactor and for a testing facility. The Commission would still be required to afford an opportunity for hearing and would hold an appropriate hearing at the request of any person whose interest may be affected. Also, the Commission in its discretion could always decide to hold a hearing. In these circumstances, the mandatory requirement to hold a hearing appears to serve no significantly useful purpose and can result in needless expenditure of technical resources that could be devoted to other regulatory objectives.

Subsection 189a.(1)(A) would require that prior notice be given and opportunity for hearing afforded at key points in the licensing process. These include applications for site approvals, final design approvals, and for a combined construction permit and operating license. Of course, the practice of giving notice for the two-step construction

permit and operating license--the traditional approach followed heretofore-- would continue to apply for those applicants who do not seek or do not qualify for a combined construction permit and operating license.

Subsection 189(a)(1)(B) requires additional notice by publication in major newspapers having national circulation be given on the receipt and prior to the granting of an application for the approval of a final nuclear power reactor design under section 194.

Subsection 189(a)(2)(A) is identical to the so-called "Sholly Amendment" language enacted by the Congress in Public Law 97-XXX.

Subsection b. substantially modifies the hearing provision of Section 189 by providing for hybrid-type hearing procedures. Heretofore, historically the hearing phase of the proceedings to license nuclear power plants have been entirely adjudicatory (i.e., formal, trial-type) with no flexibility for any informal proceedings. This practice continued--for whatever reasons--even though some years ago the responsible Congressional oversight committee encouraged the Commission to use informal procedures to the maximum extent permitted by the Administrative Procedure Act. (See H. Rept. No. 1966, 87th Cong., 2nd Sess, July 5, 1962, at p. 6 and S. Rept. No. 92-787, 92nd Cong., 2d Sess, May 9, 1972, at p. 9.) In addition, studies of regulatory reform in administrative proceedings have suggested in recent years the use of hybrid-type hearings as a technique to introduce permissible informality while preserving formal adjudicatory procedures for the resolution of relevant facts which are in dispute. Recently, the Senate passed a national nuclear waste bill (S. 1662) which includes a provision for

hybrid hearing procedures for any hearings required on application for reactor spent fuel storage expansion. In addition, the Commission has had some limited experience with hybrid hearing procedures in certain rulemaking proceedings. Thus, although hybrid hearing procedures have not been used in the licensing of nuclear power reactors, the technique is not a novel one. Indeed its feature of using informal proceedings to identify any issues which must be adjudicated is not unlike the objectives of the pre-hearing procedures provided for in the Commission's Rules of Practice.

Generally, the purpose of the procedures established in subsections 189c. and d. is to define with precision the issues, if any, that are in controversy and which must be resolved through adjudication. Discovery remains an essential part of this process, and the full discovery rights provided for in the Commission's regulations would be available to all parties.

Subsection 189 b. provides that in certain hearings, including any hearing on an application for the issuance of a construction permit, operating license, combined construction permit and operating license, site permit, or for the approval of a final nuclear power reactor design, the Commission shall provide the parties to the proceeding with an opportunity to present their views to the presiding board. The presiding board shall at the request of any party provide an opportunity for oral argument with respect to any matter which the presiding board determines to be in controversy among the parties. The oral argument is to be preceded by such discovery procedures as the rules of the Commission shall provide, and each party, including the NRC staff, shall

be required to submit to the presiding board, in written form, at the time of the oral argument, a summary of the facts, data and arguments upon which such party proposes to rely that are at that time known to the party. Of the materials submitted during oral argument, the presiding board shall only consider those facts and data that are submitted in the form of sworn testimony or written submissions.

Subsection 189 c. provides the procedures for determining the issues, if any, which must be adjudicated in formal proceedings. The subsection requires the presiding board to designate any disputed question of fact for resolution in an adjudicatory hearing only if it determines that: there is a genuine and substantial dispute of fact; the dispute can only be resolved with sufficient accuracy by the introduction of evidence in an adjudicatory hearing; and the ultimate decision is likely to depend on the resolution of the disputed facts. Applying these criteria, the presiding board would have to justify in writing why the ultimate decision is likely to depend on the resolution of the specific dispute and why an adjudicatory hearing is likely to resolve the dispute.

Subsection 189d. maintains without change the provision for the judicial review of final orders of the Commission in any proceeding of the kind specified in Section 189.



Section 103. Early Site Approval.

This is a new section 193 which authorizes the approval of one or more sites for nuclear power generation facilities prior to the filing of any application to construct or operate such facility or facilities. The purpose of this authorization is to permit the resolution of site-specific questions at an early stage in the licensing process. This would serve to focus public participation on a crucial aspect of the overall facility planning and construction process at an early point in time when public participation can be most effective. This provision is an integral part of the effort to promote the early, effective and efficient resolution of issues in the licensing process.

Subsection a. of section 193 provides that an application for early site approval may be filed by any Federal, State, regional or local governmental agency, or a utility, and the NRC is authorized to issue a site permit even though no application for a construction permit or a combined construction permit and operating license has been filed. This provision permits an early and specific focus on the suitability of a site for nuclear power plant construction without requiring the development of custom design.

Subsection b. of section 193 provides for the waiving of fees for an application for a site permit, an amendment, or a renewal of a site permit under section 193 and provides that the Commission is authorized to allocate the costs among applicants which later propose to use the approved site. The early resolution of siting issues separate from an application to construct a nuclear power plant on a particular site is an important element in the efficiency of the licensing process.

Subsection c. of section 193 provides that each application under subsection a. shall contain such information as is required by the Commission in its rules and regulations to determine the suitability of the site for its intended use. It is currently envisioned that the application would set forth an envelope of plant parameters including:

- (1) the number, type or types and thermal power level of the facilities with respect to which the application for site approval is made;
- (2) the boundaries of the site;
- (3) the proposed general location of each facility on the site;
- (4) the proposed maximum levels of radiological and thermal effluents that each such facility will produce;
- (5) the type or types of cooling systems, intake and outflow, that may be employed by each facility;
- (6) the seismic, meteorological, hydrologic, and geologic characteristics of the proposed site as well as population density of the surrounding area; and
- (7) such other information as the Commission may by rule or regulation require.

By describing the site in such a way, the Commission could determine the site suitability for one or several generic designs that may be developed pursuant to section 194, the provision for standardized plant designs.

Subsection d.(1) of section 193 authorizes the Commission to approve an application and issue a site permit with appropriate conditions if, after considering all the information in the application and providing an opportunity for a public hearing, the NRC finds that the proposed site is suitable for the construction and operation of the type of facility described in the application consistent with the public health and safety. The opportunity for hearing in accordance with

Section 189 of this Act and the Commission's Rules of Practice in 10 CFR Part 2.

Subsection d.(2) of section 193 provides that any final determination of the Commission on an application filed under this section shall be a final order of the Commission for the purposes of judicial review. This provision specifies the point of time in the administrative process when review by the courts is appropriate.

Subsection e.(1) of section 193 provides that a site permit shall be valid for a facility to be constructed on the site if an application has been filed within a period of ten years from the date of issuance of the site permit. The effect of this provision is that the rights accruing under a site permit are effectively exercised upon the filing of either a construction permit or a combined CP/OL application. In such a case, a request for renewal would be unnecessary to continue the effectiveness of the site permit.

Subsection e.(2)(A) of section 193 authorizes the Commission to renew a site permit for not less than five or more than ten years from the date of renewal. Renewal would be based only upon the application of a permit holder. The minimum period of five years is set to assure that the resources used to review a renewal request are directed toward meaningful results. For example, allowing repeated renewals for only six months or a year could cumulatively tax the resources of the agency and industry alike. Moreover, it is contemplated that information necessary to form a sound basis for the decision to renew for periods of five to ten years will be readily available and well within the state-of-the-art.

Subsection e.(2)(B) of section 193 sets out the criteria the Commission shall apply in deciding whether to renew a site permit. In the absence of significant new information relevant to the site, and in the absence of a showing that the site will not comply with this Act or NRC regulations, it is mandatory that the Commission renew the site permit.

Subsection f. of section 193 assures that a site approved under this section may be used for any other purpose.

Subsection g. of section 193 provides for a request to the Commission for a determination with respect to limited aspects of the suitability of a site for its intended purpose. This provision assures that the Act will not be construed as eliminating the effect of current Commission rules and regulations concerning the review of limited site suitability issues, 10 CFR § 2.600 et seq.

Section 104. Approval of Designs.

This is a new section 194, which provides for approval of nuclear power plant designs. As with early site approvals, this section is intended to facilitate early resolution of design related issues with full opportunity for participation by interested persons. Although the NRC currently has procedures for approving designs, this section gives explicit statutory support to the concept and establishes requirements for NRC approval of facility design. This section will encourage the development and use of standardized designs, will enhance safety, and will contribute to a better utilization of time and resources. A key incentive is the provision allowing the NRC initial waiver of application and issuance fees and allocation of those fees to users.

The final design should be described in such a way as to provide a reciprocal envelope of parameters for sites selected pursuant to section 193 to assure that the plant could be constructed on a site of given general characteristics. Typically, a final design should be described in such a manner that it could be used at most sites with a minimum of adaptations because of specific site characteristics. The Commission contemplates and encourages development and use of whole plant standardized designs as an effective means of improving both efficiency and the public health and safety.

The application requirements for approval of a final design will be set out in the Commission's rules and regulations. If, after NRC review of the information in the application, and after providing the opportunity for a public hearing under the procedures of Section 189 of this Act and, the Commissions' Rules of Practice in 10 CFR Part 2, the



Commission determines that the design is suitable for construction and operation, it will issue an approval and the design may be banked for future use. Regarding the combination of a pre-approved final design with a pre-approved site, it is contemplated that there may be a hearing if there are outstanding issues, i.e., issues raised by the matching of the site with the design or by significant new information which has come to light since either the site or design hearings. However, issues would not trigger new opportunities for hearing at the time the site and design are matched unless it could be demonstrated that, through the exercise of diligence, the basis for such issues was not and could not have been known at the time when site hearings or design hearings were appropriate.

Subsection a. of section 194 authorizes the NRC to approve final designs even though no application for a construction permit or combined construction permit and operating license has been filed by an applicant. This provision permits design applications and approvals to be made before initiation of construction of a nuclear plant. It is a key feature in removing design review and approval from the construction schedule phase.

Subsection b. of section 194 provides that notwithstanding section 161w. of the AEA or the Independent Officers Appropriation Act of 1952, no application filing or issuance fees shall be required for an application for approval or for an amendment or renewal of an approval of a complete final facility. The NRC is authorized to allocate the costs ordinarily defrayed by fees collected among future applicants for permits or licenses which propose to use the approved design. This

provision is added as an incentive to vendors and architect-engineer firms to develop and seek approval for final designs. However, if fees cannot be defrayed because a design is not used during the initial ten year approval, the applicant must pay the full amount plus accrued interest.

Subsection c. of section 194 provides that applications for design approval shall be in writing and shall contain information necessary to enable the Commission to determine the suitability of the design for its intended purpose. The information should constitute an essentially complete final design for a whole nuclear power plant useable at multiple sites.

Subsection d.(1) of section 194 authorizes the Commission to approve an application and issue a design approval with appropriate conditions if, after considering all the information in the application and providing an opportunity for a public hearing, the NRC finds that the design is suitable for the construction and operation of the type of facility described in the application consistent with the public health and safety. The opportunity for hearing and the hearing, if held, would be in accordance with the rules and regulations of the Commission, the appropriate provisions of the Administrative Procedure Act and applicable case law.

Subsection d.(2) of section 194 provides that any final determination of the Commission on an application filed under this section shall be a final order of the Commission for the purposes of judicial review. This provision specifies the point of time in the administrative process when review by the courts is appropriate.

Subsection e.(1) of section 194 provides that a design approval shall be valid for a facility to be constructed on the site if an application has been filed within a period of ten years from the date of issuance of the design approval. The effect of this provision is that the rights accruing under a design approval are effectively exercised upon the filing of either a construction permit or a combined CP/OL application. In such a case, a request for renewal would be unnecessary to continue the effectiveness of the design approval.

Subsection e.(2)(A) of section 194 authorizes the Commission to renew a design approval for not less than five or more than ten years from the date of renewal. Renewal would be based upon the application of a permit holder. The minimum period of five years is set to assure that the resources used to review renewal requests are directed toward meaningful results. For example, allowing renewals for only six months or a year could cumulatively tax the resources of the agency and industry alike. Moreover, it is contemplated that information necessary to form a sound basis for the decision to renew for periods of five to ten years will be readily available and well within the state-of-the-art.

Subsection e.(2)(B) of section 194 sets out the criteria the Commission shall apply in deciding whether to renew a design approval. Renewal shall be granted unless it can be demonstrated that the design will not comply with the Atomic Energy Act or the Commission's applicable regulations in existence at the time that renewal is requested. This provision allows for updating designs at the time a request for renewal of an approval is made.

## Chapter 3

### Proposed Rulemaking on Backfitting

**For:** The Commissioners

**From:** James R. Tourtellotte, Chairman  
Regulatory Reform Task Force

**Subject:** BACKFITTING: PROPOSED RULE AND POLICY STATEMENT

**Purpose:** Approval of Proposed Rulemaking, Policy Statement  
and Federal Register notice.

**Background:** On August 2, 1982, a proposed rule and policy statement on backfitting drafted by the Commission's Regulatory Reform Task Force (RRTF), and subsequently modified by the Commission's Senior Advisory Group, was discussed in SECY-82-326. It centered on a risk-based backfitting standard similar to that proposed for standardized plants in an earlier draft of the Nuclear Standardization Act of 1982. Before the Commission was briefed on that proposal, the ACRS and the EDO staff submitted comments opposed to a risk-based backfitting standard. Based on our evaluation of industry sponsored backfitting proposals and the report of the Ad Hoc Committee for Review of Nuclear Reactor Licensing Reform Proposals, it became apparent that these latter groups also did not support a risk-based standard.

As a result, the Task Force withdrew SECY-82-326 to respond to these comments, provide an updated discussion of the issues and submit revisions of both the proposed rule, enclosure 1, and policy statement, enclosure 2, for your consideration. We

**Contact:**  
J. Tourtellotte, RRTF  
X-43300



have also attached alternate proposals, enclosure 3, and an analysis of major comments to date, enclosure 4. We believe the enclosed RRTF proposal appropriately responds to the unanimous concern about the practicality of a risk-based backfitting standard. We also believe that the proposal could now benefit from the broader input available from the public comment process.

#### Discussion:

In its early deliberations, the RRTF identified backfitting as one of the most significant areas in which reform was needed. This conclusion was reached based on information provided by NRC Staff and industry representatives familiar with the requirements generation and implementation process. The general position of industry has been and continues to be that "backfitting" has been a major cause of uncertainty in the regulatory process, and that past backfitting decisions have resulted in costly and questionable changes.

While the staff will admit that past backfit decisionmaking could have been better disciplined, it understandably places a different emphasis on the problem. While staff comments, both formal and informal, argue with the characterizations of the extent of the problem--they do not disagree with its existence. In all cases, commenters agree that backfitting decisionmaking is in need of improvement. To date, that is the extent of general agreement. There are widely divergent views on what change is necessary and desirable, how change should be implemented, and who should control the backfitting process.

In assessing what NRC policy should be, discussion of compliance with the existing rule cannot serve its usual purpose as the base case, since we have no real experience in how it would work if properly utilized and documented. However, it can serve as an alternative standard to that recommended by the RRTF and others.

In our view, to provide a meaningful analysis at this point requires comparison of the recommended proposal to others (See Enclosure 3). We are proposing that a draft final policy in the form of a proposed rulemaking be published for public comment and that a Commission policy statement be issued as an interim solution. We do not recommend adoption of any new specific backfitting proposal without the benefit of public comment. We believe this

fundamental matter of safety philosophy is particularly benefitted by a public airing of the issues, since it is basically a matter of choice in broad decisionmaking strategy. As importantly, we believe this is the kind of issue that deserves active and direct Commission input.

#### Issues:

##### Definition of Backfitting.

The definition of backfitting which appears in the present backfitting regulation, §50.109, defines backfitting as ". . . the addition, elimination or modification of structures, systems or components of the facility after the construction permit has been issued."

In contrast to this legal definition, some of the NRC staff think of backfitting only as changes made after an OL is issued, while industry representatives have used backfitting to describe any required modifications, independent of whether the plant is still under construction or is operating. It is clear that at the present time there is no commonly accepted definition of backfitting. Without such a common understanding as a starting point, it is difficult to determine what changes to the definition of backfitting might be appropriate. Since the definition determines what will be the scope of actions considered as backfits, it is essential to a backfitting policy.

The present legal definition, while not subject to the usual analysis based on interpretation of usage--since it has not been used as a standard to make decisions--presents potential problems in the Task Force's judgment, because it defines any change after CP issuance as a backfit. If the standard were to remain in effect permanently, we believe it could unnecessarily allow misinterpretation and require that all changes mandated by the NRC be defined as a backfit. We do not believe this is a proper definition of backfit. Simply saying that after the CP issues any changes are backfits ignores the reality that certain information is not available until some later time, and that initial submittal, evaluation and modification of design information by the NRC should not be considered a backfit just because it occurs ". . . after the construction permit has been issued."

We believe the eventual definition you choose should define "backfit" in a way that allows the NRC to set initial approved design and acceptance criteria as

requirements to meet whatever health and safety objectives are considered necessary to grant approval for construction and subsequent operation. Once the NRC has set such criteria and an applicant or licensee is in the design, construction, or operation business, i.e., has committed resources to and is acting according to the criteria, then any proposed change to those accepted criteria should be considered a backfit and trigger a special decisionmaking process.

The problem in defining backfitting by solely relying on actions after a specific time (CP or OL issuance) is that the review process doesn't work that way. Certain parts of structural or operational design are not developed or approved at one time. The process is an ongoing one, some of which occurs late in the OL review process. Even with single stage licensing, this time problem could remain.

Additionally, defining backfitting as changes or modifications to some set of plant or facility characteristics has raised arguments over what should be included in the set, e.g., should changes to procedures or organization be considered a backfit?

The RRTF suggested solution is to change the definition of backfitting to "the imposition of new regulatory requirements, or the modification of previous regulatory requirements applicable to the facility after the construction permit has been issued."

This language would focus on the fundamental cause of backfitting--new or changed NRC requirements--rather than on the consequences--additions or modifications to the physical plant, organization or procedures applicable to the facility. It is the intent of this language to substantially expand those characteristics covered by backfitting. Organizational or procedural consequences would be added to the "hardware" consequences defined in the present rule. The imposition of requirements effecting organizational or procedural aspects of a facility are potentially as safety significant and costly as any hardware requirements, e.g., emergency planning requirements, and are in our view worthy of inclusion in a comprehensive backfitting policy.

### The Backfitting Standard.

The backfitting standard itself will determine the threshold for deciding that a proposed change should be implemented. The standard that the agency should have been using since 1970 is that a backfit " . . . will provide substantial additional protection which is required for the public health and safety or the common defense and security." Whether or not the present standard has been appropriately applied in making backfitting decisions, it is now associated with a period in which both the implementation and scheduling of regulatory changes have drawn sharp criticism from the regulated industry. While past backfitting has undoubtedly resulted in both "good" and "bad" backfits, the new standard should encourage the good and discourage the "bad". NRC's past backfit decisionmaking process has been criticized on three grounds:

(1) That the judgment of safety significance for some backfits was too conservative, i.e., that marginal safety improvements were implemented without due regard to their overall consequences.

(2) That scheduling of backfits did not take realistic account of licensee, vendor and engineering firm resource limitations and unnecessarily increased the cost of backfitting.

(3) That the agency sometimes reversed itself on backfitting requirements, changing its collective mind as to what was needed after licensees had begun to implement or had implemented the requirements of earlier NRC positions.

The backfitting standard should directly address and correct the first problem. (The second and third are management problems discussed elsewhere.) We believe an appropriate standard should screen out the "nice to have" or "marginal" modification and require a reasoned evaluation of benefit and cost as part of the decisionmaking process. The proposed §50.109 requires that the safety benefit provide a substantial increase in public protection, with emphasis on overall plant safety, and that the benefit exceed both direct and indirect costs. A cost benefit approach, such as that proposed, is supported by the NRC staff, the Ad Hoc Committee for Review of Nuclear Reactor Licensing Reform Proposals and industry.

### Factors for Backfitting Decisions

To assure consistent rational decisionmaking in determining the need for backfitting, the RRTF proposal includes a set of decisionmaking factors to

be used by the NRC in determining whether the standard has been met. These include consideration of:

- (1) Reduction in the risk of accidental offsite releases;
- (2) Consideration of the impact on occupational exposure;
- (3) Costs of the backfit, including downtime and delay;
- (4) Impact on safety due to changes in complexity and the relationship to other requirements;
- (5) Resource burden on the NRC; and
- (6) Differences in plant vintage, type and design on the appropriateness of the backfit.

Additionally, subsection (c) of §50.109 requires the consideration of licensee comments or alternatives as part of the decisionmaking process. The factors included have been drawn from both staff and industry suggestions.

#### The Burden of Proof

There were a significant number of staff comments on SECY-82-326 in regard to shifting the burden of proof to the staff to demonstrate that a backfit is necessary. In general, both as a matter of good policy and as a matter of law, the APA requires the regulator to base decisions upon a reasoned, rational thought process. It was with this in mind that the "shifting the burden" statements were included. The RRTF believes that this emphasis is not inconsistent with the burden carried by the licensee to prove his plant safe at the OL stage. In any event, the standard and procedures, if adopted will help assure that there consistently is a rational basis for backfitting decisionmaking.

#### Rule Change vs. Policy Statement

Both the ACRS and some staff comments questioned the need for a rule change. They asked why the present rule would not suffice if the staff were simply directed to comply with it. First, the present rule only addresses the standard and definition; it does not include decisionmaking factors, nor does it address potentially desirable conforming changes such as to §§2.204 and 50.54(f). Even if the Commission were to ultimately decide to retain the present standard and definition, the other rule modifications would still be desirable and necessitate a rulemaking. Second, as stated



earlier, we believe the present definition is potentially flawed and should be modified. This also necessitates rulemaking. Third, even if the present rule accomplished adequate backfit reform in a legal and management sense, leaving it in place would not address the external perceptual problem that the present rule is associated with a period of backfitting during which its implementation was effectively avoided. One can argue that a psychology of uncertainty has been created that can best be overcome by implementing backfit reform in the administrative manner which has the most credibility and certainty attached to it, i.e., rulemaking. We also note that despite individual staff comments asserting that no rule change is necessary, the CRGR ultimately chose the rulemaking approach in drafting its own version of backfit reform as a substitute rule for that in SECY-82-326 (See Sept. 3, 1982 Stello memo to Dircks, CRGR Minutes of September 1, 1982 meeting). Last, the RRTF supports, in agreement with comments from the staff, ACRS, industry and the Ad Hoc Regulatory Reform Committee, some form of cost benefit approach to backfitting reform. Since the present backfitting rule contains no such provision, changing the rule is a reasonable way to include it. For all of the above reasons, the RRTF proposal centers on a rule change. Also included, however, is a policy statement which directs the staff to comply with the existing backfitting rule as an interim measure and specifies that the procedures presently being used by the CRGR for generic issues be applied to backfits until such time as a rule change can be affected. A last significant aspect of our proposal is recognition that a rule is only as effective as its management and implementation. The RRTF suggests including backfit policy implementation as a PPG issue and hence require the periodic performance review that such inclusion entails. Only by continuing strong management support of the concept of disciplined, documented decisionmaking can backfit reform effectively occur.

#### How The Policy Would Be Applied:

A number of comments on SECY-82-326 expressed concern that the proposed rule would somehow curtail the staff's ability to conduct the OL review. Confusion about what the policy would mean in relation to the staff's present process appears to be a major concern. As a result, we have provided the following discussion to clarify the intent of the proposal.

Assuming the proposed rule became effective on a given future date, all existing regulatory requirements which apply to CP and OL holders at that time would be "frozen" for backfit purposes, i.e., they would remain applicable to CP and OL holders without the need for backfit analyses. In effect, those requirements existing at the time of the backfitting rule being put in place would be "grandfathered" out of the backfitting process. The rule would not be retroactive in its application to requirements in place at the time of the backfit rule implementation. Thus, those plants undergoing OL review at the time a backfit rule became effective would continue to be reviewed in the customary fashion against the requirements in place at the time of backfit rule effectiveness.

The new backfitting decisionmaking process, which would require the making of a backfitting analysis prior to implementing a backfit, would apply to (1) new or additional requirements to be applied and (2) modifications of requirements to be applied. In other words, any changes to requirements applicable to CP and OL holders which occur after a backfitting rule becomes effective would require a backfitting determination prior to implementation.

In order to minimize confusion, the requirements that are in effect at the time of backfit rule effectiveness should be documented for the use of the staff in helping to determine when a change is actually being considered that requires a backfit analysis.

For the purposes of backfit decisionmaking, the meaning of "regulatory requirements" would be similar to the meaning presently used by the CRGR in dealing with generic requirements. Regulatory requirements would include all those forms used by the NRC to impose requirements, including regulations, rules, orders, regulatory guides, branch technical positions, other acceptance criteria (e.g., SRP) and official letters.

The rule is written so that backfits are defined to include changes applied to a single plant or multiple plants, whether by order, rulemaking or other means. This is a significant departure from custom and has raised comments that rulemaking should not be included within a backfitting policy. Rulemaking has been included despite such comment because the backfitting of multiple plants has the

obvious potential of being the most significant in its effect. In our view, to exclude the major form of such backfitting, i.e., rulemaking, from a backfitting policy ignores fundamental good sense. Additionally, it would help perpetuate the application of inconsistent policy on the basis of an irrelevant distinction between one and many plants.

The factors to be evaluated in making a backfit analysis would be applied in the rulemaking context during the development of the proposed rule. This does not differ from the existing rulemaking process with its value impact analysis and senior level CRGR review. To the extent that backfitting factors might be duplicative of value impact factors, a single analysis would satisfy both. This is modeled on the present CRGR process which includes its own set of evaluation factors that may or may not overlap with other evaluations, such as value impact analyses, required as part of rulemaking.

The last significant aspect of application relates to the extent of plant-specific analysis that would be required of the staff in those backfitting cases, such as rulemaking, where multiple plants are the subject of the proposed change. As the RRTF understands present policy, one of the existing considerations used to evaluate a proposed rule is the differing impacts it may have on various classes of plants. The Task Force proposal includes a factor in the backfitting analysis which would require assessment of such differing impacts when rulemaking involves backfitting or when a backfit is proposed for multiple plants by some other means, such as by order.

The required "assessment" is yet to be operationally defined. The proposal is not intended to require a separate plant-specific backfit analysis in addition to the backfit analysis undertaken as a part of rulemaking or order issuance. In addition, depending on the specific circumstances "assessment" might be reasonably interpreted as a staff determination that the plants to be affected are of similar enough characteristics to require no further specific evaluation. (The process allows for a licensee to disagree with such a finding.)

In contrast, some proposed changes may require plant-specific evaluation, particularly in regard to scheduling, and may necessitate some licensee

conducted analysis. The extent of assessment will require reasonable interpretation. Nothing in the rule precludes the NRC from using good judgment in determining the extent to which assessment of plant characteristics is significant to the backfit decisionmaking process.

Resource Implications:

Questions regarding the resource implications of a changed backfit rule have been raised, in particular by the ACRS. An early attempt by the RRTF to have the staff develop a value impact analysis for alternative forms of this rule, including a discussion of resource implications, resulted in a recognition that the proposal did not include enough detail to allow a useful analysis. The Task Force intends to request that the staff complete such an analysis during the public comment period once the proposal has Commission approval and the staff is in a better position to determine how it would implement the rule. The necessary implementation details and value impact evaluation would be available to the Commission prior to its making a decision on a final backfitting rule.

**Recommendations:**

The RRTF recommends that the Commission:

- (1) Approve and issue the attached policy statement on backfitting as soon as practicable.
- (2) Approve the issuance of the attached proposed backfit rule for public comment as soon as practicable.

James R. Tourtellotte  
Chairman,  
Regulatory Reform Task Force

**Enclosures:**

1. Proposed Rule Change
2. Proposed Policy Statement
3. Alternate Backfit Proposals
4. Analysis of Comments

NUCLEAR REGULATORY COMMISSION

10 CFR PART 50

BACKFITTING

AGENCY: Nuclear Regulatory Commission

ACTION: Proposed Rule

SUMMARY:

The Commission is considering amending its regulations to modify the backfitting provision and associated sections applicable to utilization and production facilities. The proposed changes would modify the Commission standard for determining whether backfitting is required. First, the new standard would require that there be a substantial improvement to the public health and safety and emphasize the need to consider overall levels of safety, rather than marginal/incremental improvements. Second, demonstration that a backfit should be implemented would now include the making of a benefit cost determination concluding that the backfit is necessary. Backfitting would be redefined as the imposition of new NRC requirements or the modification of previous requirements applicable to a facility after the construction permit has been issued.

These backfitting revisions are being considered as part of a larger effort to review the NRC's internal process and procedures primarily associated with the licensing of nuclear power reactors. The proposed modifications to the NRC's regulations would be implemented in association with policy changes to staff procedures in making



backfitting decisions. A policy statement mandating an interim policy is being issued concurrently with these proposed amendments.

The purposes of the proposed amendments are as follows:

- ° To make the backfitting decisionmaking process more consistent, reasonable and publicly visible.
- ° To address the concern that the pace and nature of regulatory actions have created a potential safety problem which deserves further attention by the agency.
- ° To reduce the level of regulatory uncertainty and ensure better understanding and improved analysis of the costs and safety benefits likely to result from NRC imposed changes before they are placed in effect.

In seeking public comment, the Commission is particularly interested in receiving comments on the following questions:

- ° What is the real nature of the problem resulting from past NRC backfitting practices? What kinds of costs or benefits of past backfitting can be documented? What is the extent of the problem?
- ° What kind of evidence is available to verify the safety significance of backfitting practices? What kind of proof is

available to support the view that past backfitting has created a hazard to the public health and safety?

- ° To what extent have problems with backfitting already been corrected by the NRC? What examples might support one view or the other?
- ° Are there alternative actions necessary or available to bring backfitting under better control?

DATE: Comments received after (60 days after publication) will be considered if it is practical to do so, but assurance of consideration cannot be given except as to comments filed on or before (60 days after publication).

ADDRESSES: Written comments should be submitted to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Docketing and Service Branch. Copies of all documents received may be examined and copied for a fee in the Commission's Public Document Room at 1717 H Street, N.W., Washington, D.C.

For Further Information Contact: James Tourtellotte, Regulatory Reform Task Force, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, telephone (202) 634-3300.

SUPPLEMENTARY INFORMATION: The Nuclear Regulatory Commission requires continuous conformance to its regulations during the lifetime of each licensed facility, unless a specific exemption is granted. Advances in knowledge concerning reactor design and reactor safety inevitably lead the NRC to identify new requirements. Implementation of such new requirements to plants undergoing operating license review has traditionally been known as "ratcheting". The modification of an operating facility to meet such new requirements has been commonly referred to as "backfitting". Backfitting as used in these revisions, encompasses both processes.

The first formal appearance of backfitting in the regulations governing commercial nuclear power plants was on April 16, 1969, when the Atomic Energy Commission (AEC) published for comment a proposed new section to Part 50, Title 10 of the Code of Federal Regulations (10 CFR 50.109). The purpose of the proposed regulation was to indicate the circumstances under which the AEC could require backfitting of facilities. On March 31, 1970, (35 FR 5317) the AEC promulgated the regulation, essentially unchanged.

The present standard for making backfitting decisions as contained in the Commission's regulations states that backfitting may be required only if the Commission finds that the action will provide "substantial additional protection which is required for the public health and safety . . . . ." This broad authorization to require safety improvements is

contingent on their substantially increasing the protection of the public.

While § 50.109 is the formal statement about backfitting in the Commission's regulations, the NRC has invoked it only rarely. A 1980 Senate staff study stated that the reasons for lack of use are as follows:<sup>1/</sup> First, licensee compliance has seldom required formal orders from the NRC. Licensees have been willing to act upon notice from the NRC of an impending required action in order to avoid the procedural complications of public hearing that attach to NRC orders. (The use of confirmatory orders to verify licensee commitments is an exception to this statement.) Second, many new requirements have been identified by operating plants during the periodic reviews for reloading of new fuel or during generic reviews of important safety issues. Third, new requirements have been imposed in the licensing review of a particular reactor, sometimes without significant participation by senior agency officials, and the application of such new requirements has served as a precedent for all subsequent reviews of other reactors. The licensing staff disagrees with this characterization and believes that § 50.109 was invoked only rarely because licensees recognized the safety significance of issues and resolved them voluntarily.

The process of backfit decisionmaking, when it has been applied, has at

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<sup>1/</sup> U. S. Congress. Subcommittee on Nuclear Regulation for the Committee on Environment and Public Works U. S. Senate. Staff Studies Nuclear Accident and Recovery at Three Mile Island. 96th Congress, 2nd Session. July 1980.

times been largely ad-hoc without consistent criteria being applied to backfit decisions. The pace of backfit requirements, although it has slowed very recently, increased considerably after the Three Mile Island accident and has created concern that such accumulating regulatory actions present a potential safety problem. (See NUREG-0839, "Report on a Survey by Senior NRC Management to Obtain Viewpoints on the Safety Impact of Regulatory Activities from Representative Utilities Operating and Constructing Nuclear Power Plants," July 1981, USNRC.)

The present concern for bringing "backfitting" under better control is, therefore, not new. Licensees have complained of the economic and potential safety consequences of inappropriate backfitting decisions and scheduling for some time. The NRC staff has also recognized the problem within the context of staff review and prepared a staff paper on the generation of new reactor requirements which included this subject in January of 1979 (see SECY-79-8). This paper, prepared by the Director, NRR, provides in part a careful and well-thought out analysis of the problems of determining the need for new requirements that remains applicable today. The occurrence of the accident at Three Mile Island in March 1979 effectively sidetracked substantial consideration of the backfitting aspects of this proposal.

Since additional requirements in response to the TMI-2 accident have been put in place in the interim, now is an appropriate time to reconsider the concerns raised about the requirements process. Such consideration is also consistent with the Commission's recent attention



to development of safety goals (see NUREG-0880 and 47 FR 7023, February 17, 1982). The attempt to provide benefit/cost numerical guidelines to aid decisionmaking is a key aspect of improving the stability of the requirements process and of improving the understandability of decisionmaking. Although, as recognized in discussions of safety goals, numerical guidelines are only one consideration in decisions and for the foreseeable future, regulatory decisions will require use of qualitative factors, as well as engineering judgment.

One other recent related action involves the establishment of formal procedures for the control of generic requirements on reactor licensees. A Committee to Review Generic Requirements has been established, procedures for controlling generic requirements are being developed and preliminary criteria used in determining the need for new requirements have been identified. (See SECY 82-39 and 82-39A, dated January 29, 1982 and April 29, 1982, respectively.)

The substance of these proposed backfit revisions involves changes to §§ 2.204, 50.54 and 50.109 and the addition of a new 2.810 of the Commission's regulations. The major thrust of these changes is to provide a more reasoned and thorough decisionmaking process for use by the NRC staff when determining whether backfitting is necessary. Marginal safety improvements or minor incremental increases in safety would not meet the new threshold. Once a plant is issued a construction permit by the licensing process, backfitting shall not be required unless a substantial improvement in public protection would result. The major

change is in the language of § 50.109, the backfitting provision and the addition of 2.810, which specifies the factors to be considered in deciding whether or not to impose a backfit. The standard for determining whether a backfit is to be required is also changed, as is the definition of backfit. Additionally, the requirement for licensee submittal of information would now require EDO approval and assurance that the request is justified.

Since orders for modifications of licenses or issuance of amendments may result in changes or modifications to facilities, § 2.204 is modified to require the determination stated in § 50.109 when a backfit is involved. Additionally, an exception to the making of such a finding is included in § 2.204 if the public health and safety requires an immediately effective order for modification. The Commission has included this provision to ensure that the requirement for a backfitting determination is not the cause of delay in issuing an order in a circumstance where immediate action would be necessary to maintain an acceptable level of safety.

The modification to § 2.204 will require that a backfitting determination be made by the NRC prior to implementing a license modification requiring a backfit. This provision codifies an NRC policy to assure that backfits implemented by order undergo a reasoned, documented decisionmaking process.

The change to § 50.54(f) codifies a commitment that the NRC will evaluate information requests prior to issuance to ensure the request is justified. This provision will centralize approval of such requests in order to better assure that consistent decisions are made about the need for such information requests.

Section 50.109 is modified in the following ways. While the fundamental standard for requiring a backfit remains a "substantial" increase in safety, an additional benefit cost determination is required to meet the threshold. Backfitting is now defined as additions to or modifications of regulatory requirements imposed on a facility after the construction permit has been issued. Regulatory requirements, for backfitting purposes, refers to all methods used by the NRC to impose changes, including rules, regulations, orders, regulatory guides, branch technical positions, standard review plan positions, and official letters.

The backfitting determination will require a systematic and documented analysis of the set of factors contained in a new § 2.810. Those factors specify in more detail the considerations that will go into a backfitting determination. They include specific cost factors, risk considerations, relationship to other requirements, and consideration of occupational exposure.

The backfitting determination can be made at any time during a rulemaking proceeding, when a rulemaking is the form of imposition, or

at any time prior to implementation for other methods of imposition. Only when immediate action is necessary to protect the public health and safety will backfit imposition be allowed prior to the making of a backfit analysis. The Commission will make a reasonable effort to take plant specific characteristics into account when backfitting multiple plants, and the new modifications provide an opportunity for licensees to provide input to the decisionmaking process, including suggesting alternate means to meet whatever regulatory objective is involved.

All regulatory requirements which exist at the time of these amendments being made effective will be applicable to current CP and OL holders, whether or not yet imposed, without the making of a backfitting analysis. The amendments only apply to additions or changes to regulatory requirements made after the effective date of the rule.

The Commission has issued for public comment a proposed policy statement on safety goals for nuclear power plants. One of the purposes of developing a policy statement on safety goals is to provide a better means of testing the adequacy of and need for proposed new regulatory requirements. As the safety goals are used in the future, the Commission believes they may aid in providing additional guidelines for making backfitting decisions. If such is the case, additional modifications to the backfitting policy will be considered at that time.

The proposed backfitting modifications include emphasis on assessment of overall plant risk as one of several factors used in making

determinations. Such determinations may include probabilistic risk assessment (PRA), when appropriate, and will continue to require traditional good engineering judgment. While backfitting decisions may benefit from the use of PRA, they do not necessarily require its use, in whole or in part.

#### PAPERWORK REDUCTION ACT REVIEW

This proposed rule will be submitted to the Office of Management and Budget for clearance of its information collection requirements as required by the Paperwork Reduction Act of 1980, Public Law 96-511.

#### REGULATORY FLEXIBILITY ACT CERTIFICATION

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule affects only the licensing and operation of nuclear power plants. The companies that own these plants do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR Part 121. Since these companies are dominant in their service areas, this rule does not fall within the purview of the Act.



ENVIRONMENTAL IMPACT

Since the proposed amendments are nonsubstantive and insignificant from the standpoint of environmental impact, neither an environmental impact statement nor a negative declaration is required in accordance with 10 CFR 51.5(d)(3).

## LIST OF SUBJECTS in 10 CFR PART 50

Part 2 - Rules of Practice

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 and Waste treatment and disposal.

Part 50

Antitrust, Classified information, Fire prevention, Intergovernmental relations, Nuclear Power plants and reactors, Penalty, Radiation protection, Reactor siting criteria and Reporting requirements.

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and section 553 of title 5 of the United States Code, the following amendments to Title 10, Chapter I, Code of Federal Regulations, Parts 2 and 50 are contemplated.

## 10 CFR PART 50

The authority citation for Part 50 continues to read as follows:

AUTHORITY: Secs. 103, 104, 161, 183, 189, 68 Stat. 936, 937, 948, 953, 954, 955, 956, as amended (42 U.S.C. 2133, 2134, 2201, 2232, 2233, 2239); secs. 201, 202, 206, 88 stat. 1243, 1244, 1246 (42 U.S.C. 5841, 5842, 5846), unless otherwise noted.

Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80-50.82 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Sections 50.100-50.102 issued under sec. 186, 68 Stat. 955 (42 U.S.C. 22356).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273), §§50.10(z), (b), and (c), 50.44, 50.46, 50.48, 50.54, and 50.80(a) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§50.10(b) and (c) and 50.54 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§50.55(e), 50.59(b), 50.70, 50.71, 50.72, and 50.78 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201 (o)).

2.204 ORDER FOR MODIFICATION OF LICENSE.

The Commission may modify a license by issuing an amendment on notice to the licensee that he may demand a hearing with respect to all or any part of the amendment within twenty (20) days from the date of the notice or such longer period as the notice may provide. If the amendment involves a backfit as defined in 10 CFR 50.109(a), the determination required by that section shall be made using the relevant factors set forth in section 2.810 prior to issuance of the amendment unless the immediate action on items required by the amendment is needed to protect the public health and safety. The amendment will become effective on the expiration of the period during which the licensee may demand a hearing or, in the event that he demands a hearing, on the date specified in an order made following the hearing. When the Commission finds that the public health, safety, or interest so requires, the order may be made immediately effective.

Add a new Section 2.810 as follows:

2.810 Rulemaking Involving Backfitting.

When the Commission proposes to require by rulemaking backfitting of a production or utilization facility, the analysis required by subsection (a) of section 50.109 shall be completed as part of rulemaking and include assessment of the following factors and any other information relevant to the proposed backfit:

- (1) Potential reduction in the risk to the public of accidental offsite release of radioactive material;

(2) Potential impact on radiological exposure of facility employees;

(3) Installation and continuing costs associated with the backfit, including the cost of facility downtime or the cost of construction delay;

(4) The potential safety impact of changes in plant or operational complexity including the effect on other proposed and existing requirements.

(5) The estimated resource burden on the NRC associated with the proposed backfit, and the availability of such resources.

(6) The potential impact of differences in facility type, design or age on the relevancy and practicality of the proposed backfit.

#### 50.54 CONDITIONS OF LICENSES:

(f) The licensee will at any time before expiration of the license, upon request of the Commission submit written statements, signed under oath or affirmation, to enable the Commission to determine whether or not the license should be modified, suspended or revoked. Each information request shall be evaluated prior to issuance to ensure that the burden to be imposed on respondents is justified in view of the potential safety significance of the issue to be addressed in the requested information. Each such evaluation performed by the NRC staff shall be reviewed by the Executive Director for Operations prior to issuance of the request.

## 50.109 BACKFITTING

(a) After a facility has received a construction permit, the Commission shall not require the backfitting of that facility unless it determines, based on a systematic and documented analysis of the factors listed in section 2.810, that there is a substantial increase in the overall protection of the public health and safety or the common defense and security to be derived from the backfit and that the increased protection will clearly exceed the direct and indirect cost of implementation for that facility. This analysis need not be performed however, if the Commission determines that absent immediate action to impose the backfit, the public health and safety will not be adequately protected. While probabilistic risk assessments or safety goals may be used in making backfit decisions, they are not required for making backfit determinations. As used in this section, "backfitting" of a production or utilization facility means the imposition of new regulatory requirements, or the modification of previous regulatory requirements applicable to a facility after the construction permit has been issued. For standard design approvals issued pursuant to Appendices M, N, and O to this part, "Backfitting" means the imposition of new regulatory requirements upon the design after the approval has been issued.

(b) Remains unchanged.



(c) Where an analysis pursuant to subsection (a) has been performed, each licensee shall have an opportunity prior to final Commission action to evaluate and comment on the impact and scheduling of the backfit on its facility and to suggest alternative means to meet the objective of the requirement.

(d) The analyses required by this section shall be submitted to the Executive Director for Operations or to the Commission itself, as appropriate for approval.

(e) Regulatory requirements in effect as of the effective date of these amendments may be imposed by the Commission at any time without the making of the analysis otherwise required by paragraph (a) of this section.

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 1982.

For the Nuclear Regulatory Commission.

\_\_\_\_\_  
Samuel J. Chilk  
Secretary of the Commission

## DRAFT POLICY STATEMENT ON BACKFITTING

In revising its regulations to provide a more predictable and consistent backfitting policy, the Commission is considering modifying its standard for determining when backfitting should be applied. The Commission would also clarify that any proposed requirement meeting the definition of backfitting would require the making of a formal and documented backfitting determination under new benefit cost procedures.

While these changes will provide a more consistent application of the required backfitting determination and increase the probability that such a determination will be made when warranted, they do not address the more difficult issue of providing detailed, objective--and to the extent possible--quantitative criteria to be applied in making backfitting determinations. It is the Commission's position that the explicit statement and consistent use of such criteria will in the long-term also be necessary if the past backfit process is to come under optimum control.

In attempting to provide a more disciplined approach to the application of additional or modified requirements to existing plants, a number of considerations are recognized as important in deciding upon a changed policy. The backfitting issue is closely tied to the internal NRC process of generating new requirements--if not a direct and necessary outcome of that process. The Commission has already taken steps to provide a more rational generic requirements generation process through the creation of a senior staff Committee to Review Generic Requirements

(CRGR). In addition, in determining if additional modification is required, some consideration of plant or class of plant characteristics should be made. Past regulatory practice has attempted to use different standards in deciding whether new or additional requirements are necessary, in recognition of plant-specific or class of plant-specific characteristics which can affect a determination if a proposed change has significant value, such as plant vintage or specific design.

Finally, some consideration should be given to the differences between decisions for operating plants and decisions for plants under operating license (OL) review.

In the absence of an acceptable policy and applied methodology with which overall risk can be assessed quantitatively and used as a backfitting criterion, some set of judgmental criteria will have to serve, at least as an interim measure until safety goals and supporting analytical tools can be tested, approved and implemented. In addition, a choice must be made in defining what constitutes the point in time from which any proposed change would constitute a backfit. The point in time at which a new backfit rule becomes effective should serve as the starting point for applying the new backfitting definition and standard.

Based upon a Commission choice of a modified backfitting standard to be contained in the regulations and public comment on such proposals, the Commission intends on implementing a revised backfitting rule in the near future. The Commission staff, including the CRGR, will provide the

Commission its recommendations for an implementation plan during the public comment period.

As part of the implementation recommendations paper, the Commission requests a specific discussion of how backfit decisions should take account of the differences between certain plants, in particular older, smaller power reactors. This discussion should also describe CRGR experience to date in making such decisions, including an assessment of the value and practicality of the present CRGR decisionmaking factors.

The Commission expects the use of the proposed backfitting criteria to be compatible with the objectives and approved practices of the Committee on Generic Requirements and to be applied as necessary to the existing license review process. Additional consideration may also be given to the role of hearing board licensing decisions within the backfitting context, in as much as Board decisions may also contain requirements within the meaning of backfitting.

Prior to determining what modifications to its regulations should be adopted, as an interim measure the Commission is directing the EDO to ensure that backfitting findings are made where warranted in accordance with the Commission's existing regulations. Such findings should be made when proposed changes fit the existing backfit definition, whether or not §50.109 is formally invoked. Where a proposed backfit applies to a specific plant, rather than on a generic basis, the staff should use

the existing CRGR criteria as developed for generic requirements, in determining whether the backfit should be required.



Alternate Backfit Proposals

- (1) Existing § 50.109
- (2) DOE Legislative Proposal
- (3) AIF Proposal
- (4) CRGR Proposal of September 3, 1982

ATOMIC INDUSTRIAL FORUM PROPOSAL

Atomic Industrial Forum, Inc.  
7101 Wisconsin Avenue  
Washington, D.C. 20014  
Telephone: (301) 854-9260  
TWX 7108249602 ATOMIC FOR DC

Francis M. Staszewsky  
Chairman

July 27, 1982

The Honorable Nunzio J. Palladino  
Chairman  
U.S. Nuclear Regulatory Commission  
1717 H Street, N.W.  
Washington, D.C. 20555

Dear Chairman Palladino:

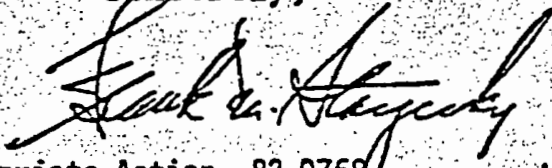
In my letter to you, dated April 27, 1982, I requested that the proposed revision to 10 CFR 50.109, "Backfitting", be singled out for your special attention and expedited action. I reiterate that request and add to it some further recommendations on the content of the revised backfit provisions.

The Atomic Industrial Forum, the Edison Electric Institute, and the American Nuclear Energy Council coordinated comments on the proposed "Nuclear Standardization Act of 1982", which were submitted to you on July 16, 1982. These joint comments suggested a backfitting standard which differs from the standard included in the NRC proposed legislation.

Consistent with the legislative standard suggested in the joint comments, we now forward to you a proposal for revision of the backfitting rule which we believe should be published expeditiously for comment in conjunction with the Regulatory Reform Task Force's administrative reform proposal on backfitting. Due to the importance of establishing rational and workable backfitting controls, we consider that these backfit proposals should, if necessary to avoid further delay, be published in advance of any other administrative reform proposals the Commission may now be contemplating.

We again offer our assistance in obtaining the earliest and most effective resolution of this fundamental issue.

Sincerely,



FMS:seu  
Enclosure

7/28..To EDO for Appropriate Action..82-0768

## BACKFIT RULE DRAFT

Amend 10 CFR 50.109 to read as follows:

- (a) The Commission may, in accordance with the standards and procedures specified in this section, require the backfitting of a production or utilization facility only by rule, regulation or order. No such backfitting shall be required by the Commission unless it is clearly demonstrated in accordance with paragraph (c) of this section, with respect to any plant as to which such backfit is proposed to apply, that the proposed backfit clearly is justified by improvement in overall plant safety that will be realized, taking into account all appropriate factors, and that the benefits of such proposed improvement outweigh the costs. Such demonstration shall, where applicable, utilize quantitative measures.
- (b) As used in this section, 'backfitting' of a production or utilization facility means a modification required by the Commission after a construction permit has been issued, to the structures, systems or components of a facility, the procedures pursuant to which such a facility is to be constructed or operated or the organization required to construct or operate the facility. Backfitting also shall mean analyses or testing required by the Commission after a construction permit has been issued which are estimated to impose substantial financial, manpower or other costs on a licensee, as determined by the Executive Director for Operations.
- (c) For each proposed backfit the demonstration required by paragraph (a) of this section shall be set forth in a Backfit Analysis which shall include:
  - (1) a precise statement of the specific objectives that the proposed backfitting requirement is designed to achieve;
  - (2) the impacts of the proposed backfit (including cost, occupational exposures, added plant and operational complexity, downtime or delay and resource requirements) on each affected licensee, the Commission and the public;



- (3) the benefits of the proposed backfit (including a quantitative risk reduction assessment, where the data warrants such use and the areas are amenable to such assessment) for each affected licensee, the Commission and the public;
- (4) alternatives to the proposed backfit and how the alternatives (including the recommended backfit) will affect other proposed or imposed facility modifications;
- (5) whether the proposed backfit is interim or final, and, if interim, the justification therefor; and
- (6) A priority ranking of such proposed backfit against other regulatory requirements imposed by the Commission.

(d) The Backfit Analysis required in paragraph (c) of this section shall be submitted to the Executive Director for Operations for consideration and recommendation to the Commission.

Change 10 CFR 50.54(f)

Add the following sentence at the end of 10 CFT 50.54 (f)

If the request is a backfit as defined in 50.109 (b), the requirements of 50.109 shall be applicable.



Amend 10 CFR Section 2.204 to read as follows:

**2.204 Order for Modification of License**

- (a) The Commission may modify a license by issuing an amendment on notice to the licensee that it may demand a hearing with respect to all or any part of the amendment within twenty (20) days from the date of the notice or such longer period as the notice may provide. The amendment will become effective on the expiration of the period during which the licensee may demand a hearing, or, in the event that he demands a hearing, on the date specified in an order made following the hearing. When the Commission finds that the public health, safety, or interest so requires, it will explain the basis for that finding, and the order may be made effective immediately.
- (b) Whenever the Commission proposes to modify a construction permit or operating license by issuing an amendment imposing backfitting on a facility within the meaning of 50.109(b), the provisions of 50.109 shall apply. If a hearing is demanded by the licensee, the notice of hearing shall include appropriate reference to the Backfit Analysis. In any such hearing, the burden of proof in making the clear demonstration referred to in Section 50.109 shall be upon the staff.
- (c) Any rule, regulation or order proposed pursuant to 50.109 shall be deemed to be a proposal for an amendment subject to the provisions of this Section 2.204.

CRGR PROPOSAL



NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D. C. 20555

SEP 3 1982

MEMORANDUM FOR: William J. Dircks  
Executive Director for Operations

FROM: Victor Stello, Jr., Chairman  
Committee to Review Generic Requirements

SUBJECT: MINUTES OF CRGR MEETING NUMBER 17

The Committee to Review Generic Requirements met on Wednesday, September 1, 1982 from 1-5:30 p.m. to review the proposed rule and policy statement on backfitting, as you had requested. A list of attendees is enclosed.

In addition to the proposed rule and policy statement in SECY 82-326, the CRGR considered the written comments sent to you by the Offices of NRR, IE, RES, and ELD as well as letters to Chairman Palladino from the Atomic Industrial Forum and the Ad Hoc Committee for Review of Nuclear Reactor Licensing Reform Proposals, and a letter from the ACRS staff to Mr. Tourtellotte. Representatives from NRR, IE, ELD, RES and NMSS summarized their views on the proposed rule at the meeting.

The Committee was in agreement that there is a need for more stability in regulatory requirements for nuclear plants and, therefore, improvements are needed in the current method of controlling backfitting requirements. The Committee could not, however, support the rule changes proposed in SECY 82-326, principally because (a) the use of overall plant risk as the basis for approving or disapproving design changes cannot be supported by the current state of probabilistic risk assessment (PRA) techniques, and (b) comparing the current estimate of the overall risk of plant operation, even if it could be estimated accurately, with the overall risk estimated to exist at the time of initial licensing would not be a practicable approach.

It was noted during the discussion that a major thrust of the proposed rule change is to place a heavier burden on the NRC staff when determining whether backfitting is necessary. The Committee believes that the purpose of any additional cost-benefit analyses required of the staff should be to systematize, codify and make more visible the process by which the staff makes judgments on whether backfits are needed. Thus, the focus of a backfit policy should be on improving the decisionmaking process and not on erecting high procedural barriers for the staff.

While acknowledging that there could be alternate approaches for controlling backfitting requirements, CRGR focused its attention on possible changes to the proposed rule. It was agreed that any revised backfit rule should consider the following principles:

SEP 3 1982

William J. Dircks

- 2 -

- (1) A backfit rule should not relieve a licensee from complying with existing regulations.
- (2) A backfit rule should provide for the staff to take immediate regulatory action when it concludes that such actions are necessary for the protection of the health and safety of the public.
- (3) There should be some controls on potential abuse of the provisions in 10 CFR 50.54f for requesting information from licensees, while retaining the ability for the staff to obtain the information it needs to conclude that NRC's safety regulations are met.

With these considerations in mind, the Committee discussed an alternate rule which it believes meets the intent of the proposed rule in SECY 82-326, but which represents an improvement in the areas mentioned above. In summary, the Committee recommends that you forward for Commission consideration the enclosed rule as an alternate to that proposed in SECY 82-326.

Original Signed by  
V. Stello

Victor Stello, Jr., Chairman  
Committee to Review Generic Requirements

Enclosures:

1. List of Attendees
2. Alternate Backfit Rule

cc w/o encl:

Commission (5)  
Office Directors  
Regional Administrators  
G. Cunningham  
CRGR Members

Distribution:

VStello  
TEMurley  
DEDROGR cf  
Central File  
PDR (NRG/CRGR) (Not to be sent to PDR until after Commission Consideration)  
WSchwink  
MMalsch, OGC

OFFICE	DEDROGR/D -	DEDROGR					
NAME	TEMurley, bg	VStello					

**CRGR MEETING #17**  
**LIST OF ATTENDEES**

**CRGR Members**

R. A. Purple (for D. Eisenhut))  
V. Stello  
R. Bernero  
E. Jordan  
Bill Olmstead (for J. Scinto)  
Dick Cunningham (for D. Mausshardt)

**Others**

Tom Murley  
Tom Cox  
Mat Taylor  
Harold Denton  
Jim Lieberman  
Jim Sniezek  
Ed Goodwin  
Guy Cunningham  
Vicki Harding  
Daniel Garner  
Ed Abbott  
John Austin  
Walt Schwink



## 2.204 ORDER FOR MODIFICATION OF LICENSEE:

The Commission may modify a license by issuing an amendment on notice to the licensee that he may demand a hearing with respect to all or any part of the amendment within twenty (20) days from the date of the notice or such longer period as the notice may provide. If the modification involves a backfit as defined in 10 CFR 50.109(a), the findings required by that section shall be made prior to issuance of the amendment unless the amendment is needed immediately to protect the public health and safety. The amendment will become effective on the expiration of the period during which the licensee may demand a hearing or, in the event that he demands a hearing, on the date specified in an order made following the hearing. When the Commission finds that the public health, safety, or interest so requires, the order may be made immediately effective.

## 50.54 CONDITIONS OF LICENSES:

(f) The licensee will at any time before expiration of the license, upon request of the Commission submit written statements, signed under oath or affirmation, to enable the Commission to determine whether or not the license should be modified, suspended or revoked. Each information request shall be evaluated prior to issuance to ensure that the burden to be imposed on respondents is justified in view of the potential safety significance of the issue to be addressed in the requested information. Each such evaluation shall be reviewed by the EDO prior to issuance of the request.

## 50.109 BACKFITTING

(a) After a facility has received a construction permit, the Commission shall not require the backfitting of that facility unless it determines, based on a systematic and documented analysis of the factors listed in subsection (d) of this section, that the net increase in the protection of the public health and safety or the common defense and security to be derived from the backfit will clearly exceed the direct and indirect cost of implementation for that facility. This analysis need not be performed, however, if the Commission determines that, absent the backfit, the public health and safety will not be adequately protected. As used in this section, "backfitting" of a production or utilization facility means that imposition of new regulatory requirements, or the modification of previous regulatory requirements, by means other than rulemaking, upon the facility after the construction permit has been issued. For standard design approvals issued pursuant to Appendices M, N, and O to this part, "backfitting" means the imposition of new regulatory requirements, or the modification of previous regulatory requirements, by means other than rulemaking, upon the design after the approval has been issued.

(b) Remains unchanged.

(c) In reaching the determination required by subsection (a) of this section, the Commission will consider information available concerning the following factors, and any other information relevant to the proposed backfit:

- (1) Potential reduction in the risk of accidental offsite release of radioactive material;
- (2) Potential change to routine or accidental radiological exposure of facility employees;
- (3) Potential reduction in the risk of accident-related damage to the facility;
- (4) Installation and maintenance costs associated with the proposed backfit, including the cost of facility downtime;
- (5) The estimated resource burden on the NRC associated with the proposed backfit, and the availability of such resources.

(d) Each licensee shall have an opportunity to evaluate and comment on the impact of the backfit on its facility and the schedule for implementing the backfit prior to final Commission action:

(e) The analyses required by this section shall be submitted to the Executive Director for Operations or to the Commission itself, as appropriate for approval.

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 1982.

For the Nuclear Regulatory Commission

Samuel J. Chilk  
Secretary of the Commission



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

SEP 9 1982

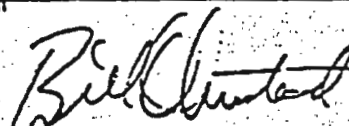
MEMORANDUM FOR: Victor Stello, Jr., Chairman  
Committee to Review Generic Requirements

FROM: William J. Olmstead  
Director and Chief Counsel, Regulations Division  
Office of the Executive Legal Director

SUBJECT: MINUTES OF CRGR MEETING NUMBER 17

As you are aware, at the above-mentioned meeting of CRGR I sat in for Joe Scinto, who was on leave. I have reviewed the minutes and find that they accurately describe the discussion at the meeting. I have the following specific comments on the draft backfit rule attached to the minutes:

1. 2.204: Change second sentence to read: "If the modification involves a backfit as defined in 10 CFR 50.109(a), the findings required by that section shall be made prior to issuance of the amendment unless immediate action on items required by the amendment is needed to protect the public health and safety."
2. 50.54(f): Change last sentence to read: "Each such evaluation performed by the NRC staff shall be reviewed by the Executive Director for Operations prior to issuance of the request."
3. 50.109(a): Change first sentence to read: "After a facility has received a construction permit, the Commission shall not require the backfitting of that facility unless it determines, based on a systematic and documented analysis of the relevant factors listed in subsection (c)..."
4. 50.109(d): Change to read: "Where an evaluation pursuant to subsection (c) has been performed, each licensee..."

  
William J. Olmstead

**EXISTING REGULATION**



## **BACKFITTING**

### **§ 50.109 Backfitting.**

(a) The Commission may, in accordance with the procedures specified in this chapter, require the backfitting of a facility if it finds that such action will provide substantial, additional protection which is required for the public health and safety or the common defense and security. As used in this section, "backfitting" of a production or utilization facility means the addition, elimination or modification of structures, systems or components of the facility after the construction permit has been issued.

(b) Nothing in this section shall be deemed to relieve a holder of a construction permit or a license from compliance with the rules, regulations, or orders of the Commission.

(c) The Commission may at any time require a holder of a construction permit or a license to submit such information concerning the addition or proposed addition, the elimination or proposed elimination, or the modification or proposed modification of structures, systems or components of a facility as it deems appropriate.

[35 FR 5318, Mar. 31, 1970]

Department of Energy Proposal

1           (2) to protect the public interest and  
2       ensure meaningful public participation in the  
3       nuclear licensing and regulatory process;

4           (3) to recognize the interests of the  
5       States and local authorities in the nuclear  
6       licensing and regulatory process;

7           (4) to facilitate the use of pre-approved  
8       sites and designs for nuclear powerplants; and

9           (5) to provide for a single-stage licensing  
10      process for nuclear powerplants.

11      **TITLE I - LICENSING AND REGULATORY PROCESS**

12           **Backfitting Requirements**

13      SEC. 101. The Atomic Energy Act of 1954 is amended  
14      by adding after section 29 a new section 29a to read as  
15      follows:

16           SEC. 29a. BACKFITTING REQUIREMENTS.--

17           "a. The Commission shall adopt regulations  
18      establishing procedures for centralized review and  
19      approval of Commission staff proposals for backfitting  
20      requirements.

21           "b. The Commission shall adopt regulations setting  
22      forth criteria to be used in review and approval of proposed  
23      backfitting requirements under subsection a. of this section.  
24      The regulations shall require evaluation of the safety  
25      or security concerns which give rise to the proposal,

1 the improvements in safety that would result from adoption  
2 of the proposal, estimates of costs to potentially affected  
3 licensees in implementing the proposal, and other matters  
4 the Commission determines to be necessary. The Commission  
5 shall not approve a backfitting requirement under subsection  
6 a. of this section unless it is needed to reduce the risk  
7 of overall plant operation to the public health and  
8 safety or the common defense and security from potentially  
9 affected facilities to an acceptable level.

10 "c. As used in this section, "backfitting require-  
11 ment" means an addition, deletion, or modification to  
12 those aspects of the engineering, construction, or operation  
13 of a production or utilization facility upon which a permit,  
14 license, or approval was issued.

15 "d. A backfitting requirement approved under subsection  
16 a. of this section does not apply to a facility until it is  
17 approved by the Commission as an amendment to a permit,  
18 license, or approval, or as a rule, regulation, order,  
19 or amendment thereof. The decision of the Commission under  
20 this subsection is not delegable.

21 "e. The Commission may apply the requirements  
22 of this section to analyses and testing requirements  
23 proposed by the Commission staff."

24 Construction Permits, Operating Licenses, and Construction  
25 and Operating Licenses

1 or approve designs for production or utilization

2 facilities used for other than commercial purposes.

3 "f. A final Commission determination on an application

4 filed under sections 194 a., b., or e. of this Act

5 is a final order of the Commission for purposes of

6 section 189 g. of this Act."

7 Amendments and Variances

8 SEC. 106. The Atomic Energy Act of 1954 is amended

9 by adding after section 194, as added by this Act, a new

10 section 195 to read as follows:

11 "SEC. 195. AMENDMENTS AND VARIANCES.

12 "a. The Commission shall not approve an amendment

13 to a license, construction permit, construction and

14 operating license, design approval, or site permit

15 unless it determines:

16 "(1) that the amendment is needed to reduce

17 the risk of overall plant operation to the public

18 health and safety or the common defense and

19 security to an acceptable level; or

20 "(2) if the amendment is proposed by the

21 holder of the permit, license, or approval, that

22 the amendment will not increase the risk of overall

23 plant operation to the public health and safety or

24 the common defense and security above an acceptable

25 level.



## Section-By-Section Analysis

Section 101. Backfitting Requirements

This section would require the NRC to establish procedures for centralized review and approval of all backfitting requirements proposed by the NRC staff. The method of implementing this requirement would be left to NRC discretion. Criteria to be used in reviewing and approving a backfitting requirement would include consideration of safety, security and cost factors. A backfitting requirement would only be approved under this section if it was "needed to reduce the risk of overall plant operation. . .to an acceptable level." This test would require examination of risk at a plant level, and sets as the relevant test the acceptability of the level of risk. An increase in risk which was significant but did not bring the plant to an unacceptable level of risk would not be subject to a backfitting requirement. The proposed test would also allow the NRC to evaluate a generic backfitting requirement in terms of its effect on the overall level of risk at the class of affected facilities rather than at each individual plant.

A proposed backfitting requirement approved under this section would not be applicable to any facility until approved by the Commission as an amendment to a permit or license or rule, regulation, order, or amendment thereof. This Commission approval responsibility would be non-delegable in order to assure that the Commission itself assumes direct responsibility for the imposition of backfits. Since the Commission itself would have the responsibility initially for determining the safety of overall plant operation when it grants the construction permit, any modification in the plant in order to render it "safe", even though such modification is approved through the centralized NRC review process, should also require Commission review. Backfitting proposals which are denied through the centralized review process would not need to be reviewed by the Commission. Disposition of these proposals would be left to NRC's discretion.

This section would also authorize the Commission to apply the requirements described above, to the extent it deemed appropriate, to analyses and testing requirements proposed by the NRC staff.

MAJOR ISSUES

1. Definition--CP Issue
2. Restricts use of 50.54(f) for info collection
3. Incompatible with Safety Goal
4. Staff does not have ability to do cost-benefit studies
5. Backfit decision should be made by CRGR
6. 50.91--licensee amendments

Attachments:

- (1) Staff Comments
- (2) Ad Hoc Committee on Regulatory Reform Comments

## ANALYSIS OF MAJOR STAFF COMMENTS

Comment: (1) The use of overall plant risk as the basis for current state of probabilistic risk assessment techniques.

Response: While the Task Force continues to believe that a regulatory judgment of overall plant risk or safety should at least be implicit in backfitting decisions, we have accepted the unanimous judgment of commenters that actual implementation could lead to unacceptable reliance on PRA at the exclusion of other means to make judgments. The rule has been modified accordingly.

Comment: (2) The current estimate of the overall risk of plant operation, even if it could be estimated accurately, with the overall risk estimated to exist at the time of initial licensing would not be a practicable regulatory approach to backfitting.

Response: The proposed rule would not require a comparison study. Rather backfit would be applied at any given time after a systematic and documented analysis of plant operation showed that public health and safety was not currently adequately protected.

Comment: Many times it is not known whether a problem is generic until requests for additional information have been issued by the NRC, responded to by licensees and reviewed by the NRC. These requests could be interpreted as involving potential modifications or requests for new information or analyses. To ask for such information under revised Section 50.54, the NRC must provide an evaluation of the costs and benefits of the request before issuing the request. It is possible, that the administrative burden of trying to justify the need for additional information would preclude questions about safety issues that should be asked of licensees. It may be more appropriate and efficient to limit inappropriate questioning of licensees and ill-founded backfit decisions through management review and direction rather than by modifying the regulations.

Response: The proposed rule does not preclude the NRC's use of 50.54(f) as a mechanism for obtaining information from licensees. It formalizes and disciplines the management review by requiring approval of the EDO prior to issuance of a request for information. It restricts information solicitation to legitimate need-to-know issues.

Comment: If such a rule is deemed necessary and appropriately written, it may be too early to implement the rule, as Commission action is still pending on the Safety Goal and Severe Accident

Considerations (SECY-82-1A) and both of these items would play a large role in the implementation criteria of the rulemaking.

Response: The Task Force believes a backfit standard can and should be developed at this time. The collateral development of the Safety Goal and Severe Accident Consideration neither impedes nor enhances backfit considerations. The latter require the use of probabilistic risk assessment. Backfitting decisions may benefit from the use of PRA, however, such decisions do not require use of PRA in whole or in part.

Comment: Secy 82-326 restricts backfits on CP holders to make changes following CP issuance.

Response: The RRTF recognizes the problem of interpretation created in the backfit definition contained in Secy 82-326. The suggested solution is to change the definition of backfit to "the imposition of new regulatory requirements, or the modification of previous regulatory requirements applicable to the facility after the CP has been issued."

Comment: Concept of ALARA is absent.

Response: The proposed rule does not express ALARA per se, however, the procedures delineate an analysis of such concepts in the decisionmaking process.

Comment: Staff does not have the capability to do technical and cost analysis required. Industry is the only source of information.

Response: The Task Force believes the staff has the knowledge, skills and abilities to do such analysis. Further, sufficient data is available to perform such analyses. The Task Force does not believe requirement for cost/benefit analyses would unduly tax staff resources. We are, however, requesting formal staff evaluation of this issue.

Comment: Backfit decisions should be made by CRGR.

Response: The Task Force recommends criteria be developed for plant-specific backfit decisions which are compatible with the objectives and approved practices of CRGR. Which organizational entity actually decides is secondary to improving the decisionmaking process.

Comment: Secy 82-326 addresses 50.91 which are license requests for amendments.

Response: The Task Force has deleted this proposed amendment.



# SHAW, PITTMAN, POTTS & TROWERIDGE

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

1800 M STREET, N. W.  
WASHINGTON, D. C. 20036

(202) 822-1000

TELECOPIER

(202) 822-1000 & 822-1100

TELEX

89-2693 (SHAWLAW WSH)

CABLE "SHAWLAW"

JOHN F. DEALY  
COUNSEL

RAMSAY D. POTTS, P.C.  
STEWART L. PITTMAN, P.C.  
GEORGE F. TROWERIDGE, P.C.  
STEPHEN D. POTTS, P.C.  
GERALD CHARNOFF, P.C.  
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RICHARD E. GALEN, P.C.  
ROBERT B. ROBBINS, P.C.  
STEVEN M. LUCAS, P.C.  
DAVID M. RUBENSTEIN, P.C.  
LYNN WHITTELEY WILSON, P.C.  
MATIAS F. TRAVIESO-DIAZ, P.C.  
VICTORIA J. PERKINS, P.C.

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JOHN L. CARR, JR.  
PHILIP J. HARVEY  
ROBERT M. GORDON  
BARBARA J. MCGREN  
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SHEILA M. HARVEY  
DELISSA A. RIDGWAY

KENNETH J. NAUTH  
DAVID LAWRENCE M.  
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ANDREW D. ELLIS  
WENDELIN A. WHITE  
STANLEY M. SARG  
KRIST L. LIMBO  
LESLIE K. SMITH  
VIRGINIA S. RUTLEDGE  
KATHERINE P. CHEE  
JANICE LEHRER-STE  
TRAVIS T. SPICER, JR.  
GAIL E. CURREY  
RICHARD M. KRONTH  
STEPHEN B. REICHMAN  
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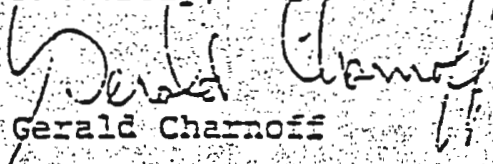
August 16, 1982

The Honorable Nunzio J. Palladino  
Chairman  
U. S. Nuclear Regulatory Commission  
Washington, D. C. 20555

Dear Chairman Palladino:

I am enclosing the Report of the Ad Hoc Committee for Review of Nuclear Reactor Licensing Reform Proposals. This Report considers the proposed Nuclear Standardization Act of 1982. We hope that our comments will be useful to you in your consideration of the necessary reforms to the regulatory process. We look forward to reviewing the remaining proposals for legislative and administrative reform of the Regulatory Reform Task Force.

Sincerely,

  
Gerald Charnoff

encl

cc: Commissioner Victor Gilinsky  
Commissioner John F. Ahearne  
Commissioner Thomas M. Roberts  
Commissioner James K. Asselstine



REPORT  
of the

AD ECC COMMITTEE  
FOR  
REVIEW OF NUCLEAR REACTOR LICENSING REFORM PROPOSALS

August 16, 1982

From: Gerald Charnoff, Chairman  
George L. Edgar  
Stephen Long  
Robert F. Redmond  
Anthony Roisman  
David Stevens

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## EXECUTIVE SUMMARY

The attached report represents the consensus of the members of this Committee with minor exceptions noted in the report. The report generally follows the outline of the proposed legislative package. However, a number of themes in the report represent crucial concepts which the Committee believes warrant special emphasis. The purpose of this brief summary is to highlight those themes and assure that their significance is not lost in the body of the report.

### A. Scope of Legislative Proposal

We believe the Commission should send to Congress one comprehensive legislative proposal that addresses all of the licensing reform issues. Matters reportedly contained in the supplemental legislative proposals and administrative proposals being developed by the Regulatory Reform Task Force are so fundamentally interrelated with the present legislative package that they must be viewed in their totality to be properly evaluated. In addition, the proposals should not only address the hypothetical future where all plants are standardized designs proposed for pre-approved sites, but also the range of other possibilities including present plants.

### B. Clarity of Proposals

In a number of instances, most notably the treatment of issues arising under the National Environmental Policy Act and the nature of the licensing hearing, the present package

contains vague language apparently intended to provide a subtle flexibility. We believe a sound legislative proposal must clearly address even the most controversial issues and provide the clearest possible resolution of them. Any time saved in the legislative process by glossing over these hard issues will only produce significantly larger delays in the subsequent judicial process as parties argue over the varying meaning of ambiguous phrases.

### C. Flexibility of Proposals

A major goal of any reform package should be to assure flexibility in order to broaden its potential utility. Thus we have proposed that with respect to early site review, combined CP/OL reviews and standardized plant design, the statutory authority be written to allow the Commission to provide definitive and early resolution not only as to the entire site suitability issue, the entire combined CP/OL issues or the entire standardized design, but also to provide definitive and early resolution for discrete subsets of those issues to the extent they can be independently resolved. Similarly, issues whose final resolutions have to be postponed should not await some artificial future date to be resolved -- such as commencement of the operating license hearing -- but should be resolved as soon as they are ready for resolution. In the first instance, the principal initiator of the early resolution of an issue should be the proponent with respect to the issue.

#### D. Stability of Decisions

Although the legislative proposal more narrowly speaks of stability of standardized designs, it is clear that a principal benefit of the legislative package is stability of all decisions, not only those related to design. The Committee concluded that all decisions whether related to early site issues, design or combined CP/OL should essentially be final and subject to reopening only if very stringent thresholds are met and that the same standard should be applicable to all such issues in order to qualify for enhanced stability. Our standard is that no issue may be reopened, absent a special showing, if at the time of its initial resolution the only remaining regulatory responsibility with respect to such issue would be the verification of the design, and the inspection and testing necessary to determine whether the plant had been constructed in compliance with the approved parameters.

The re-opening of a previously determined issue -- which would include backfitting of new standards or new hardware -- should be allowed only where the proponent of the proposal provides to the extent practicable a fully developed statement of the rational basis for the proposal which demonstrates as a prima facie matter that the proposed change is required to meet statutory requirements.



## E. Hearings

The Committee believes a full administrative/legislative package regarding modifications in the hearings should be developed as part of a single legislative proposal for licensing reform. We further believe that the first step to develop such a package is a determination of the purpose of the hearing. We believe the purpose of the hearings should be dispute resolution. Determination of the purpose of the hearing first will allow for easier resolution of the other issues related to the structure and procedures for hearings.

## F. Energy Decisions

In the legislative proposals submitted to the Committee, the full range of energy decisions including need for power, alternative systems, conservation and the like, is to be resolved either by the NRC or the Federal Energy Regulatory Commission (FERC). In our view, states and some regional authorities are far better equipped to resolve these matters and to the extent their hearing procedures are substantially equivalent to NRC hearing procedures and to the extent they certify that they have in fact resolved one or more of these energy issues, the NRC should defer to them. Thus the legislative proposal should be amended to allow the Commission to defer to a variety of potential authorities as to energy issues.

G. Conclusion

This summary is not intended to touch on every point made in our report but only to highlight those aspects of the report which we believe are particularly important.

REPORT OF THE AD EOC COMMITTEE  
FOR  
REVIEW OF NUCLEAR REACTOR REFORM PROPOSALS

The Ad Eoc Committee for Review of Nuclear Reactor Reform proposals has reviewed the proposed Nuclear Standardization Act of 1982 ("the proposed Act"). In this connection, we met to discuss the legislative proposals on six occasions; at one such meeting, we had a useful, extended discussion with Mr. Townecliffe, Chairman of your Regulatory Reform Task Force.

The proposed Act is intended to provide for:

- (a) Early Site Reviews;
- (b) Standardized Plant Design Approvals;
- (c) One-Step Licensing -- issuance of a Combined Construction Permit/Operating License;
- (d) Stability of Approved Standardized Plant Designs -- Protection Against Unwarranted Backfit Changes;
- (e) Deferral by NRC to EERC with respect to Need for Power Determinations; and
- (f) Revised Hearing Procedures for Standardized Plant Design Approvals, Early Site Approvals and One-Step Licensing.

While the Ad Eoc Committee endorses the need for change in these areas, we disagree with:

- (a) the scope of the proposed Act;
- (b) important details of each of the provisions of the proposed Act; and
- (c) the failure to make the intended purposes and characteristics of the public hearing processes explicit in the proposed Act.

We understand that the Commission staff intends to propose, later this summer, a package of administrative reforms and supplementary legislation. It is our conclusion that the Commission should not proceed with proposing the Nuclear Standardization Act of 1982 to Congress without full consideration of the supplementary legislation and administrative reforms now under preparation by the Regulatory Reform Task Force. While the broad features of the proposals were sketched for us by Mr. Tourtellotte, we, of course, did not have them before us. With such proposals on the table, it is possible that some of our opinions with respect to the proposed Act would be modified.

#### Scope of the Proposed Legislation

There is at least a hiatus with respect to new nuclear plant proposals. Accordingly, it is reasonable and wise to utilize this time period to develop a revised regulatory framework to accommodate such proposals, when and if they should occur. The proposed Act is prompted by the view that the licensing process would be improved if it encourages proposals to locate pre-approved standardized plant designs on

pre-approved sites. While this concept has much appeal, it presents a number of questions, which are discussed below. And, if the reform legislation is cast only in such concepts, it begs the question of regulatory reform for the existing nuclear power plants now under construction or in operation. These amount to more than ten percent of this nation's currently planned electric generating capacity; the uncertainty and inefficiency in the regulatory process surrounding these units is of current, significant national interest.

Moreover, it is possible that a renewal of interest in new nuclear power projects -- in Alvin Weinberg's terminology, a second nuclear era -- may involve plants of very different design, proposed perhaps by new social or economic institutions. In this regard, it is important that any new regulatory framework allow for considerable flexibility and refrain from insisting on formulations which would limit such new proposals only to more mature versions of the present plants. The proposed Act does not provide the desirable flexibility.

#### A. Early Site Reviews and Approvals

The Committee favors revision of the Atomic Energy Act to explicitly allow early consideration and resolution of site-related issues. An essential element of such a program is to assure that, upon their resolution, these matters would not be



subject to reconsideration at downstream stages of the licensing process in the absence of good cause.

The Commission should be authorized to allow proponents of specific sites to request and obtain a range of approvals and determinations, including:

- (a) approval of a site for subsequent installation of a nuclear power plant having specifications within defined limits of design parameters which reflect the site characteristics;
- (b) determination of environmental issues, where appropriate, including alternative sites and their rankings; and
- (c) individual determination of specific site-related characteristics that could affect the design and/or installation of a nuclear power plant at that site.

While the Commission obviously has to define those characteristics of sites which it may consider significant in any specific instance, the proponent of a site should be permitted to selectively request those approvals or determinations it requires at any time for planning purposes.

In our view, the proposed Section 193 does not clearly allow this flexibility to site proponents, although Section 193g would seem to recognize the possibility of limited site characteristic determinations. Our concern is that, as

drafted, Section 193 appears to be focused primarily on overall site suitability determinations.

We believe the Commission should explicitly consider and determine when and how NEPA and environmental matters will be taken into account in the several site suitability determinations. Among the difficult issues to be addressed and resolved are:

- (a) whether and which environmental determinations would necessarily require assessments of the cost of, and the need for power from, facilities which only later may be proposed for installation at the site;
- (b) at what point in a site suitability determination would an environmental impact statement be required; and
- (c) the stability of environmental determinations made prior to the preparation of an environmental impact statement.

The proposed Act implicitly recognizes the advantages to planners and the public alike in early selection and approval of power plant sites. We concur. We recognize too, however, that the planning process often involves sequential consideration of a variety of factors. The Commission's procedures should recognize this and allow for appropriate state agency and public participation in making binding determinations with

regard to such matters. In some states, state agency involvement in early site approval may be a necessity for its practical implementation.

The proposed Act is not sufficiently explicit with respect to the binding nature of such determinations. It addresses the matter only in terms of "validity" of the site permit for a term of years. The determinations and approvals made in the early site review process are essential premises for planners. The statute should clarify the extent to which such determinations and approvals can be reopened prior to or at any subsequent licensing stage, at the initiation of the staff or any party. The present draft is silent on these matters, although it would allow review -- presumably at least by the staff -- of "significant new information" at a renewal of a site permit. A "backfit" standard should be developed for application to these site approvals and individual site characteristic determinations. The standard should also be applicable to applications for renewal of such approvals and determinations. In our view, an appropriately formulated and implemented backfit provision would remove any need for a fixed statutory expiration period for the site approvals and determinations. In this connection, while we address below the matter of public hearings as they might apply to early site reviews and other matters, we note that the proposed Act is silent with respect to public hearing opportunities at the renewal stage of a site permit. The Commission's intent in this regard should be clarified.

### B. Standardized Plant Design Reviews and Approvals

The section-by-section analysis of the proposed Act contemplates review and approval under Section 194 of an "essentially complete final design for a whole nuclear power plant usable at multiple sites." This definition is not explicitly included in the draft statute.

The Committee recognizes and endorses the value of standardized design reviews and approvals. Such review could reduce redundant staff review activities, and approved designs of whole nuclear plants could be matched with previously approved sites to expedite the regulatory process for purchasers and operators of such approved plants.

Nevertheless, we believe the limitation of Section 194 to essentially complete final designs for whole nuclear power plants would reduce the value and utility of the proposal. The statute should authorize the Commission to allow the submittal of designs of major safety-related systems or subsystems which represent sufficiently discrete major features of nuclear power plants so as to be amenable to independent review. Similarly, while the statute should facilitate the review of final designs, it should not insist on essentially complete final designs. We believe the value of this more flexible approach outweighs the potential benefit of inducing standardized plant design by limiting Section 194 (and Section 185) to such plants.

For purposes of standardization, the degree of finality should be measured by whether the proposed design can be subject to a reasonable backfit rule and whether, if constructed, the only regulatory responsibility would be the verification of the design, and the inspection and testing necessary to determine whether the plant had been designed and built in compliance with the approved parameters. This may not require at the standardized plant design review stage all of the detail that is now included in an FSAR. But it will require the definition by rule, or in individual case determinations, of detailed performance criteria for all safety-related plant systems and key safety components.

Under the proposed Act, standardized plant design approvals would be "valid" for a term of years. While we believe we understand the concept of validity here to disallow any modifications in the approval except through the backfit or design stability provisions in Section 196, it would be well to be explicit here.

Like the early site approval, the draft is inappropriately silent with respect to public hearing opportunities, if any, to be afforded in connection with amendments or renewals of standardized plant design approvals. In addition, an appropriately formulated and implemented backfit provision would remove any need for a fixed statutory expiration period for the design approval.



Our discussion below of Section 196 is also applicable to the criteria set out in Section 194e(2)(B).

### C. One-Step Licensing

The Committee agreed that in appropriate cases, a single hearing on the principal issues related to whether to construct and operate a nuclear reactor at a proposed site is desirable. Although arguably much of this could be done without new legislation, it would be unwieldy, unreliable, and would cause much litigation and attendant delays to do it without legislation. The legislative proposal presented for review, however, was not deemed adequate, primarily because of its ambiguities and failure to address key concepts central to such a proposal. The justifications provided in the preamble to the legislative proposal were also judged to be inadequate and in some cases inaccurate.

Either a standardized design or a custom design, to the extent it contains the required detail, should be eligible to qualify for a combined CP/OL. To require a standardized design could limit the combined CP/OL to only a handful, if any, of licensing proposals and might have utility only years in the future. There is no apparent safety or environmental concern which would justify limitation of this concept to pre-approved standardized designs only. Although such a limitation might encourage standardization, we believe the flexibility afforded by our proposal outweighs such considerations.

As with standardized plant designs, the Committee is of the view that the Commission should have the authority to allow one-step review and resolution of sufficiently discrete major portions of the plant design which are amenable to independent approval. This would facilitate use of the benefits of combined hearings to the fullest extent possible without waiting for final designs on all parts of the plant.

The Committee also considered the level of design detail which should be required to be eligible for a combined CP/OL determination. Again, as with standardized plant designs, there was agreement that the standard for sufficiency of design detail in standardized plant designs should be sufficient to allow applicability of a reasonable backfit rule, and for those matters considered and determined at the CP/OL proceeding, what should be left would be only the verification of the design, and the inspection and testing necessary to determine whether the plant had been designed and built in compliance with the approved parameters.

The Committee recognized that certain matters, such as emergency planning, may not lend themselves to ultimate determination at the time of issuance of a combined CP/OL. Emergency planning, for example, would involve state and local authorities at a point many years before actual planning would be required, thus involving premature expenditures and possibly changing circumstances. One solution would be to defer this

kind of matter to a later time, considering only at the combined CP/OL stage, or at an earlier site approval proceeding, whether there were any peculiar local circumstances that would make development of an adequate emergency plan impractical. In the absence of such a finding, the CP/OL would issue, subject to a condition providing for later development and consideration of emergency planning. While this is a departure from a full one-step CP/OL proceeding and determination, the inherent flexibility it provides may be necessary for plant operating procedures and other issues. The responsibility for scheduling a timely submittal of such deferred matters would, of course, be that of the applicant initially, although the Commission should be able to establish scheduling guidance for such submissions.

The Committee considered the absence of an explicit backfitting provision applicable to combined CP/OLs. The absence of such a provision undoubtedly reflects the view that a combined CP/OL might only be issued in connection with an approved standardized plant design. While the text doesn't make this explicit, we noted our disagreement with such a limitation above. A combined CP/OL will only be meaningful if it is accompanied by meaningful assurances of design stability. The Committee agreed that all issues once resolved should remain resolved absent a showing which meets the requirements of a reasonable backfit provision.

The Committee also generally agreed that when the staff conducts its design verifications, construction inspection and testing, the details of those reviews and findings should be made publicly available. The Committee believes that any person should be able to obtain a hearing on the issue of whether the plant, as built, complied with the combined CP/OL conditions, if the person establishes by a prima facie showing that a significant safety or environmental issue was involved and that the plant did not meet the CP/OL requirements.

However, the majority of the Committee believes that in such circumstances, the proper procedure to follow is that established in Section 2.206 of the Commission's regulations, under which the initial determination to convene a proceeding is made by the Director of Regulation. One member believes that the initial determination should be made by an independent decision-maker, such as an ASLB or ASLAB member. In any event, this matter merits explicit consideration by the Commission.

D. Stability of Approved Standardized Plant Designs --  
Protection Against Backfit Changes

As is evident from the discussion above, an effective provision regarding design stability is essential to provide a strong incentive for early site approvals, standardized plant design approvals and combined CP/OL issuances. It is also important to the existing power reactors now under construction or in operation. In this regard, the explicit limitation in

the proposed Act of the backfit provision to approved final standardized plant designs only is wanting. Moreover, as a result of a drafting quirk, the intended provision would not seem to protect even the holder of a standardized plant design approval because, by its terms, it would apply only to a "licensee of, or license applicant for a production or utilization facility." To that extent, the incentive for a designer to seek a standardized design approval would be diminished.

The Committee believes that the backfit standard proposed is unworkable because it will not be possible to calculate societal risk with sufficient precision, and because we do not believe that a standard for "acceptable levels of risk" is close at hand. As a concept, the "acceptable level of risk" standard does not appear qualitatively different from the standard in the Commission's existing backfit regulation (10 C.F.R. § 50.109). (In that regard, there is little evidence that the NRC staff is currently abiding by the existing rule.) In our view, it would be a mistake to enact into law a requirement for quantification of risk when the tools for quantification and the standards for acceptance themselves would be likely sources of litigation.

A more workable formulation would be to require the staff to produce a systematic analysis setting forth a rational basis for any required change in design or operating limits (related to safety or environmental concerns), including a discussion of



the objectives of the change; a quantification of the impacts and the benefits of the change, to the extent possible; a consideration of alternatives to the change; and a reasonable implementation schedule. The purpose of such an analysis would be to require the staff to set out whether the proposed change is required to meet the statutory requirements and why. Organizationally, within the NRC an appointed group of senior officials should be charged with reviewing and approving each such analysis. A similar systematic analysis should be required for changes proposed by applicants and third parties, to the extent practicable.

As a final note, there was disagreement within the Committee as to the need for special provisions in regard to backfits proposed by members of the public. Under existing law, a licensee has a right to a hearing on any order imposing a change in a previously approved matter, and as a matter of logic, Section 196 would impose a burden of persuasion on the party, e.g. the Regulatory staff, seeking such a change. On the other hand, when a third party, such as an intervenor, seeks such a change, his remedy is under 10 C.F.R. § 2.206 and he would not have the opportunity for a hearing as a matter of right. One view is that this is fundamentally unfair, contending that it results in an imbalance of rights among parties who may have participated in the initial licensing proceeding. According to this view, the showing of conformance with the

desired criteria -- when the proponent of the change is a member of the public -- should be considered by a panel convened from the licensing board roster of members rather than by the staff. The majority view is that the Section 2.206 procedure is consistent with longstanding principles of administrative law which recognize a licensee's vested rights and the presumptive validity of an existing license. Moreover, if incentives for standardization are desirable, maintenance of existing law -- notwithstanding the apparent imbalance of rights -- would seem desirable.

E. Deferred to EEOC with Respect to Need for Power Determination

The current version of the legislative package provides, in Section 135B, that

In making a determination on the issuance of any permit or license, the Commission is authorized to rely upon the certification of need for power made by the Federal Energy Regulatory Commission or its successor. If the Commission declares its reliance upon such certification, it shall constitute a definitive determination of need for the power to be provided by the facility for the purposes of any other provision of Federal law administered by the Commission.

An earlier version of the legislative package had provided that "the Commission is authorized to rely upon the certification of need for power made by competent Federal, regional, or state government organizations."

The Committee considered at length several ramifications of this proposal, and was able to reach consensus on several points:

- (a) There are benefits of regulatory efficiency and accuracy to be gained by providing to the Commission the authority to rely upon the expertise of other government entities in this subject area.
- (b) The legislation should allow the Commission broad capability to accept need determinations made by state agencies or other competent government organizations, as originally proposed, rather than restrict it to determinations made by the FERC.
- (c) This legislative package is not the appropriate instrument for revision of the extant authority distribution between the federal and state governments in the area of public need certification for electric power units.
- (d) It will be necessary to explicitly delineate (in the administrative package) the necessary content and form of any such certification in order to avoid ambiguity concerning which of the several facets of a need determination are covered.

The Committee considers the need issue to encompass the spectrum of factors inherent to generation planning. Not only must future increases in electric power demand be projected, but means of influencing those increases should be considered and the best means of meeting total future power demand must be addressed. Most of these factors, of course, are utility or region specific; they do not lend themselves readily to broad federal plans. Some members of the Committee believe that the existing system of state regulatory authorities, as supplemented by regional organizations, is best suited to consider these factors in reaching determinations of need for proposed new units. Neither the NRC nor the FERC appears to possess sufficient resources or expertise to assume these duties on a national or regional basis. (Moreover, there is at least some doubt as to FERC's current authority to perform such certifications.) In the case of federally authorized power authorities, however, federal agencies could be utilized as the appropriate sources of need determinations for the Commission. Consequently, the Committee recommends that the Commission be given the authority to accept need certifications from a variety of sources. Of course, there may be circumstances where there is no other agency certification or where a certification may be incomplete; in such circumstances, the NRC will have to determine the matter.

The Committee sees a critical need for the Commission to delineate the necessary content of an acceptable certification in its forthcoming administrative package. This should include, among other things, an explicit statement of the issues considered and the decisions made.

Concern was expressed by some members of the Committee that the variations in procedure, including opportunity for public participation, among such a wide variety of potential certifiers could, in some cases, lead to acceptance of inferior quality "need" determinations, compared to what might be achieved through the NEPA review process and by the ASLB. Specifically with respect to FERC, in the absence of established procedures or practice with regard to "need" certifications, there may be questions concerning whether FERC procedures would provide an airing of the issues equivalent to the current NRC procedures. The Commission, outside the docket of any specific license application, should determine whether the procedures utilized by potential certifiers are substantially equivalent to NRC procedures. That determination should be binding and not subject to review by any court or in any NRC licensing proceeding. One member of the Committee, however, believes that under no circumstances should the Commission put itself in a position of judging the adequacy or fairness of procedures utilized by state agencies.



Concern has been expressed by some members of the Committee that new preemption arguments may be made possible under the presently proposed legislative package. The replacement of the state and local governments by FERC in succeeding drafts, coupled with the comments of Commissioner Gilinsky at the April 16, 1982 Commission meeting (Tr. pp. 63-65), could result in future arguments over legislative intent. We believe that is not the intention of the Commission and it should make this clear.

#### Revised Hearing Procedures

Amendments in 1957 to the Atomic Energy Act of 1954 provided for mandatory public hearings at both the construction permit and the operating license stages for nuclear power reactors. Ever since 1957, the focus of legislative reform of the nuclear regulatory process has been on the public hearing. In the 1960's, the mandatory hearing at the operating license stage was deleted and the institution of atomic safety and licensing boards was created. More recently, the so-called "Sholly" amendments in the NRC authorization legislation addressed the requirement of public hearings in connection with operating license amendments. And, of course, legislative proposals in the 1970's were concerned with the format and timing of hearings, particularly at the operating license stage.

The proposed Act reflects yet another attempt to integrate the public hearing meaningfully into the licensing process -- at least for standardized plant design approvals, for early site approvals and for issuance of a combined construction permit and operating license for a standardized nuclear power plant. In all three instances, Sections 194d, 193d and 185c, respectively, of the proposed legislation would allow for reform of the public hearing process by inclusion of the phrase "after providing an opportunity for public hearing." The insertion of this phrase, according to the section-by-section analysis, was "to assure flexibility of the hearing process for standardized plants," and to avoid the application of the public hearing provisions in Section 189a of the Atomic Energy Act of 1954, as amended, to the one-step proceedings for standardized plants and to the proceedings for standardized plant design approvals and early site approvals.

Whether Section 189a requires very formal adjudicatory procedures or whether it allows a flexible approach to establishing hearing procedures, in our view a serious effort to reform the public hearing process should involve much more explicit proposals to the Congress.

We understand that the Commission's Regulatory Reform Task Force is developing further legislative proposals which may include, among other things, clarification of the Commission's discretion in selecting hearing formats under Section 189a.

Similarly, the Task Force's development of a package of administrative reforms may also deal with hearing formats. Without having those proposals before us, we are not now in a position to comment specifically on the Commission's intended implementation of Sections 185c, 193d and 194d.

Nevertheless, it is our view that, if the reform package is intended to provide more certainty to the regulatory process, and to thereby lessen the risk of endless litigation involving challenges to the hearing procedures, explicit consideration by Congress of the public hearing process should be encouraged. In this regard, a vague reference in the section-by-section analysis to attaining "flexibility of the hearing process" is not sufficient.

Beyond this, we question whether the lack of specific reference to Section 189a in proposed Sections 185c, 193d and 194d is sufficient to exclude judicial application of Section 189a to such proceedings and particularly to amendments and extensions of such permits/licenses and approvals. If avoidance of unnecessary litigation is the goal, this issue should be addressed directly.

In our view, both the Commission and the Congress should explicitly address such fundamental questions as:

- (a) the purpose of the public hearings;

- (b) the appropriate parties to such hearings;
- (c) the role of the NRC Staff in such hearings and the proper standard for sua sponte reviews by the licensing boards;
- (d) the timing of such hearings;
- (e) the appropriate utilization of formal adjudicatory and less formal processes;
- (f) the desirability of intervenor funding;
- (g) the appropriate threshold level for purposes of defining an issue in dispute; and
- (h) the desirability of applying such reforms only to standardized plants and early site reviews as distinguished from current plant designs.

At the outset, it is important to confront and define the purpose of the public hearings. For out of such definition, guidelines could emerge for responses to the other issues listed above. The definition of the appropriate public hearing process does not carry with it any constitutional requirements. There is no constitutional right to a public hearing and certainly not to a particular form of public hearing, so long as considerations of fairness are satisfied. Surely many -- indeed most -- decisions which affect the lives of many people are made without imposition of particular constitutional concepts. The choice to include an opportunity for public participation in the regulatory process is that of Congress; it

is not dictated by elevated principles of due process. That being the case, the question remains: What is or should be the purpose of the public hearing process?

- (1) Should it be to build public understanding of, and public confidence in, nuclear power and the staff review?

This, at one time, was a stated purpose of the mandatory public hearing procedures. While those procedures probably have resulted in more disclosure of the safety considerations associated with nuclear power as compared with most other industrial activities, it is probable that the Commission's public hearing procedures have not led to a significant level of public understanding of, or confidence in, the regulatory process. Indeed, the formalities of those proceedings, although perhaps necessary to safeguard the rights of participants, may have led to misunderstanding of nuclear power and the nature of the staff review. We urge that this not be adopted as a purpose for the public hearing and that alternate means be considered for educating the public.

- (2) Should it be to test the adequacy of the Regulatory Staff's review of the application?

At one time, this too was a stated function of the hearing process, whether the hearing was contested or not. As contested hearings became routine, licensing boards gradually



focused almost entirely on the contested issues before them and abandoned their independent efforts to test the adequacy of the staff review. While disputes as to specific issues surely result in a testing of the validity of the staff's review process, it is clearly episodic only. The hearing process does not provide a systematic check of the adequacy of the staff review, absent a specific dispute. Other mechanisms for this task should be sought. For example, review groups within the staff and the Advisory Committee on Reactor Safeguards acting openly and in a systematic manner could provide a more efficient means of testing the staff review. Nevertheless, a minority of the Committee holds the view that some limited independent testing of the staff review process could be of benefit.

- (3) Should it be to allow the expression of conflicting political views?

Public hearings held before licensing boards cannot, by their nature, resolve the larger political disputes surrounding the societal decision relating to whether to utilize nuclear energy to provide electric power. That type of political decision is uniquely appropriate for legislative bodies. Therefore, public hearings should not be directed at responding to conflicting political views.

(4) Should it be to resolve disputes?

This is the classic function of the public hearing process. Members of the public and competing interests in possession of facts or views contradictory to those of the applicant or license holder could benefit the decision-making process by presenting those facts and views to the agency. The public hearing provides such an opportunity and should allow for the testing of such facts and views. Under the circumstances there should be no opportunity for sua sponte review by licensing boards, nor should the boards be expected to reach conclusions related to matters beyond the scope of the disputes before them. If the sole purpose of the public hearings is the resolution of disputes -- and this is the view of the majority of this Committee -- then absent a matter in dispute, there should be no public hearing.

We have not attempted to be exhaustive with respect to either the purposes of the public hearing or the issues to be addressed in connection therewith by the Congress or the Commission. Nor have we arrived at a consensus on each of these matters. We have unanimously concluded, however, that reform of the regulatory process requires explicit consideration of these matters by the Congress. Applicants, be they private or public bodies, can no longer be expected to commit a few billion dollars to a single power plant without having an adequate appreciation that the hearing process will be better

focused and better managed than it has been in the past and with less risk of contentious litigation and judicial review. Similarly, interested states and third party intervenors cannot be expected to invest the necessary effort to make the process work better without a better appreciation of the focus and purpose of the public hearings. Thus the Commission should first determine the purpose of the public hearing process and then decide the issues affected by that determination.

We find the consideration of the public hearing process in the proposed Act to be unacceptably brief and indirect. Nor are we persuaded that reform of the public hearing process should be initiated only in the context of standardization proposals. The issues listed here transcend such proposals; they apply equally to plants now under construction or in operation.

### Conclusion

We have concluded that the present hiatus -- if that is an appropriate term -- in new nuclear plant proposals provides an opportune time to review and reform the regulatory process. The reform proposals should address the regulatory process as it applies to both the plants in operation or under construction as well as any prospective new plants.

The Proposed Nuclear Standardization Act of 1982 reflects a serious effort to address the major problems in the

regulatory process as it would apply to prospective new plants. Certainly early site approvals, standard plant design approvals, combined CP/OL's and stabilization criteria reflect serious proposals for consideration by the Congress. In our view, however, the proposals do not adequately address important current problems, nor are they sufficiently comprehensive in their consideration of the problems to which they are addressed. It would be better, in our view, to first develop the remaining legislative proposals and administrative reforms now under consideration by the Regulatory Reform Task Force. In that comprehensive context, the overall reform proposals could be considered in a more meaningful fashion.

SEPARATE VIEWS  
OF  
ANTHONY Z. ROISMAN



The report of this Committee represents a substantial effort to accommodate the views of all of its members and produce a consensus. Each of us on one or more issues would have taken a somewhat different view were it not for our desire to reach a consensus, a desire motivated by our belief that the failings of the present licensing process are so severe and so long-standing that a new and better process, even if not a "perfect" process, is preferable to no change. The principal report focuses on those aspects of the hearing process which if modified will make it operate more smoothly and efficiently. In short, we address proposals which will reduce the total elapsed time required to decide whether to build and operate a nuclear power plant.

While this efficiency will undoubtedly indirectly improve the quality of the presentations at the hearings by allowing each party to better focus its efforts on the principal matters in dispute, it does not directly improve the quality of the hearing. Yet in the last analysis if the primary function of the hearing is dispute resolution, the most important task of the hearing is to assure to the fullest extent possible that the dispute is correctly resolved. This is particularly true here where the incorrect resolution of a safety issue can and has caused significant damage. Thus, for instance, it is now undeniable that all parties would have ultimately benefitted if the hearings on Three Mile Island, Unit 2 had included an

analysis of the incident which had occurred at the Davis-Besse plant several months earlier and which was ultimately the initiator of the Three Mile Island accident. Such an analysis would have slightly lengthened the hearing but the benefits of full knowledge of and remedies for those events before operation began would have far outweighed any conceivable cost of delay.

How then can a licensing reform package not only properly make the hearings more efficient but also make them more effective? On this point the Committee was unwilling to reach a consensus and thus I have prepared and submitted separate views.

The key ingredient to assure better quality in the hearings is to assure that as to legitimate matters in dispute, the decision-makers have the benefit of the most reliable and complete record reasonably attainable. Thus, for instance, a hearing board should not have to conclude that although significant additional evidence was available -- such as the testimony of a particular expert -- nonetheless a disputed issue would be resolved without that evidence because no party offered the expert. Does this happen? Absolutely, as the hearing board or appeal board members will attest. Does the absence of such additional information adversely affect the public? Yes, as Three Mile Island so dramatically illustrates. How can the problem be solved? There are several possible solutions.

First, hearing boards could be given the authority to direct the Staff to retain particular experts or particular types of experts to do an analysis on and present testimony with respect to a disputed issue as to which the board was aware that significant relevant information would not otherwise be presented. Second, the board itself could retain such experts for the purpose of the hearing. Third, upon application of a party who demonstrated its lack of sufficient financial resources, the board could tentatively agree to reimburse that party for the cost of such presentations to the extent the board concluded after hearing the evidence that it was of significant value in resolving the disputes.

The benefits of a system such as this are significant. First, there is a positive incentive to the staff to see to it that its own presentations fully encompass all relevant evidence (not merely that evidence which supports the staff conclusions), thus avoiding the need for the board to invoke any evidence gathering authority. Second, it provides a premium to the party in the hearing that fully develops in a rational way its contention by assuring that such a contention will not fail for lack of competent evidence. Contentions for which no competent technical evidence is reasonably available will be inherently less worthwhile to pursue. Third, by establishing a mechanism that assures a full exploration of disputed issues which have substantive merit, the Commission

can more properly -- both legally and politically -- establish high standards for an issue to be allowed into the process. Since the function of the hearing under this regime would be dispute resolution and not a vehicle to allow every interested person to express his view regardless of the merits of that view, the Commission could probably demand that for a disputed issue to be admitted to the hearing, there must be prima facie evidence that it is valid. Interested parties could focus their limited resources on making that showing on those meritorious issues, confident that if they met that threshold the disputed issue would be fully developed. Finally, and most importantly, the decision whether or not and how to build and operate a nuclear facility would more likely be correct, thus better protecting the public interest and in the end improving the stability of the decisions made.

The majority of the Committee presented essentially philosophical objection to this proposal. It centered on the premise that the process should be "neutral" and avoid favoring one party over any other party. Already the process fails in this neutrality since significant financial help is provided to the industry through taxpayers supporting research and development to better able nuclear facilities to pass muster in the hearings. And, of course, taxes pay for the staff participation and involuntary utility rates pay for the applicant participation. It was also observed that it is the staff's job

to fully explore all relevant issues. If the staff fully presents all relevant data as to a disputed matter, the board will not order production of additional evidence. If not, then the staff has not fulfilled its function and the board must see to it that the gap is filled.

Finally, the majority of the Committee argues that in any event, a contested proceeding is not the best way to resolve these disputes and particularly a contested adjudicatory hearing. This would argue for abolition of all hearings and elimination of all fair mechanisms for resolving what are undeniably real disputes. The majority wisely does not argue this logical extreme and if, as we all acknowledge, a legal mechanism for dispute resolution should exist, then it is far better to assure a full evidentiary presentation as a prerequisite to the dispute resolution. In fact, it is hard to imagine that the "collegial" decision-makers suggested by the majority would be satisfied to decide disputed issues without all the relevant data before them.

In the last analysis, the essential consideration must be that the decision-maker has available a substantially complete record in order to decide the significant issues presented. Only in this way will we achieve the legitimate goal of the hearing: to produce as nearly as reasonably possible a correct result. It is this goal which the present system does not now achieve, but could with the modifications proposed here.



SEPARATE VIEWS

OF

GERALD CHARNOFF, GEORGE L. EDGAR,  
STEPHEN LONG, ROBERT F. REDMOND

In his separate views Mr. Roisman contends that, once a dispute is accepted for resolution by a licensing board, the assigned board should be authorized to (a) direct the staff to retain particular experts to present testimony on the disputed issue, (b) itself retain such experts, or (c) tentatively agree to reimburse a party -- needing such funds -- for the cost of its presentation if it determines that such presentation "was of significant value."

We disagree with this proposal. It is neither necessary nor desirable as public policy; it is not necessary as a stimulus to public participation.

Both we and Mr. Roisman agree that the primary, if not the sole, purpose of the public hearing is the resolution of disputes. And Mr. Roisman apparently agrees that the Commission "could" -- may we say "should" -- "probably demand that for a disputed issue to be admitted to the hearing, there must be prima facie evidence that it is valid," at least if the proposal is accepted. It does not follow, however, that the proposal is sound.

The Roisman proposal is a refined version of intervenor funding proposals which have regularly been rejected by the Congress. The proposal fundamentally is at odds with the philosophy of a regulatory system under which a government agency is staffed and funded at great public expense to assure

the public health and safety. That agency and its staff are charged with making an independent review of licensing requests from the standpoint of the public interest. The proposal is premised on the proposition that the regulatory agency will not be ably staffed or will not obtain the services of competent expert consultants; therefore, the proposal would equip the licensing boards to overcome such alleged agency staff deficits. This, however, would only provide, as noted in the Committee Report, an episodic check on the staff. We would urge a more systematic review program if that is required.

As between private disputants, the law and the process should remain neutral. The funding authority proposed by Mr. Roisman would serve to promote more litigation, further complicate and protract the hearing process, divert public resources, and most likely divert Commission attention from its principal task of managing the agency and its staff.

While the adversary process may be well suited to resolving ordinary disputes, we do not believe it is the best way to arrive at fundamental safety and environmental decisions of a technical nature. This is best done by objective and competent experts engaged in direct informal discussion and evaluation of technical analyses and data. The adversary process does not facilitate that kind of interchange or the clarification and resolution of technical issues. The Roisman proposal, on the other hand, would place more emphasis on the

adversary process for these purposes. It is not an appropriate policy.



SEPARATE VIEWS  
OF  
DAVID W. STEVENS



I would like to associate myself with the views of Mr. Roisman relative to the establishment of conditions to improve the quality of the hearing process. I do not necessarily dissent from the views of the Committee relative to the ways which we have explored to improve the hearing process. I subscribe to them. The separate statement of the other members, however, appears to conclude that: (1) there is no need to further improve presentations made under a revised and improved hearing process by making limited financial support available where need is demonstrated, and (2) the adversarial aspect of licensing is found wanting and an atmosphere of information-sharing by experts in a relatively informal atmosphere would be a preferred approach. I doubt that under current conditions of public concern and uneasiness that such a technique, as is suggested by the latter proposal, is achievable. A central point with which we can all agree is that there probably is too much litigation and that in the interests of all, it should be reduced. That is not to say, however, that we can and should eliminate disputes. That will not happen. We can and should, and certainly the Committee has striven to suggest the kind of licensing structure which will, if executed, improve the efficacy of the process. We cannot will an elimination of disputes, but we may be able to confine them in a more appealing framework.

I am also persuaded that the members of the Committee who are hesitant about the impact of intervenor funding may have been persuaded by past, more comprehensive proposals and not by those presently advanced by Mr. Roisman. Funding of intervenors appears to be only a part of the proposal, not the central theme. And such support would not be automatic; it would be conditional.

I suspect that in a "pure" regulatory framework that there ought not to be a need for intervention -- that all analytical work would be comprehensive and inclusive of all relevant information on all substantive issues without added external input. That state may not be achievable in the foreseeable future. It can be argued that there are potential issues that may not have the proper exposure unless some supporting resources are made available. I would not feel comfortable in foreclosing that opportunity during the discussions on regulatory reform. I think that the proposal advanced by Mr. Roisman is cautious, relevant and should be further explored.

The desire of all of us on the Committee is common -- that we encourage a regulatory foundation that will permit identification and resolution of relevant issues on a timely basis. In doing so, we would hope to avoid the emotional contentiousness which permeates much existing regulatory review.

## Chapter 4

Proposed Rulemaking  
on amendments to 10  
CFR 2 and 50 - the  
Hearing process

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2 and 50

Regulatory Reform of the Rules of Practice, Rules for  
Licensing of Production & Utilization Facilities

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Proposed Rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is considering revising Parts 2 and 50 of its regulations to improve the quality of the hearing process. The proposed revisions will increase the quality of the hearing process by making selective adjustments to the regulations and by eliminating unnecessary requirements. The proposed changes can be categorized into three groups. The first group of changes are intended to improve the screening process, i.e., the process for determining whether a hearing should be held and what issues should be heard. The second group of changes consist of improvements of the procedures for conducting the hearing itself. The third group of changes are intended to improve the decisionmaking process once the hearing is completed.

DATES: Comment period expires \_\_\_\_.\* Comments received after (insert date \_\_\_\_ days after publication in the Federal Register) will \_\_\_\_

\*Insert date \_\_\_\_ days from publication in the Federal Register.

be considered if it is practical to do so, but assurances of consideration cannot be given except as to comments filed on or before the due date specified herein.

ADDRESSES: Submit written comments and suggestions to: the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Docketing and Service Branch. Examine copies of comments received at: the Commission's Public Document Room at 1717 H Street NW, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: James R. Tourtellotte, Regulatory Reform Task Force, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555 (Telephone: (202) 634-3300).

#### SUPPLEMENTARY INFORMATION:

##### I. Introduction

In November, 1981, the NRC created a Regulatory Reform Task Force charged to conduct a detailed evaluation of the NRC licensing process for nuclear power plants. The Commission directed that the Task Force develop proposals for legislation and for regulatory changes to improve the licensing process for nuclear power plants. The Task Force conducted its review and submitted a report identifying certain deficiencies in the existing licensing process and containing proposals for amendments to the NRC's regulations to remedy these deficiencies. This notice of proposed rulemaking contains



amendments to the NRC's regulations designed to implement the Task Force's recommendations.

The Regulatory Reform Task Force found that the quality of the existing hearing process can and should be improved. The three principal parts of the hearing process, i.e., the screening process, the actual conduct of the hearing, and the decisionmaking process, were closely examined and changes in all three areas were proposed. In the discussion which follows, the improvements proposed within each of the three categories are summarized. A section by section analysis of the proposed changes follows. The section by section analysis explains the major proposed changes in more detail. However, minor conforming changes of an editorial or insignificant nature are not broken out for specific discussion.

Many of the proposed changes are applicable only to "initial licensing proceedings" (as defined in proposed § 2.4(r)) and, therefore, do not affect proceedings under Subpart B of 10 CFR Part 2, "Rules of Practice for Domestic Licensing Proceedings" to modify, suspend or revoke a license. For example, the proposed creation of the screening Atomic Safety and Licensing Board to rule on hearing requests, petitions for leave to intervene and contentions is applicable only to initial licensing. However, certain proposed changes will, if adopted, affect all agency proceedings, including enforcement proceedings. Examples in this category include the proposed requirement that judicial standards for determining whether a potential party has standing

will be applied to determine whether a hearing request or intervention petition should be granted and the proposed elimination of the Atomic Safety and Licensing Appeal Board as an intermediate appellate tribunal.

No amendments to Subparts D and E of Part 2 are proposed at this time. Those subparts specify the additional procedures applicable to standardized plant designs subject to the requirements of Appendices M and N of 10 CFR Part 50. Standardization is the subject of a separate rulemaking. Any necessary changes to Subparts D and E will be addressed in that rulemaking.

## I. SUMMARY OF IMPROVEMENTS

### A. SCREENING PROCESS

For purposes of the discussion which follows, the "screening process" refers to the process for determining whether a hearing should be held and, if so, what issues should be heard by the presiding officer. The Regulatory Reform Task Force identified three major ways in which the screening process could be improved. The first major improvement is the proposed creation of a screening Atomic Safety and Licensing Board ("screening board"). In initial licensing proceedings all requests for hearings, petitions for leave to intervene, and proposed contentions will be referred to a screening board. Under existing practice, the presiding officer designated to conduct the

hearing usually rules on all such requests. The screening board will determine whether standing requirements have been met, whether a hearing or petition for intervention should be granted and which contentions are admissible. Late filed contentions and issues which the presiding officer conducting the hearing proposes to consider sua sponte will also be referred to a screening board for a determination of admissibility. As a central "clearinghouse" for hearing requests, intervention petitions, and contentions, the screening board will add a necessary measure of predictability to such rulings. Under present practice, this predictability is lacking because intervention rulings are made by numerous Atomic Safety and Licensing Boards. Public comment is particularly invited on the advisability of creating a screening board or whether the existing system permitting the presiding officer designated to conduct the hearing to rule on intervention matters and raise issues sua sponte should be retained.

Second, under existing Commission practice, a person who fails to meet judicial standards of standing may nonetheless be permitted to intervene (or to trigger a hearing) in Commission proceedings. See Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, NRC 610 (1976). The proposed rule requires presiding officers to apply judicial requirements for standing in determining whether a person may trigger a hearing or intervene in an ongoing proceeding. Requiring a person to demonstrate standing will help ensure that all participants in NRC proceedings have an interest in the proceeding sufficient to justify his or her participation in the proceeding and the necessary commitment of additional Commission resources.

The third proposed improvement would raise the threshold for the admission of contentions to essentially require the proponent of the contention to tender evidence suggesting the existence of a genuine factual dispute. This is consistent with Supreme Court precedent. See Costle v. Pacific Legal Foundation, 445 U.S. 198, 214 (1980), citing Weinberger v. Hynson, Westcott and Running, Inc., 412 U.S. 609 at 620-621 (1973). Under existing regulations, once a petitioner is admitted to the proceeding he or she is only required to draft contentions which set forth the basis for the contentions with reasonable specificity. 10 CFR § 2.714(a)(3). No inquiry is made into the merits of the contention and the petitioner is under no obligation to demonstrate the existence of some factual support for the contention as a precondition for its acceptance. In practice, this requirement may be met by copying contentions from another proceeding involving another reactor. Thus, an intervenor need not fully understand a contention and frivolous contentions are easily admitted. The increased evidentiary threshold for admission of contentions will ensure that frivolous contentions are not litigated in NRC proceedings.

#### B. CONDUCT OF THE HEARING

A number of improvements are proposed to improve the conduct of the hearing itself. First, under the proposed rules, pretrial discovery will be more rigorously controlled by presiding officers. To prevent abusive or burdensome discovery, a party will be required to sign each discovery

request, answer, objection, or motion. The signature certifies, among other things, that the party's discovery filing is based on good faith and not primarily for the purpose of delay. Permissible discovery against the staff will also be appropriately limited to matters which form the basis for the staff's position on a given issue; discovery requests may not require the staff to perform additional work on matters beyond what is needed to support the staff's position on the issue or to explain why matters not relied on by the staff were not considered.

Second, substantial changes are proposed in how evidence is presented in initial licensing proceedings. To the fullest extent possible, all evidence, direct and rebuttal, will be submitted in writing; a special need for live testimony, including cross-examination, must be demonstrated. In this regard, cross-examination plans which assure that cross-examination would be meaningful must be submitted to assist the presiding officer in deciding whether to permit cross-examination. Legal scholars and critics of the current system have suggested that the scientific and technical issues, well stated and properly understood, may generally be amenable to resolution on written pleadings, that credibility of the witnesses usually is not a central issue and that testimony of a scientific nature is well-suited to being reduced to writing. Under existing practice most direct testimony in licensing proceedings is submitted in writing. See 10 CFR 2.743(b). Limitations on cross-examination are also desirable because, although the existing rules authorize the Licensing Boards to control cross-examination, the Boards often fail to do so. In addition,



in practice, the value of cross-examination is often diminished by unskilled questioning. This results in a cluttered trial record.

Third, a new provision is proposed which would allow the screening board or the presiding officer conducting the hearing to appoint a panel of technical subject matter experts. The screening board could request the assistance of the experts to help it determine whether there is a technical basis for reaching a conclusion that a proposed contention raises a genuine issue of disputed fact. The presiding officer conducting the hearing could appoint a panel to sit with him or her to hear the evidence on a particular issue. The panel would then prepare a report with recommendations or conclusions. Panel members could be appointed from inside or from outside the agency, but each member would be subject to the existing notice and disqualification procedures contained in § 2.704.

A number of miscellaneous improvements are also suggested. The sua sponte rule, which allows presiding officers to raise issues on their own motion, would be tightened so that in all but the most unusual situations the scope of the hearing would be confined to the disputed issues of fact properly placed into controversy by the parties; to encourage the use of summary procedures to dispose of issues prior to hearing, summary disposition motions could be filed at any stage of the proceeding; motions which are not controverted by other parties must be granted; and an express provision is added to recognize that the Commission may designate a qualified hearing

examiner to preside in initial licensing proceedings in lieu of a three member licensing board.

### C. IMPROVEMENTS TO THE DECISIONMAKING PROCESS

Several improvements to the decisionmaking process are also proposed. The most fundamental is the proposed removal of the Atomic Safety and Licensing Appeal Board as an independent, intermediate administrative appellate tribunal. The Appeal Board will function as a staff office of the Commission with the responsibility to draft proposed decisions for Commission review. It will no longer function as an administrative "court of appeals." This change will permit the Commission itself to expeditiously resolve the important policy questions which frequently arise in the course of its licensing and enforcement proceedings. In addition, the Commission will also be able to exercise a greater degree of supervision over the conduct of its proceedings. Finally, removal of the Appeal Board as a separate appellate tribunal should also expedite final agency action on adjudicated matters by eliminating a layer of review.

Another major improvement is the proposed addition of a rule which will allow the expeditious codification of generic factual issues resolved in initial licensing proceedings as regulations. This rule is intended to preclude the relitigation of generic factual issues resolved in one proceeding in subsequent proceedings involving similar facilities or reactors. The rule would only apply to generic factual issues which are litigated to a

conclusion, i.e. issues not dismissed on summary disposition or withdrawn by a party, to ensure that the merits of the issues have been fully considered in the proceeding. Once resolved, the generic issue will be expeditiously issued as a proposed rule on the basis of the hearing record with a 45-day period for public comment. If the Commission adopts the rule after considering the public comments, the generic issue could not be litigated in subsequent adjudications unless special circumstances could be shown pursuant to § 2.758.

The third proposed improvement would prohibit an intervening party from filing proposed findings of fact and conclusions of law, or filing exceptions to initial decisions, on issues not placed in controversy by that party. Present practice permits any party to file proposed findings, conclusions of law, and exceptions on any issue in the proceeding, including issues not raised by it. The purpose of this change is to ensure that presiding officers and the agency appellate tribunal, i.e. the Commission, are able to focus on the disputed issues in the proceeding as presented and argued by the parties with the chief interest in the issue. The proponent of a contention is expected to present and argue its case on the contention much more persuasively than a party who elects to argue an issue only in legal papers filed after the evidentiary portion of hearing is completed. These filing limitations are expected to improve the decisionmaking process by allowing presiding officers and the Commission to focus their energies on the arguments made by the proponents (and opponents) of each particular issue.

Fourth, the immediate effectiveness rule will be restored for all initial decisions. Following the TMI accident, the rule was substantially modified to require a limited Appeal Board or Commission review of initial decisions authorizing construction permits or operation at more than 5% of full power. Experience gained since the TMI accident has shown this restriction on effectiveness has not had a positive effect on safety and has been procedurally cumbersome. Restoration of the immediate effectiveness rule does not affect the right of a party to seek a stay of an initial decision pursuant to the provisions of § 2.788.

Finally, under existing practice, the Director of Nuclear Reactor Regulation or Nuclear Material Safety and Safeguards, as appropriate, issues licenses authorized by initial decisions. Under the proposed rules, responsibility for license issuance will rest with the Executive Director for Operations, the chief staff officer of the Commission.

## II. SECTION-BY-SECTION ANALYSIS

### 1. Definitions (10 CFR 2.4)

Two new definitional sections are proposed. Proposed § 2.4(r) defines "initial licensing" in accordance with the guidance contained in the 1947 Attorney General's Manual on the Administrative Procedure Act. See pp. 50-51 of the Manual. In general, all agency proceedings for the

issuance or amendment of licenses fall within the definition, but proceedings in the nature of enforcement or renewal actions are not included. The definition of "initial licensing" is added so that procedures applicable to "initial licensing" are clearly distinguished from procedures which may be applicable to other types of proceedings. Proposed section 2.4(s) defines the term "presiding officer." This term is used in numerous provisions in Part 2, but has heretofore not been explicitly defined. Note that the screening atomic safety and licensing board (see proposed § 2.721) is a "presiding officer."

2. Notice of Hearing (10 CFR 2.104)

The primary purpose of revised § 2.104 is to limit presiding officers to deciding disputed issues of fact. Section 2.104 has also been reorganized to clearly distinguish between different types of applications. Paragraph (a) is limited to mandatory construction permit proceedings. The major difference between this provision and the existing provisions applicable to construction permit proceedings is that in contested proceedings, except for issues which must be considered under NEPA, presiding officers will consider only disputed issues placed in controversy by the parties. Therefore, the notice of hearing will no longer state that in contested proceedings the presiding officer will automatically consider the issues listed in existing § 2.104(b)(1). Paragraph (b) of revised § 2.104 is applicable to all other notices of hearing for proceedings within the scope of subpart A of Part 2, except for antitrust proceedings held in connection with a CP or OL license. (The notice for



antitrust proceedings is contained in revised § 2.104 (c)). Proposed § 2.104(b) differs from the existing provision (§ 2.104(c)) primarily in that, as in the case of CP proceedings, except for NEPA issues which must be considered by the presiding officer, only controverted issues will be considered by the presiding officer. As noted above, proposed 2.104(c), specifies the notice of hearing for antitrust proceedings and is substantially the same as the existing provision (§ 2.104(d)). Proposed paragraph (d) is identical with existing paragraph (e).

3. Notice of Opportunity for Hearing (10 CFR 2.105)

Proposed § 2.105, "Notice of Opportunity for Hearing," differs in several minor respects from the existing provision. First, proposed § 2.105(e)(2) reflects the creation of the screening atomic safety and licensing board (see proposed § 2.721) by specifying that the screening board will rule on requests for hearing. Second, a new paragraph (d)(3) is proposed which provides that the notice of opportunity for hearing will state that a person's participation in any hearing held on the proposed action will be limited to the issues specified in the notice of hearing, unless good cause is shown for considering additional issues. This provision is intended to ensure that persons whose interest may be affected by the proceeding raise issues on a timely basis by responding to the notice of opportunity for hearing rather than waiting until a notice of hearing, if any, is subsequently published. Third, paragraph (e)(1) is changed to designate the Executive Director for

Operations as the individual who may take the proposed action if a timely request for hearing is not filed. The existing provision designates the Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards. The purpose of this change is to enhance the concept of a strong Executive Director for Operations and ensure management accountability for licensing. Finally, the notice published pursuant to this section will now be called a "notice of opportunity for hearing" rather than a "notice of proposed action."

4. Exceptions (10 CFR 2.700a)

A new paragraph (c) is added to § 2.700a, "Exceptions," which provides that the Commission, notwithstanding any other provision to the contrary in Part 2, may prescribe such alternative procedures as it deems necessary in initial licensing proceedings. The notice of hearing or opportunity for hearing will specify the procedures. This provision is intended to allow the Commission to make full use of the procedural flexibility allowed under the Administrative Procedure Act. See Vermont Yankee Nuclear Power Corporation v. NRDC, 435 US 519 (1978).

5. Designation of Presiding Officer, Disqualification, Unavailability  
(10 CFR 2.704)

Minor revisions to § 2.704 are proposed to specify that an administrative law judge may be designated by the Commission to preside at hearings. A conforming change in paragraph (d) is also proposed to allow the Chief Administrative Law Judge to designate a replacement for

an administrative law judge who may become unavailable during the course of a proceeding.

6. Requests for Hearings and Petitions to Intervene (10 CFR 2.714)

Section 2.714 has been reorganized and substantially modified. The major changes from the existing intervention rule are as follows:

- o A potential intervenor must meet judicial standards for standing in order to be admitted to an NRC proceeding. Proposed § 2.714(f). The purpose of this provision is to abolish the concept of discretionary intervention which the Commission first recognized in Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2) CLI-76-27, 4 NRC 610 (1976).
- o Contentions must be filed at the time the request for hearing or petition for leave to intervene is filed. Proposed § 2.714(g)(2). The existing provision requires only that an "aspect" of the subject matter of the proceeding be identified at the time the hearing request or intervention petition is filed and final contentions need not be filed until 15 days prior to the special prehearing or prehearing conference. The purpose of requiring the filing of contentions with the request for hearing or petition to intervene is to require the identification of issues as early as possible in the proceeding. The applicant's safety and

environmental reports are publicly available by this time in the Commission's Public Document and Local Public Document Rooms. However, since the staff's environmental reviews are not completed until after the time for filing requests or petitions has passed, amended or additional contentions based on the staff environmental documents may be filed if the data or conclusions differ significantly from those in the applicant's documents. Proposed § 2.714 (g)(1)(ii). Non-timely filings of contentions will not be entertained absent a determination by the screening ASLB or other presiding officer designated to rule on contentions that the filing should be permitted based on a balancing of the factors listed in paragraph (c)(4). The factors to be considered in ruling on late filed contentions are identical to those specified in the current rule. Therefore, the screening ASLB or other presiding officer will have a considerable body of NRC case law to assist it in making any such determinations.

- o the threshold for admission of contentions is raised. Proposed contentions must show that a genuine dispute exists with the applicant on an issue of law, fact or policy and the showing must include references to the specific portions of the application which are disputed. The contention must be supported by a concise statement of the alleged facts or expert opinion, together with specific sources and documents of which the petitioner is aware, which will be relied on to establish the facts or expert opinion.

The purpose of the increased threshold is to ensure that the resources of all parties are focused on real rather than imaginary issues.

- o A provision has been added (proposed § 2.714(i)(1)(iv)) which provides that a contention raising only an issue of law will not be admitted for resolution in an evidentiary hearing but shall be decided on the basis of briefs and/or oral argument.
- o In initial licensing proceedings, the screening board will rule on requests for hearings, petitions for intervention and contentions contained therein. (Proposed § 2.714(j)). In other types of proceedings, e.g. enforcement proceedings, these rulings will be made by the presiding officer designated by the Commission.

7. Appeals From Certain Rulings on Petitions for Leave to Intervene and/or Requests for Hearing (10 CFR 2.714a)

Section 2.714a is proposed to be modified so that appeals of such rulings lie with the Commission rather than the Atomic Safety and Licensing Appeal Board. This change is consistent with the removal of the Appeal Board as an intermediate appellate tribunal.



8. Consolidation of Parties in Construction Permit or Operating License Proceedings (10 CFR 2.715a)

Proposed § 2.715a is expanded in scope. Absent a showing by a party that its rights would be prejudiced, the proposed rule would require presiding officers to consolidate parties in initial licensing proceedings after first offering the parties an opportunity to consolidate voluntarily. State and local government entities appearing in NRC proceedings represent unique interests. Therefore, the Commission would not expect presiding officers to consolidate these participants with private intervenors.

9. Subpoenas (10 CFR 2.720)

Discovery against the NRC staff is tightened in proposed section 2.720(h)(2)(ii). Specifically, while interrogatories may seek to elicit factual information reasonably related to the staff's position at the hearing, interrogatories may not be used to require the staff to explain why alternative data, assumptions or analyses were not relied on in the staff review. In addition, interrogatories may not require the staff to perform additional research or analytical work beyond that needed to support the staff's position on any particular matter. These provisions are intended to avoid the unnecessary expenditure of scarce staff resources at pretrial stages of the hearing on matters not directly pertinent to the staff's position in the hearing. Of course, it would

still be permissible for a party to argue at the hearing that the staff should have performed additional studies or relied on alternative data. Finally, a specific reference is added regarding the Commission's Public and Local Public Document Rooms. The purpose of this provision is to make clear that if an interrogatory requests information already in the Public Document Rooms, such information is "reasonably obtainable from any other source" and, therefore, need not be provided. A sufficient answer to such a question would be the title and page reference to the relevant document.

10. Atomic Safety and Licensing Boards (10 CFR 2.721)

Section 2.721 is revised to authorize the establishment of one or more screening atomic safety and licensing boards. A screening board will be composed of three members with the same qualifications as members of a regular atomic safety and licensing board. The principal function of the screening board will be to rule on requests for hearings, petitions for leave to intervene and contentions in all initial licensing proceedings. The screening board may hold prehearing conferences, appoint expert panels and utilize any other procedures available to presiding officers to enable it to rule on hearing requests, intervention petitions and contentions. The screening board will then transfer the proceeding with the list of admitted issues to the

presiding officer designated to conduct the hearing. If no party has demonstrated standing and filed an admissible contention, the screening board will dismiss the proceeding except in construction permit applications in which there is a mandatory hearing requirement. Late filed contentions and revised or new contentions filed after the staff's environmental documents are issued will be referred back to the screening board for a determination of admissibility, even if filed after the hearing has commenced. Similarly, issues which the presiding officer proposes to raise sua sponte during the course of a proceeding will be referred to the screening board for a determination of admissibility.

The screening board will serve as a centralized and specialized forum for resolution of the difficult questions faced by presiding officers in resolving issues of standing and the admissibility of contentions. It is expected that the screening board(s) will develop substantial expertise in resolving these issues and add a measure of predictability and consistency to intervention rulings. This has been difficult to achieve under present practice because a multiplicity of licensing boards now make these rulings.

A new paragraph (e) is also proposed to explicitly recognize that the Commission may appoint a qualified administrative law judge in lieu of an atomic safety and licensing board to preside in its proceedings.

11. Special Assistants to the Presiding Officer and Expert Panels  
(10 CFR 2.722)

Section 2.722 is revised to permit the presiding officer, including a screening board, to appoint an expert panel consisting of one, three or five members with specific subject matter expertise. The panel will assist the presiding officer designated to conduct the hearing by hearing evidentiary presentations, either oral or written, within its subject matter expertise and may examine the witnesses of the parties as a technical interrogator. The panel will advise the presiding officer of its recommendations and conclusions through an on-the-record report. The report is advisory only. In the case of an expert panel appointed by a screening board, the panel will assist the board in determining whether sufficient evidence had been tendered to conclude that there exists a genuine issue of disputed fact.

It is expected that expert panels will be used only in those situations when the subject matter of the issue at hand is both highly technical and not within the general expertise of the technical members of the licensing board conducting the hearing. The proposed rule provides for one, three or five expert panel members to avoid an evenly divided panel report. Panel members may be selected from either inside or outside the agency.

All are subject, however, to the notice and disqualification provisions described in § 2.704.

12. Motions (10 CFR 2.730)

A new paragraph is added to section 2.730 to expressly provide that uncontroverted motions shall be granted by the presiding officer to the extent authorized by law. In addition, the term "presiding officer" is substituted for the narrow reference to "the Board" in paragraph (e).

13. Examination of Experts (10 CFR 2.733)

A minor addition to Section 2.733 is proposed to make clear that examination and cross-examination of expert witnesses by technically qualified individuals may be permitted only to the extent that oral direct or cross-examination is otherwise permitted. See the discussion of revised § 2.743.

14. General Provisions Governing Discovery (10 CFR 2.740)

Section 2.740 has been revised to ensure that presiding officers have ample tools to prevent and remedy unnecessary, burdensome or abusive discovery. Proposed paragraph (b)(2) allows the presiding officer upon his or her own initiative, or upon a motion for a protective order, to



limit the use of discovery, including the number of interrogatories a party may serve. In addition, proposed paragraph (g) requires that every discovery request, response, objection thereto, or motion for a protective order be signed by the party or its authorized representative. The signature constitutes a certification that, among other things, the signatory has read the filing and that it has been filed in good faith and not primarily to cause delay. Failure to sign negates the effect of the document. The presiding officer may impose sanctions if a certification is falsely made.

15. Evidence (10 CFR 2.743)

Section 2.743 is substantially revised. The major proposed changes, applicable only to initial licensing proceedings, are as follows:

- ° Direct and rebuttal testimony will be submitted in written form unless otherwise ordered by the presiding officer for good cause. A schedule for the filing of such testimony is established in proposed paragraph (b)(3).
- ° Cross-examination is permitted only upon the request of a party filed within 10 days after service of the written testimony concerning a particular issue. Cross-examination is available to an intervening party only on those issues on which the requesting party has proffered an admissible contention. This is a departure

from the present practice in which oral cross-examination is the rule rather than the exception and which does not necessarily limit cross-examination by an intervening party to issues proffered by it. The NRC staff, a governmental representative admitted to the proceeding pursuant to § 2.715(c), and the license applicant may move to cross-examine on any admitted contention in the proceeding. The proposed rule places the burden of establishing the need for cross-examination on the requesting party, including the NRC staff, a governmental representative and the license applicant. A motion to cross-examine, among other things, must include a detailed cross-examination plan and a statement as to why written testimony could not establish the same points. See proposed paragraphs (b)(5)-(8). The cross-examination plan will be kept confidential by the presiding officer until the completion of the cross-examination, if allowed, at which time it will be inserted into the record. This provision is intended to ensure an adequate record is made for possible appellate review of orders granting or denying cross-examination.

16. Authority of Presiding Officer to Dispose of Certain Issues on the Pleadings (10 CFR 2.749)

Section 2.749 is modified in two respects. First, the rule as proposed would permit summary disposition motions to be filed at any time during the proceeding rather than, as provided in the existing rule "within

such time as may be fixed by the presiding officer." This change is intended to give the parties maximum flexibility to file such motions and to make it possible to terminate litigation at any point during the proceeding when it becomes apparent that a genuine issue of fact is no longer in dispute. Second, the proposed rule eliminates the present prohibition against determining on summary disposition the ultimate issue as to whether a construction permit should issue. This prohibition is unnecessary.

17. Proposed Findings and Conclusions (10 CFR 2.754)

Paragraph (c) of section 2.754 is revised to limit filings of proposed findings of fact and conclusions of law by parties who do not have the burden of proof or who have only a limited interest in the proceeding to those issues placed in contention by the party. The proponent of a contention is responsible for making its case on the issue at the hearing. The revision recognizes that the proponent of a contention is in the best position to present the arguments in support of the contention and is intended to ensure that presiding officers are not inundated with a multiplicity of extraneous filings from persons with no stake in the resolution of a particular issue. Since license applicants have the burden of proof and the NRC staff has a general interest in the proceeding to ensure that the public health and safety and environmental values are protected, the limitation on filings in paragraph (c) are not applicable to either; each has an obvious interest in filing proposed findings and conclusions on most, if not all, contested issues. Presiding officers will be expected to strike those portions of proposed findings and conclusions of law filed in contravention of this section.

18. Authority of Presiding Officer to Regulate Procedures In a Hearing  
(10 CFR 2.754)

Section 2.754 is revised to make mandatory the Commission's presently permissive admonition that presiding officers should limit the number of witnesses whose testimony may be cumulative, strike argumentative, repetitious, cumulative, or irrelevant evidence. This is intended to tighten up the proceeding and produce a better record.

19. Codification of Generic Factual Issues Resolved In Initial Licensing  
Proceedings (10 CFR 2.758a)

A new section 2.758a is proposed. This section requires that generic factual issues resolved in initial licensing proceedings be considered for promulgation as final Commission rules after public comment is sought in accordance with the rulemaking provisions of the Administrative Procedure Act. The purpose of this provision is to ensure that generic issues resolved in an evidentiary proceeding are not relitigated in subsequent proceedings. Generic factual issues codified as final rules will be subject to challenge in Commission licensing proceedings only to the extent permitted under the existing provisions of § 2.758, "Consideration of Commission rules and regulations in adjudicatory proceedings," i.e. upon a showing of special circumstances.

20. Initial Decisions In Contested Proceedings On Applications For Facility Operating Licenses (10 CFR 2.760a)

Section 2.760a is revised to revoke the 1979 relaxation of the sua sponte rule for review of uncontested matters by adjudicatory boards. See 44 Fed. Reg. 67088 (November 23, 1979). Experience under the relaxed standard has indicated that issues have been raised sua sponte which do not warrant such consideration. For example, contentions raised and later dropped by intervenors have been adopted by some Licensing Boards with little apparent regard for the seriousness of the issues involved. Accordingly, the sua sponte authority of presiding officers to raise new issues will be limited to extraordinary circumstances and is to be used sparingly. A similar change is proposed to be made to § 2.785(b)(2). Any issue(s) proposed to be raised sua sponte by the presiding officer conducting the hearing is to be referred with an explanation to the screening Atomic Safety and Licensing Board for a determination whether the matter should be considered at the hearing.

21. Appeals to the Commission From Initial Decisions (10 CFR 2.762)

Section 2.762 is revised to provide that an intervening party may file exceptions only on those issues which the party placed in controversy or sought to place in controversy in the proceeding. This will reverse the rule established in Northern States Power Co., (Prairie Island Nuclear



Generating Plant, Units 1 and 2), ALAB-244, 8 AEC 857, 863 (1974), that an intervenor can appeal on all issues, whether or not raised by his or her own contentions. The rationale for this revision is the same as that discussed in regard to proposed § 2.754(c), supra.

22. Immediate Effectiveness of Decision Directing Issuance or Amendment of Construction Permit or Operating License (10 CFR 2.764)

Section 2.764 is revised to return to the pre-TMI rule that initial decisions of presiding officers are immediately effective. Accordingly, it is proposed that paragraphs (e) and (f), which provide for Appeal Board and/or Commission consideration of effectiveness of initial decisions authorizing construction permits and operating licenses at greater than 5% power, be deleted. The Commission has tentatively concluded that the lessons learned from TMI have been sufficiently factored into the licensing and regulatory process to make limited Commission review on the question of effectiveness no longer necessary. Stays of initial decisions may continue to be sought in accordance with the provisions of § 2.788.

23. Elimination of the Atomic Safety and Licensing Appeal Board (10 CFR 2.785, 2.786, and 7.787)

The Commission proposes to delete §§ 2.785, 2.786 and 2.787. These provisions establish and describe the functions of the Atomic Safety and

Licensing Appeal Board. Unlike most agencies, the Commission's adjudicative process resembles that of the Federal Court system. The Commission sits as the administrative "supreme court," the Appeal Boards sit as the administrative "courts of appeal" and Licensing Boards and administrative law judges sit as the "district" or trial courts. The amendments would substantially change the existing three-tiered adjudicative structure of the NRC by eliminating the Appeal Board as the middle rung of this process. While the Appeal Board would retain its existing review functions, it will function as a staff office of the Commission. It will not issue decisions, but will prepare draft opinions and rulings for the Commission. After appropriate review, the Commission will issue its decision. Thus, the Appeal Board will function as a Commission staff office responsible for reviewing and drafting decisions on adjudicatory matters, rather than as an intermediate appellate tribunal. Elimination of the intermediate tribunal would have several benefits. First, the Commission will be able to supervise its adjudicatory process more closely. This supervision is especially crucial when, as happens frequently, issues of a policy nature arise during the course of its proceedings. Second, elimination of sequential Appeal Board and possible Commission review should expedite final agency action on adjudicatory matters. Third, some duplication of resource commitment would be eliminated since the need for separate review by the Commission's offices of Policy Evaluation and General Counsel could be eliminated or reduced.

Conforming changes to § 2.788 are also proposed to eliminate references to stays of Appeal Board decisions.

24. Appendix A to Part 2

"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," is proposed to be deleted as unnecessary.

25. License Required (10 CFR 50.10)

Two conforming changes to § 50.10 are proposed to note that the Executive Director for Operations rather than the Director of Nuclear Reactor Regulation will issue limited work authorizations. This is consistent with the revisions discussed supra, which provide that the Executive Director rather than particular Office Directors will issue licenses authorized after hearing.

PAPERWORK REDUCTION ACT REVIEW

The Nuclear Regulatory Commission has submitted this proposed rule to the Office of Management and Budget for such review as may be appropriate under

the Paperwork Reduction Act of 1980, Pub. L. 96-511, 94 Stat. 2812, 44 U.S.C. § 3501 et seq.

REGULATORY FLEXIBILITY STATEMENT

The proposed rule will reduce the procedural burden on NRC licensees by improving the hearing process. The impact on intervenors or potential intervenors will be neutral. While intervenors or potential intervenors will have to meet a higher threshold to gain admission to NRC proceedings and, thereby, incur some additional economic costs in preparing its request for hearing or intervention request, the proposed improvements should reduce an intervenors costs once the hearing commences. Thus, in accordance with the Regulatory Flexibility Act, 5 U.S.C. § 605(b), the NRC hereby certifies that this rule, if promulgated, will not have a significant economic impact upon a substantial number of small entities.

LIST OF SUBJECTS 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.

LIST OF SUBJECTS IN 10 CFR PART 50

Antitrust, Classified information, Fire prevention, Intergovernmental relations, Nuclear power plants and reactors, Penalties, Radiation protection, Reactor siting criteria, Reporting requirements.

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and Sections 552 and 553 of Title 5 of the United States Code, notice is hereby given that adoption of the following amendments to 10 CFR Parts 2 and 50 are contemplated:

It is proposed that 10 CFR Parts 2 and 50 be amended as follows:

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

Authority Secs. 161, 68 Stat. 948, 953 (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, Pub. L. 93-438, 88 Stat. 1242, as amended by Pub. L. 94-79, 89 Stat. 413 (42 U.S.C. 5841); 5 U.S.C. 552.

(Section 2.101 also issued under secs. 53, 62, 81, 103, 104, 105, 68 Stat. 930, 932, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2093, 2111, 2133, 2134, 2135); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233,



2239). Sections 2.200-2.206 also issued under sec. 186, 68 Stat. 955 (42 U.S.C. 2236); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600-2.606, 2.730, 2.772 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853 (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). Sections 2.800-2.807 also issued under 5 U.S.C. 553. Section 2.808 also issued under 5 U.S.C. 553 and sec. 102, 83 Stat. 853 (42 U.S.C. 4332). Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 95-209, 91 Stat. 1483 (42 U.S.C. 2039).

2. In § 2.4, paragraph (r) is redesignated as paragraph (t), and new paragraphs (r) and (s) are added to read as follows:

§ 2.4 Definitions.

\* \* \* \* \*

(r) "Initial licensing" includes any proceeding on an application for a construction permit, operating license, or any other license for a facility or other activity, or for any amendment or modification thereof, but normally does not include licensing proceedings involving the renewal, revocation, suspension, annulment, withdrawal, or agency-initiated modification or amendment of licenses.

(s) "Presiding officer" means one or more members of the Commission, an administrative law judge, an atomic safety and licensing board, a screening atomic safety and licensing board, or a named officer who has been delegated authority to preside in an evidentiary hearing under this chapter.

~~[(\*)]~~ (t) Except as redefined in this section, words and phrases which are defined in the Act and in this Chapter have the same meaning when used in this part.

3. Section 2.104 is amended by revising paragraphs (a) and (b), revoking paragraph (c), redesignating paragraphs (d) and (e) as paragraphs (c) and (d), respectively, and revising them to read as follows:

2.104 Notice of hearing.

(a)(1) In the case of an application for the issuance of ~~[concerning]~~ a construction permit for a facility of the type described in § 50.21(b) or § 50.22 of this chapter or a testing facility ~~[on which a hearing is required by the Act or this chapter, or in which the Commission finds that a hearing is required in the public interest,]~~ the Secretary will issue a notice of hearing to be published in the FEDERAL REGISTER as required by law ~~[at least fifteen (15) days, and in the case of an application concerning a construction permit for a facility of the type described in § 50.21(b) or~~

~~§-50-22-of-this-chapter-or-a-testing-facility]~~ at least thirty (30) days, prior to the date set for hearing in the notice.<sup>1</sup>

In addition ~~[in-the-case-of-an-application-for-a-construction-permit-for a-facility-of-the-type-described-in-§-50-22-of-this-chapter,-or-a-testing facility]~~ the notice (other than a notice pursuant to paragraph (c)[d] of this section) shall be issued as soon as practicable after the application has been docketed: Provided, That if the Commission, pursuant to § 2.102(a)(2), decides to determine the acceptability of the application on the basis of its technical adequacy as well as completeness, the notice shall be issued as soon as practicable after the application has been tendered.

The notice will state:

(A) The time, place, and nature of the hearing and/or prehearing conference, if any;

(B) The authority under which the hearing is to be held;

(C) The matters of fact and law to be considered; and

(D) The time within which answers to the notice or petitions for leave to intervene shall be filed.

Except in the case of a construction permit proceeding noticed pursuant to paragraph (c) of this section and unless the Commission determines otherwise, the notice of hearing will state in implementation of paragraph (a)(1)(C) of this section:

(A) That, if the proceeding is not a contested proceeding, the presiding officer will determine (i) without conducting a de novo evaluation of the application, whether the application and the record of the proceeding contain sufficient information, and the review of the application by the Commission's staff has been adequate, to support the safety findings required by the Atomic Energy Act of 1954, as amended, proposed to be made and the issuance of the construction permit proposed by the Executive Director for Operations, and (ii) if the application is for a construction permit for a nuclear power reactor, a testing facility, a fuel reprocessing plant, or other facility whose construction or operation has been determined by the Commission to have a significant impact of the environment whether the review conducted by the Commission pursuant to the National Environmental Policy Act (NEPA) has been adequate.

(B) That regardless of whether the proceeding is contested or uncontested, the presiding officer will, in accordance with Part 51 of this chapter:

(i) Determine whether the requirements of section 102(2)(A), (C) and (E) of the National Environmental Policy Act and Part 51 of this chapter have been complied with in the proceeding;

(ii) Independently consider the final balance among conflicting factors contained in the record of the proceeding with a view to determining the appropriate action to be taken; and

(iii) Determine whether the construction permit should be issued, denied, or appropriately conditioned to protect environmental values.

<sup>1</sup>If the notice of hearing [~~concerning an application for a construction permit for a facility of the type described in § 50.21(b) or § 50.22 of this chapter or a testing facility~~] does not specify the time and place of initial hearing, a subsequent notice will be published in the FEDERAL REGISTER which will provide at least thirty (30) days notice of the time and place of that hearing. After this notice is given the presiding officer may reschedule the commencement of the initial hearing for a later date or reconvene a recessed hearing without again providing thirty (30) days notice.

(b)(1) In the case of any other application within the scope of this subpart in which the presiding officer has determined that a hearing should be held, the presiding officer will issue a notice of hearing to be published in the FEDERAL REGISTER as required by law at least fifteen (15) days prior to the date set for hearing in the notice.

The notice will state:

(A) The time, place, and nature of the hearing and/or prehearing conference, if any;

(B) The authority under which the hearing is to be held;

(C) The matters of fact and law to be considered; and

(D) The time within which answers to the notice or petitions for leave to intervene shall be filed.



(b)(2) Except in the case of an operating license proceeding noticed pursuant to paragraph (c) of this section, and unless the Commission determines otherwise, if the application is for an operating license for a nuclear power reactor, a testing facility, or a fuel reprocessing plant, or other facility whose operation has been determined by the Commission to have a significant impact on the environment, the notice of hearing will state in implementation of paragraph (b)(1)(C) of this section that the presiding officer will determine whether, in accordance with the requirements of Part 51 of this chapter, the operating license should be issued as proposed.

(c)[d] In an application for a construction permit or an operating license for a facility on which a hearing is required by the Act or this chapter, or in which the Commission finds that a hearing is required in the public interest to consider the antitrust aspects of the application, the notice of hearing will, unless the Commission determines otherwise, state:

(1) A time of the hearing, which will be as soon as practicable after the receipt of the Attorney General's advice and compliance with sections 105 and 189a of the Act and this part:<sup>1</sup>

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<sup>1/</sup> As permitted by subsection 105c of the Act, with respect to proceedings in which an application for a construction permit was filed prior to December 19, 1970, and proceedings in which a written request for antitrust review of an application for an operating license to be issued under section 104b has been made by a person who intervened or sought by timely written notice to the Commission to intervene in the construction permit proceeding for the facility to obtain a determination of

antitrust considerations or to advance a jurisdictional basis for such determination within 25 days after the date of publication in the FEDERAL REGISTER or notice of filing of the application for an operating license or December 19, 1970, whichever is later, the Commission may issue a construction permit or operating license which contains the conditions specified in § 50.55b of this chapter before the antitrust aspects of the application are finally resolved.

(2) The presiding officer for the hearing who shall be either an administrative law judge or an atomic safety and licensing board established by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel;

(3) That the presiding officer will consider and decide whether the activities under the proposed license would create or maintain a situation inconsistent with the antitrust laws described in section 105a of the Act; and

(4) That matters of radiological health and safety and common defense and security, and matters raised under the National Environmental Policy Act of 1969, will be considered at another hearing for which a notice will be published pursuant to paragraphs (a) and (b) of this section, unless otherwise authorized by the Commission.

[e](d) The Secretary will give timely notice of the hearing to all parties and to other persons, if any, entitled by law to notice. The Secretary will transmit a notice of hearing on an application for a facility license or for a license for receipt of waste radioactive material from other persons for the purpose of commercial disposal by the waste disposal licensee

or for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter to the Governor or other appropriate official of the State and to the chief executive of the municipality in which the facility is to be located or the activity is to be conducted or, if the facility is not to be located or the activity conducted within a municipality, to the chief executive of the county (or to the Tribal organization if it is to be so located or conducted within an Indian reservation).

4. In § 2.105, paragraphs (a), (b), (d), and (e) are revised to read as follows:

2.105 Notice of [~~proposed-action~~] Opportunity for hearing

(a) If a hearing is not required by the Act or this Chapter, and if the Commission has not found that a hearing is in the public interest, it will, prior to acting thereon, cause to be published in the FEDERAL REGISTER a notice of [~~proposed-action~~] opportunity for hearing with respect to an application for:

(1) \* \* \*

(2) \* \* \*

(3) \* \* \*

(4) \* \* \*

(b) The notice of [~~proposed-action~~] opportunity for hearing will set forth

(1) \* \* \*

(2) \* \* \*

(c) \* \* \*

(d) The notice of [~~proposed-action~~] opportunity for hearing will provide that within thirty (30) days from the date of publication of the notice in the FEDERAL REGISTER, or such lesser period authorized as the Commission may specify:

(1) The applicant may file a request for a hearing; and

(2) Any person whose interest may be affected by the proceeding may file a [~~petition-for-leave-to-intervene~~] request for a hearing.

(3) Any person's participation as a party in any hearing held on the proposed action shall be limited to the issues specified in the notice of hearing unless the screening Atomic Safety and Licensing Board determines that good cause for considering additional issues is shown in accordance with the provisions of section 2.714.

(e)(1) If no request for a hearing [~~or petition-for-leave-to-intervene~~] is filed within the time prescribed in the notice, the [~~Director-of-Nuclear~~

~~Reactor-Regulation-or-the-Director-of-Nuclear-Material-Safety-and~~  
~~Safeguards,-as-appropriate,]~~ Executive Director for Operations may take the proposed action, inform the appropriate State and local officials, and publish in the FEDERAL REGISTER a notice of issuance of the license or other action.

(2) If a request for a hearing ~~[or-a-petition-for-leave-to-intervene]~~ is filed within the time prescribed in the notice, the screening Atomic Safety and Licensing Board ~~[presiding-officer-who-shall-be-either-an Atomic-Safety-and-Licensing-Board-established-by-the-Commission-or-by-the Chief-Administrative-Judge-of-the-Atomic-Safety-and-Licensing-Board-Panel]~~ will rule on the request ~~[and/or-petition,-and]~~ in accordance with the provisions of section 2.714, ~~[designated-to-rule-on-the-request-of-petition concerning-the-anti-trust-aspects-of-an-application-may-be-either-an Administrative-Law-Judge-or-an-Atomic-Safety-and-Licensing-Board.]~~

\* \* \* \* \*

5. In § 2.106, paragraph (a) is revised to read as follows:

§ 2.106 Notice of Issuance

(a) The ~~[Director-of-Nuclear-Reactor-Regulation-or-Director-of-Nuclear Material-Safety-and-Safeguards,-as-appropriate,]~~ Executive Director for Operations will cause to be published in the FEDERAL REGISTER notice of, and



will inform the State and local officials specified in § 2.104[~~(e)~~](d) of the issuance of:

(1) A license or an amendment of a license for which a notice of opportunity for hearing [~~proposed-action~~] has been previously published; and

(2) An amendment of a license for a facility of the type described in § 50.21(b) or § 50.22 of this chapter, or a testing facility, whether or not a notice of [~~proposed-action~~] opportunity for hearing has been previously published.

\* \* \* \* \*

6. Section 2.700 is revised to read as follows:

§ 2.700 Scope of subpart.

The general rules in this subpart govern procedure in all adjudications initiated by the issuance of an order to show cause, an order pursuant to § 2.205(e), a notice of hearing, a notice of [~~proposed-action~~] opportunity for hearing issued pursuant to § 2.105, or a notice issued pursuant to § 2.102(d)(3).

7. In § 2.700a, paragraph (c) is added to read as follows:

§ 2.700a Exceptions.

\* \* \* \* \*

(c) Notwithstanding any other provisions to the contrary in this Part, in any initial licensing proceeding the Commission may prescribe such procedures as it deems necessary. The notice of opportunity for hearing or notice of hearing will specify the procedures.

8. In § 2.703, paragraph (a) is revised to read as follows:

§ 2.703 Notice of hearing.

(a) In a proceeding in which the terms of a notice of hearing are not otherwise prescribed by this part, the order or notice of hearing will state:

(1) The nature of the hearing, and its time and place, or a statement that the time and place will be fixed by subsequent order;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law asserted or to be considered; and

(4) The time within which an answer or petition for leave to intervene shall be filed.

\* \* \* \* \*

9. In § 2.704, paragraphs (a) and (d) are revised to read as follows:

§2.704 Designation of presiding officer, disqualification, unavailability

(a) The Commission may provide in the notice of hearing that one or more members of the Commission, an administrative law judge, an atomic safety and licensing board, or a named officer who has been delegated final authority in the matter, shall preside. If the Commission does not so provide, the Chairman of the Atomic Safety and Licensing Board Panel will issue an order designating an atomic safety and licensing board appointed pursuant to section 191 of the Atomic Energy Act of 1954, as amended, or, if the Commission has not provided for the hearing to be conducted by an atomic safety and licensing board, the Chief Administrative Law Judge will issue an order designating an administrative law judge appointed pursuant to section 3105 of title 5 of the United States Code.

(b) \* \* \*

(c) \* \* \*

(d) If a presiding officer or a designated member of an atomic safety and licensing board becomes unavailable during the course of a hearing, the Commission, the Chief Administrative Law Judge, or the Chairman of the Atomic Safety and Licensing Board Panel, as appropriate, will designate another presiding officer or atomic safety and licensing board member. If he becomes unavailable after the hearing has been concluded:

(1)(i) The Commission or the Chief Administrative Law Judge, as appropriate may designate another presiding officer to make the decision; or

\* \* \* \* \*

10. Section 2.714 is revised to read as follows:

**2.714 Requests For Hearings and Petitions to Intervene.**

**(a) Requests For Hearings.**

Any person whose interest may be affected in a proceeding noticed pursuant to §§ 2.102(d)(3), 2.105, 2.202 or 2.204 may file a written request for hearing which includes the information specified in paragraph (d) of this section. The request shall be filed within the time specified in paragraph (c) of this section. The requestor must also file a list of the contentions which the requestor seeks to have litigated in the hearing within the time specified in paragraph (g) of this section.

**(b) Petitions to Intervene.**

Any person whose interest may be affected by a proceeding in which a notice of hearing has been published and who desires to participate as a party in such a proceeding shall file a written petition for intervention which includes the information specified in paragraph (d) of this section. The petition shall be filed within the time specified in paragraph (c) of this section. The petitioner must also file a list of the contentions which petitioner seeks to have litigated in the hearing within the time specified in paragraph (g) of this section.

**(c) Time For Filing Requests for Hearing and Petitions to Intervene**

(1) A request for hearing shall be filed not later than the time specified in the notice of opportunity for hearing or notice published pursuant to §§ 2.102(d)(3), 2.202 or 2.204.

(2) A petition for leave to intervene shall be filed not later than the time specified in the notice of hearing.

(3) Non-timely filings will not be entertained absent a determination by the Commission or the presiding officer designated to rule on the intervention petition or request for hearing, that the intervention or hearing should be granted based upon a balancing of the following factors in addition to those set out in paragraph (f) of this section:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the requestor's or petitioner's interest will be protected.

(iii) The extent to which the requestor's or petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the requestor's or petitioner's interest will be represented by existing parties.

(v) The extent to which the requestor's or petitioner's participation will broaden the issues or delay the proceeding.

(d) Contents of Request for Hearing or Petition to Intervene

(1) A request for hearing or petition to intervene shall be filed with the Secretary of the Commission and served on such others as may be specified



in the notice. It shall be filed in the format required by § 2./08 and shall set forth with particularity:

(i) The nature of the requestor's or petitioner's right under the Act to be made a party to the proceeding.

(ii) The nature and extent of the requestor's or petitioner's property, financial or other interest which could be affected by the outcome of the proceeding.

(iii) The possible effect of any order which may be entered in the proceeding on the requestor's or petitioner's interest.

(e) Answer to Request For Hearing or Petition to Intervene.

The applicant or licensee and any party to the proceeding may file an answer to a petition for leave to intervene or request for a hearing within ten (10) days after service of the request or petition. The staff may file an answer within fifteen (15) days after service of the request for hearing or the petition.

(f) Ruling on Request For Hearing or Petition to Intervene.

The Commission or the presiding officer designated to rule on the intervention petition or request for hearing shall, in ruling on the request or petition shall consider the following factors, among other things:

(i) The nature of the requestor's or petitioner's right under the Act to be made a party to the proceeding.

(ii) The nature and extent of the requestor's or petitioner's property, financial, or other interest in the proceeding.

(iii) The possible effect of any order which may be entered in the proceeding on the requestor's or petitioner's interest.

No request for hearing or petition to intervene may be granted unless the Commission or the presiding officer designated to rule on the request or petition determines that the requestor or the petitioner meets judicial standards for standing.

(g) Filing of Contentions

(1) The requestor or the petitioner shall also file a list of the contentions which the requestor or the petitioner seeks to have litigated in the hearing. Each contention shall consist of a specific statement of the issue of law, fact or policy to be raised or controverted. In addition, except for contentions advanced in enforcement proceedings noticed under §§ 2.105, 2.202 or 2.204, the requestor or the petitioner must provide the following information with respect to each contention:

(i) A brief explanation of the bases of the contention.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and which at the time of the filing the requestor or petitioner intends to rely upon in proving its contention at the hearing, together with references to the specific sources and documents of which petitioner is aware which will be relied on to establish such facts or expert opinion.

(iii) Sufficient information (which may include information pursuant to (i) and (ii) above) to show that a genuine dispute exists with the applicant on an issue of law, fact or policy. This showing must include references to the specific portions of the application (including the applicant's environmental and safety report) which the requestor or petitioner disputes and the supporting reasons for each such dispute, or, if the requestor or petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each such failure and the supporting reasons for the requestor's or petitioner's belief. On issues arising under NEPA, a petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement or appraisal that differ significantly from the data or conclusions in the applicant's document. Amended or new contentions based on NRC environmental documents shall be filed and ruled upon in initial licensing proceedings in accordance with paragraph (j) of this section.

(2) The information required by paragraph (1) shall be filed at the time the petition or request is filed.

(3) Non-timely filing of the information required by paragraph (1) will not be entertained absent a determination by the Commission or the presiding officer designated to rule on the admissibility of contentions that the

filing should be permitted based upon a balancing of the factors set out in paragraph (c)(3) of this section.

(4) A requestor or petitioner that fails to comply with the requirements of (g)(1) with respect to at least one contention will not be permitted to participate as a party.

h. Response to Contentions

The applicant or licensee and any party to a proceeding may file an answer to the contentions within ten (10) days after service of the contentions. The staff may file such an answer within fifteen (15) days after service of the contentions.

i. Admissibility of Contentions

The Commission or the presiding officer designated to rule on the admissibility of contentions shall refuse to admit a contention if:

(1)(i) the contention and supporting material fail to satisfy the requirements of paragraph (g) of this section. In determining whether a genuine dispute exists on a material issue of law, fact or policy, the Commission or the presiding officer shall consider whether the information presented pursuant to paragraph (g) of this section prompts reasonable minds to inquire further as to the validity of the contention; or

(ii) it appears unlikely that petitioner can prove a set of facts in support of its contention; or

(iii) the contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.

(iv) A contention raising only an issue of law shall not be admitted for resolution in an evidentiary hearing, but rather, shall be decided on the basis of briefs and/or oral argument as directed by the Commission or presiding officer.

j. Rulings on Contentions in Initial Licensing Proceedings by the Screening Atomic Safety and Licensing Board

(1) Requests for Hearings

The screening atomic safety and licensing board shall rule on requests for hearing and contentions contained in the requests in all initial licensing proceedings. After providing the staff and the licensee or license applicant an opportunity to respond to the request for hearing in accordance with paragraphs (e) and (h) of this section, the screening atomic safety and licensing board shall issue an order granting or denying, in whole or in part, each request for hearing and contention therein. An order granting a request for a hearing shall specify the parties to the proceeding and the issues in controversy.



(2) Petitions to Intervene

(i) The screening atomic safety and licensing board shall rule on petitions to intervene and the contentions contained in the petitions which are filed in all initial licensing proceedings in which a notice of hearing has been published. The screening atomic safety and licensing board shall issue an order granting or denying, in whole or in part, each petition and contention therein. An order granting a petition shall specify the parties to the proceeding and the issues admitted to the proceeding.

(ii) Issues not specified in the notice of hearing shall not be admitted to the proceeding unless the screening atomic safety and licensing board first determines that such issues should be admitted based upon a balancing of the factors set out in paragraph (c)(3) of this section.

(k)(1) An order permitting intervention and/or directing a hearing may be conditioned on such terms as the Commission or the presiding officer may direct in the interests of: (A) restricting irrelevant, duplicative, or repetitive evidence and argument, (B) having common interests represented by a spokesperson, and (C) retaining authority to determine priorities and control the scope of the hearing.

(k)(2) In any case in which, after consideration of the factors set forth in this paragraph, the Commission or the presiding officer finds that the petitioner's interest is limited to one or more of the issues involved in

the proceeding, any order allowing intervention shall limit his participation accordingly.

(l) Unless otherwise expressly provided by the Commission, the granting of a petition for leave to intervene and/or hearing request does not enlarge upon the scope of issues specified in the notice of hearing or notice of opportunity for hearing.

(m) A person permitted to intervene becomes a party to the proceeding, subject to any limitations imposed pursuant to paragraph (k) of this section.

11. Section 2.714a is amended by revising paragraph (a) to read as follows:

§ 2.714a Appeals from 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 [~~of 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 [~~Atomic-Safety-and-Licensing-Appeal-Board~~] 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.

★ ★ ★ ★ ★

12. In § 2.715, paragraph (c) is revised to read as follows:

§ 2.715 Participation by a person not a party

★ ★ ★ ★ ★

(c) The presiding officer will afford representatives of an interested State, county, municipality, and/or agencies thereof, a reasonable opportunity to participate and to introduce evidence, interrogate witnesses as authorized under §2.743 and advise the Commission without requiring the representative to take a position with respect to the issue. Such participants may also file proposed findings and exceptions pursuant to §§2.754 and 2.762 and petitions for review by the Commission pursuant to §2.786. The presiding officer may require such representative to indicate with reasonable specificity, in advance of the hearing, the subject matters on which he desires to participate.

13. Section 2.715a is revised to read as follows:

§2.715a Consolidation of parties in [~~construction-permit-or-operating~~  
~~license~~] initial licensing proceedings.

On motion or on its or his own initiative, the Commission or the presiding officer shall, after first affording the parties an opportunity to consolidate voluntarily and absent a showing by a party subject to consolidation that its rights would be prejudiced, [may] order any parties in an initial licensing proceeding [for the issuance of a construction permit ~~or an operating license for a production or utilization facility~~] who have substantially the same interest that may be affected by the proceeding and who raise substantially the same questions, to consolidate their presentation of evidence, cross-examination, briefs, proposed findings of fact, and conclusions of law and argument [~~However, it may not order any consolidation that would prejudice the rights of any party.~~] A consolidation under this section may be for all purposes of the proceeding, all of the issues of the proceeding, or with respect to any one or more issues thereof.

14. In § 2.717, paragraph (a) is revised to read as follows:

§ 2.717 Commencement and termination of jurisdiction of presiding officer.

(a) Unless otherwise ordered by the Commission, the jurisdiction of the presiding officer designated to conduct a hearing over the proceeding, including motions and procedural matters, commences when the proceeding commences. If no presiding officer has been designated, the Chief Administrative Law Judge has such jurisdiction or, if he is unavailable, another administrative law judge has such jurisdiction. A proceeding is deemed to commence when a notice of hearing or a notice of [~~proposed action~~]

opportunity for hearing pursuant to § 2.105 is issued. When a notice of hearing provides that the presiding officer is to be an administrative law judge, the Chief Administrative Law Judge will designate by order the administrative law judge who is to preside. The presiding officer's jurisdiction in each proceeding will terminate upon the expiration of the period within which the Commission may direct that the record be certified to it for final decision, or when the Commission renders a final decision, or when the presiding officer shall have withdrawn himself from the case upon considering himself disqualified, whichever is earliest.

\* \* \* \* \*

15. In § 2.720, paragraph (h)(2)(ii) is revised to read as follows:

§ 2.720 Subpoenas.

\* \* \* \* \*

(h) \* \* \*

(1) \* \* \*

(2)(i) \* \* \*

(ii) In addition, a party may file with the presiding officer written interrogatories to be answered by NRC personnel with knowledge of the facts designated by the Executive Director for Operations. Upon a finding by the presiding officer that answers to the interrogatories are necessary to a



proper decision in the proceeding and that answers to the interrogatories are not reasonably obtainable from any other source, such as from the Commission's Public Document Room or Local Public Document Rooms, the presiding officer may require that the staff answer the interrogatories. Such interrogatories may seek to elicit factual information reasonably related to the NRC staff's position in the proceeding, including data used, assumptions made, and analyses performed by the NRC staff. Such interrogatories shall not, however, be addressed to, or be construed to require, (1) reasons for not using alternative data, assumptions, and analyses, where such alternative data, assumptions, and analyses were not relied on in the staff review, or (2) performance of additional research or analytical work beyond that which is needed to support the staff's position on any particular matter.

\* \* \* \* \*

16. In § 2.721, paragraph (a) is redesignated as paragraph (a)(i), paragraph (a)(ii) is added, paragraph (d) is revised and paragraph (e) is added to read as follows:

§2.721 Atomic Safety and Licensing Boards

\* \* \*

(a)(ii) The Commission or the Chairman of the Atomic Safety and Licensing Board Panel shall establish one or more screening atomic safety and licensing boards in the manner described in subsection (a)(i). The screening atomic safety and licensing board shall rule on all requests for

hearing and petitions for leave to intervene in initial licensing proceedings, shall rule upon and refer admissible contentions to the appropriate forum for resolution in accordance with the provisions of this chapter, may designate issues to be heard by an expert panel pursuant to § 2.722 and shall perform such other adjudicatory functions as the Commission deems appropriate:

\* \* \*

(d) An atomic safety and licensing board, including a screening atomic safety and licensing board, shall have the duties and may exercise the powers of a presiding officer as granted by § 2.718 and otherwise in this part. At any time when such a board is in existence but is not actually in session, any powers which could be exercised by a presiding officer or by the Chief Administrative Law Judge may be exercised with respect to such a proceeding by the chairman of the board having jurisdiction over it. Two members of an atomic safety and licensing board constitute a quorum, if one of those members is the member qualified in the conduct of administrative proceedings.

(e) Nothing in this section limits the discretion of the Commission to designate one or more administrative law judges appointed pursuant to section 3105 of title 5 of the United States Code to preside in proceedings for granting, suspending, revoking, or amending licenses or authorizations and to perform such other adjudicatory functions as the Commission deems appropriate.

17. In section 2.722, paragraphs (c) and (d) are added to read as follows:

§ 2.722 Special assistants to the presiding officer and expert panels.

\* \* \*

(c) In consultation with the Panel Chairman, the presiding officer may appoint an expert panel of one, three or five experts with specific subject matter expertise. Panel members may be selected from inside or outside the Commission. Such appointments may occur at any appropriate time during the proceeding but shall, at the time of the appointment, be subject to the notice and disqualification provisions as described in § 2.704. The expert panel, with the presiding officer designated to conduct the hearing, will hear evidentiary presentations by the parties on the specific issues related to the subject matter for which the panel possesses special expertise and may examine the witnesses of the parties as a technical interrogator. The panel will advise the presiding officer of its conclusions on the specific issues through an on-the-record report. This report is advisory only; the presiding officer shall retain final authority on issues for which the expert panel was designated. In the case of an expert panel appointed to assist a screening board, the panel shall assist the board in determining whether a sufficient showing has been made to admit a particular contention(s).

18. Section 2.730 is amended by revising paragraph (e) and adding paragraph (i) to read as follows:

§ 2.730 Motions.

\* \* \*

(e) The [Board] presiding officer may dispose of written motions either by written order or by ruling orally during the course of a prehearing conference or hearing. The presiding officer [Board] should ensure that parties not present for the oral ruling are notified promptly of the order.

\* \* \*

(i) Uncontroverted motions. If no party controverts the grounds asserted and the relief sought by the movant within the time prescribed in subsection (c) of this section, the presiding officer shall grant the motion to the extent authorized by law.

19. Section 2.733 is revised to read as follows:

§2.733 Examination by experts.

Subject to the requirements of §2.743, a party may request the presiding officer to permit a qualified individual who has scientific or technical training or experience to participate on behalf of that party in the examination and cross-examination of expert witnesses. The presiding officer may

permit such individual to participate on behalf of the party in the examination and cross-examination of expert witness where it would serve the purpose of furthering the conduct of the proceeding. Upon finding (a) that the individual is qualified by scientific or technical training or experience to contribute to the development of an adequate decisional record in the proceeding by the conduct of such examination, (b) that the individual has read any written testimony on which he intends to examine or cross-examine and any documents to be used or referred to in the course of the examination or cross-examination, and (c) that the individual has prepared himself to conduct a meaningful and expeditious examination or cross-examination. Examination or cross-examination conducted pursuant to this section shall be limited to areas within the expertise of the individual conducting the examination or cross-examination. The party on behalf of whom such examination or cross-examination is conducted and his attorney shall be responsible for the conduct of examination or cross-examination by such individuals.

20. Section 2.740 is amended by redesignating paragraph (b)(2) as (b)(3), adding a new paragraph (b)(2), revising paragraph (c) and adding paragraph (g) to read as follows:

§ 2.740 General provisions governing discovery.

\* \* \* \* \*

(b) Scope of discovery.

(1) \* \* \*



(2) Supervision of discovery. The frequency or extent of use of the discovery methods set forth in paragraph (a) of this section may be limited by the presiding officer if he or she determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or obtainable from some other formal or informal source or method that is either more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, given the needs of the case, and the number and complexity of the issues in controversy. The presiding officer may act upon its own initiative or pursuant to a motion under paragraph (c) of this section to specifically limit the use of discovery, for example, the number of interrogatories any party may serve.

~~[(2)]~~(3) Trial preparation materials. A party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (1) of this paragraph and prepared in anticipation of or for the hearing by or for another party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the presiding officer shall protect against disclosure of the mental impressions, conclu-

sions, opinions, or legal theories of an attorney or other representative of a party concerning the proceeding.

(c) Protective order. Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the presiding officer may [make-any] issue an order to further any of the purposes of paragraph (b) of this section, or which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) That the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters may be inquired into, or that the scope of discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the presiding officer; (6) that, subject to the provisions of §§ 2.744 and 2.790, a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (7) that studies and evaluations not be prepared. If the motion for a protective order is denied in whole or in part, the presiding officer may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

\* \* \*

(g) Signing of Discovery Requests, Responses, and Objections. Every request for discovery, response, or objection thereto, or motion for a pro-

jective order, shall be signed by the party or its authorized representative pursuant to § 2.713 and shall include the party's or representative's address. The signature of the attorney or other authorized representative constitutes a certification that he or she has read the request, response, objection, or motion and that it is (1) to the best of his or her knowledge, information, or belief formed after a reasonable inquiry, consistent with these rules; (2) filed in good faith and not primarily to cause delay or for any other improper purpose; and (3) insofar as discovery is requested, not unduly burdensome or expensive, given the needs of the case, its nature and complexity, and the discovery already had in the case. If a request, response, or objection is not signed it shall be of no effect. If a certification is falsely made in violation of this paragraph, the presiding officer, where appropriate and upon motion or upon its own initiative, shall impose upon the person who made the certification or the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction pursuant to § 2.707 or 2.713.

21. Section 2.743 is amended by revising paragraphs (a), (b), (c) and (d) to read as follows:

§2.743 Evidence.

(a) General. Every party to a proceeding shall have the right to present written [~~such-oral~~] or documentary evidence and written rebuttal evidence under oath or affirmation. Oral evidence and/or cross-examination

of oral or written evidence will be allowed only as provided in subsection (b) below, provided, however, that every party to a proceeding under Subpart B for modification, suspension, or revocation of a license, or imposition of a civil penalty shall have the right to present such oral evidence and rebuttal evidence and conduct such cross-examination as may be required for full and true disclosure of the facts.

(b) [Written] Testimony and Cross-examination.

(1) The parties shall submit all direct and rebuttal testimony of witnesses, in written form, unless otherwise ordered by the presiding officer [on-the-basis-of-objection-presented] upon a showing of good cause that oral presentation of the evidence on any particular fact is reasonably necessary for the efficient identification, clarification and resolution of issues.

[In-any-proceeding-in-which-advance-written-testimony-is-to-be-used, each-party-shall-serve-copies-of-its-proposed-written-testimony-on-each other-party-at-least-fifteen-(15)-days-in-advance-of-the-session-of the-hearing-at-which-its-testimony-is-to-be-presented---The-presiding officer-may-permit-the-introduction-of-written-testimony-not-so-served, either-with-the-consent-of-all-parties-present-or-after-they-have-had-a reasonable-opportunity-to-examine-it.]

(2) If good cause is shown the presiding officer may schedule the taking of oral evidence either by deposition or by presiding at a hearing session where a transcript of oral testimony and cross-examination is made.

(3) The presiding officer may set dates for the filing of testimony on each factual issue in controversy as follows:

(A) The license applicant shall file written direct testimony first.

(B) All parties other than the license applicant shall file their written direct testimony on said issue not later than 20 days after the date of filing of the testimony under the preceding subsection.

(C) All written rebuttal testimony shall be filed no later than 20 days after the date of the filing of the testimony under the preceding subsection.

(D) The presiding officer may allow such additional rounds of testimony as deemed necessary to develop an adequate record.

(4) Written testimony shall be incorporated in the [~~transcript-of-the~~] record as if read or, in the discretion of the presiding officer, may be offered and admitted in evidence as an exhibit.

(5) A party may submit a request to cross-examine on any issue of material fact by filing a written motion within 10 days after service of the written testimony concerning the issue. A party may request to cross-examine only as to issues of material fact germane to the subject matter of an admitted contention advanced by that party; provided, however, the staff, license applicant or a governmental representative admitted pursuant to



§ 2.715 may move to cross-examine on any admitted contention in the proceeding. The motion shall specify: (i) the disputed issue of material fact regarding which cross-examination is requested, (ii) a description in the nature of an offer of proof (see subsection (e) of this section) of what the movant will establish by the cross-examination (iii) a statement as to why the cross-examination will result in resolving the issue of material fact involved, (iv) a statement as to why written testimony could not establish the same points, (v) a cross-examination plan consisting of a proposed line of questions along with postulated answers which might reasonably be anticipated and which may logically lead to achieving the objective of the cross-examination, (vi) an estimate of time necessary to complete the cross-examination and (vii) the name of the individual who shall conduct the cross-examination.

(6) Answers to a motion for cross-examination may be filed by other parties within 10 days after service of the motion.

(7) The presiding officer shall promptly issue an order granting, denying or conditioning the request for cross-examination. If the request is granted the order shall specify:

(i) the issues on which cross-examination is granted;

(ii) the person(s) allowed to conduct cross-examination, and time allowed;

(iii) the date, time and place of the hearing at which cross-examination shall take place; and

(iv) that the party sponsoring the witness(es) subject to cross-examination shall be allowed a reasonable amount of time for oral redirect examination immediately following the cross-examination.

(8) The cross-examination plan submitted to the presiding officer shall be kept in confidence until the completion of the cross-examination, if granted, at which time it shall be physically inserted in the record.

(9) This subsection does not apply to proceedings under Subpart B for modification, suspension, or revocation of a license, or the imposition of a civil penalty.

(c) Admissibility.

The presiding officer shall admit only relevant, material, and reliable evidence which is not unduly repetitious [will-be-admitted]. Immaterial or irrelevant parts of an admissible document will be segregated and excluded [se-far-as-is] if practicable.

(d) Objections.

An objection to the admission of evidence shall briefly state the grounds of objection. Unless oral presentation of the evidence has been ordered by the presiding officer, objections to written testimony filed pursuant to subsection (b) shall be made within 10 days after service of the objectionable testimony in accordance with the provisions of § 2.730 or the objections shall be deemed waived. The presiding officer shall rule on

the objections promptly. Unless otherwise ordered by the presiding officer,  
the filing of objections shall not extend the time for filing written testi-  
mony. The transcript or record of the proceeding shall include the objection,  
the grounds, and the ruling. Exception to an adverse ruling is preserved  
without notation on the record.

\* \* \* \* \*

22. In § 2.749, paragraphs (a) and (d) are revised to read as follows:

§2.749 Authority of presiding officer to dispose of certain issues on the  
pleadings.

(a) Any party to a proceeding may move, with or without supporting,  
affidavits, for a decision by the presiding officer in that party's favor as  
to all or any part of the matters involved in the proceeding. There shall be  
annexed to the motion a separate short and concise statement of the material  
facts as to which the moving party contends that there is no genuine issue  
to be heard. Motions may be filed at any time. [~~shall be filed within such  
time as may be fixed by the presiding officer~~]. Any other party may serve  
as an answer supporting or opposing the motion, with or without affidavits,  
within twenty (20) days after service of the motion. There shall be annexed  
to any answer opposing the motion a separate, short and concise statement of  
the material facts as to which it is contended that there exists a genuine  
issue to be heard. All material facts set forth in the statement required  
to be served by the moving party will be deemed to be admitted unless contro-

verted by the statement required to be served by the opposing party. The opposing party may within ten days after service respond in writing to new facts and arguments presented in any statement filed in support of the motion. No further supporting statements or responses thereto shall be entertained. ~~[The board may dismiss summarily motions filed shortly before the hearing commences or during the hearing if the other parties or the board would be required to divert substantial resources from the hearing in order to respond adequately to the motion.]~~

(b) \* \* \*

(c) \* \* \*

(d) The presiding officer shall render the decision sought if the filings in the proceeding, depositions, answers to interrogatories, and admissions on file, together with the statements of the parties and the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law. ~~[However, if any proceeding involving a construction permit for a production or utilization facility, the procedure described in this section may be used only for the determination of specific subordinate issues and may not be used to determine the ultimate issue as to whether the permit shall be issued.]~~

23. In § 2.752, paragraph (a)(5) is revised to read as follows:

§2.752. Prehearing Conference

(a) \* \* \*

(5) The setting of a hearing schedule, including a schedule for the filing of direct and rebuttal testimony; and

\* \* \* \* \*

24. In § 2.752, paragraph (c) is revised to read as follows:

§ 2.752 Prehearing conference.

\* \* \* \* \*

(c) The presiding officer shall enter an order which recites the action taken at the conference, the amendments allowed to the pleadings and agreements by the parties, and which limits the issues or defines the matters in controversy to be determined in the proceeding. Objections to the order may be filed by a party within five (5) days after service of the order, except that the regulatory staff may file objections to such order within ten (10) days after service. Parties may not file replies to the objections unless the [beard] presiding officer so directs. The filing of objections shall not stay the decision unless the presiding officer so orders. The [beard] presiding officer may revise the order in the light of the objections presented and, as permitted by § 2.718(i) may certify for determination to the Commission or the Atomic Safety and Licensing Appeal Board, as appropriate, such matters raised in the objections as it deems appropriate. The order



shall control the subsequent course of the proceeding unless modified for good cause.

25. In § 2.754, paragraph (c) is revised to read as follows:

§2.754 Proposed findings and conclusions.

\* \* \* \* \*

(c) Proposed findings of fact shall be clearly and concisely set forth in numbered paragraphs and shall be confined to the material issues of fact presented on the record, with exact citations to the transcript of record and exhibits in support of each proposed finding. Proposed conclusions of law shall be set forth in numbered paragraphs as to all material issues of law or discretion presented on the record. Proposed findings of fact and conclusions of law submitted by a person who does not have the burden of proof and who has only a limited interest in the proceeding [~~may~~] shall be confined to matters which affect his interests.

26. Section 2.757 is revised to read as follows:

§2.757 Authority of presiding officer to regulate procedures in a hearing.

To prevent unnecessary delays or an unnecessarily large record, the presiding officer [~~may~~] shall, consistent with § 2.743:

- (a) Limit the number of witnesses whose testimony may be cumulative;
- (b) Strike argumentative, repetitious, cumulative, or irrelevant evidence;
- (c) Take necessary and proper measures to prevent argumentative, repetitious, or cumulative cross-examination; and
- (d) Impose such time limitations on arguments as he determines appropriate, having regard for the volume of the evidence and the importance and complexity of the issues involved.

27. Section 2.758a is added to read as follows:

§ 2.758a Codification of Generic Factual Issues Resolved in Initial Licensing Proceedings.

(a) Within 15 days after a generic factual issue(s) is resolved in an initial licensing proceeding, the presiding officer who conducted the hearing shall inform the Executive Director for Operations in writing of the factual basis upon which such issue(s) was resolved. For purposes of this section, a generic factual issue means a controverted issue of fact which is common to facilities of similar type or design and which is the subject of an evidentiary presentation before a presiding officer which is not dismissed on motion or settled by stipulation of the parties. A generic issue is considered resolved at the earlier of the time when 1) the decision of the presiding officer has become the final agency action; or 2) the opportunity

for a party to seek agency review of the presiding officer's finding on the generic fact has passed and no party has sought review.

(b) Within 15 days after receipt of the notification, the Executive Director for Operations shall prepare and transmit a notice of proposed rulemaking to the Commission which is consistent with the requirements set forth in subpart H of this Part. The notice shall provide for a 45-day period for public comment.

(c) Within 45 days after the close of the public comment period and after due consideration of the comments, the Commission shall take such further action on the proposed rule as it deems appropriate.

28. Section 2.760a is revised to read as follows:

§ 2.760a Initial decisions in contested proceedings on applications for facility operating licenses.

In any initial decision in a contested proceeding on an application for an operating license for a production or utilization facility, the presiding officer shall make findings of fact and conclusions of law on the matters put into controversy by the parties to the proceeding and on matters which have been determined to be the issues in the proceeding by the Commission or the presiding officer. Where the presiding officer determines that a serious safety, environmental, or common defense and security matter

exists and has not been put into controversy by the parties, he or she shall certify the matter to the screening atomic safety and licensing board with an explanatory statement. This authority is to be used sparingly. The screening atomic safety and licensing board shall determine whether the matter should be examined and decided by the presiding officer or may take such other action as may be appropriate. ~~[Depending-on-the-resolution of-these-matters,]~~ ~~[t]~~The Executive Director for Operations, ~~[Director-of Nuclear-Reactor-Regulation-or-Director-of-Nuclear-Material-Safety-and Safeguards-as-appropriate,]~~ ~~[and]~~ after making the requisite findings, will issue, deny, or appropriately condition the license.

29. In § 2.762, paragraph (a) is revised to read as follows:

§ 2.762 Appeals to the Commission from initial decisions.

(a) Within ten (10) days after service of an initial decision any party may take an appeal to the Commission by ~~[the]~~ filing of exceptions to that decision or designated portions thereof. Exceptions submitted by a party who does not have the burden of proof or who has only a limited interest in the proceeding shall be confined to issues which that party placed in controversy or sought to place in controversy in the proceeding. Each exception shall be separately numbered and shall (1) state concisely, without supporting argumentation, the single error of fact or law which is being asserted in that exception; and (2) identify with particularity the portion of the decision (or earlier order or ruling) to which the exception is addressed. A brief in support of

the exceptions shall be filed within thirty (30) days thereafter (forty (40) days in the case of the staff). The brief shall be confined to a consideration of the exceptions previously filed by the party and, with respect to each exception, shall specify, inter alia, the precise portion of the record relied upon in support of the assertion of error.

\* \* \* \* \*

30. In § 2.764, paragraphs (a) and (b) are revised and paragraphs (e) and (f) are removed 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) and (d) [~~through-(f)~~] of this section, or as otherwise ordered by the Commission in special circumstances an initial decision [~~directing~~] relating to 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 exceptions filed by any party pursuant to § 2.762 or upon its own motion.

(b) Except as provided in paragraphs (c) and (d) [~~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,]~~ the Executive Director for Operations, notwithstanding the filing of exceptions, 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.

(c) \* \* \*

(d) \* \* \*

31. Section 2.785 is removed.

§ 2.785 Functions of Atomic Safety and Licensing Appeal Boards. [removal]

32. Section 2.786 is removed.

§ 2.786 Review of decisions and actions of an Atomic Safety and Licensing Appeal Board. [removal]

33. Section 2.787 is removed.

§ 2.787 Composition of Atomic Safety and Licensing Appeal Boards. [removal]

34. In § 2.788, paragraph (b)(3) is removed, paragraph (b)(4) is redesignated paragraph (b)(3), and paragraphs (a), (c), (e), (f), (g) and (h) are revised to read as follows:

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

(a) Within ten (10) days after service of a decision or action 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 an appeal [~~or petition for review~~] [~~Except as provided in paragraph (f) of this section, such~~] An application for a stay may be filed with the Commission [~~Atomic-Safety-and-Licensing-Appeal-Board~~] or the presiding officer.

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

(1) \* \* \*

(2) \* \* \*

[~~(3) In the case of an application to the Commission for stay of decisions or actions by an Atomic-Safety-and-Licensing-Appeal-Board, a statement where (including record citation, if available) a stay was requested from the Appeal Board and denied, -- if no such request was made of~~

~~the Appeal Board, the application should state why it could not have been made, and]~~

(3) [4] 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. telegram, mail, as the method for filing the application with the Commission[~~Atomic Safety and Licensing Appeal Board,~~] or the presiding officer

(e) In determining whether to grant or deny an application for a stay, the Commission[~~Atomic Safety and Licensing Appeal Board,~~] or presiding officer will consider:

(1) \* \* \*

(2) \* \* \*

(3) \* \* \*

(4) \* \* \*

(f) [An application to the Commission for a stay of a decision or action by an Atomic Safety and Licensing Appeal Board will be denied if a stay was not, but could have been, sought before the Appeal Board.] An application for a stay of a decision or action of a presiding officer may be filed before

either the [~~Atomic-Safety-and-Licensing-Appeal-Board~~] Commission or the presiding officer, but not both at the same time.

(g) In extraordinary cases, where prompt application is made under this section, the Commission[~~,-Atomic-Safety-and-Licensing-Appeal-Board,-~~] 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 telegram. Any party applying under this paragraph shall make all reasonable efforts to inform the other parties of the application, orally if made orally.

(h) A party may file an application for a stay of a decision or action granting or denying a stay. As to a decision or action of a presiding officer, the application shall be filed with the [~~Atomic-Safety-and-Licensing Appeal-Board~~] Commission. [~~As-to-a-decision-or-action-of-the-Atomic-Safety-and Licensing-Appeal-Board,-Atomic-Safety-and-the-application-shall-be-filed-with the-Commission,-~~] In each case the procedures and criteria of paragraphs 2.788(a)-(e) shall be followed.

34. Appendix A to Part 2 is removed.

35. The authority citation for Part 50 reads as follows:

Authority: Secs. 103, 104, 161, 182, 183, 189, 68 Stat. 936, 937, 948, 953, 954, 955, 956, as amended (42 U.S.C. 2133, 2134, 2201, 2232, 2233,

2239); Secs. 201, 202, 206, 88 Stat. 1243, 1244, 1246), unless otherwise noted. Section 50.78 also issued under Sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80-50.81 also issued under Sec. 184, 68 Stat. 954 as amended; (42 U.S.C. 2234). Sections 50.100-50.102 issued under Sec. 186, 68 Stat. 955; (42 U.S.C. 2236). For the purposes of Sec. 223, 68 Stat. 958, as amended; (42 U.S.C. 2273), § 50.54(i) issued under sec. 161i 68 Stat. 949; (42 U.S.C. 2201(i)), §§ 50.70, 50.71, 50.78 issued under sec. 161o, 68 Stat. 950, as amended; (42 U.S.C. 2201(o)) and the Laws referred to in Appendices.

36. In § 50.10, paragraphs (e)(1), (e)(3)(i) are revised to read as follows:

§ 50.10 License required.

\* \* \* \* \*

(e)(1) The [~~Director of Nuclear Reactor Regulation~~] Executive Director for Operations may authorize an applicant for a construction permit for a utilization facility which is subject to § 51.5(a) of this chapter, and is of the type specified in § 50.21(b)(2) or is a testing facility to conduct the following activities: (i) Preparation of the site for construction of the facility (including such activities as clearing, grading, construction of temporary access roads and borrow areas); (ii) installation of temporary construction support facilities (including such items as warehouse and shop facilities, utilities, concrete mixing plants, docking and unloading facilities, and construction support buildings); (iii) excavation for facility structures; (iv) construction of service facilities (including such



facilities as roadways, paving, railroad spurs, fencing, exterior utility and lighting systems, transmission lines, and sanitary sewerage treatment facilities; and (v) the construction of structures, systems, and components which do not prevent or mitigate the consequences of postulated accidents that could cause undue risk to the health and safety of the public. No such authorization shall be granted unless the staff has completed a final environmental impact statement on the issuance of the construction permit as required by Part 51 of this chapter.

\* \* \*

3(i) The [~~Director of Nuclear Reactor Regulation~~] Executive Director for Operations may authorize an applicant for a construction permit for a utilization facility which is subject to § 51.5(a) of this chapter, and is of the type specified in §§ 50.21(b)(2) and (3) or 50.22 or is a testing facility to conduct, in addition to the activities described in paragraph (e)(1) of this section, the installation of structural foundations, including any necessary subsurface preparation, for structures, systems and components which prevent or mitigate the consequences of postulated

accidents that could cause undue risk to the health and safety of the public.

★ ★ ★ ★ ★

Dated at Washington, D.C. this \_\_\_\_ day of \_\_\_\_, 1982.

For the Nuclear Regulatory Commission

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Samuel J. Chilk  
Secretary of the Commission

Chapter 5

Proposed Rulemaking  
to amend Commission  
policy on Separation  
of Functions and  
Ex Parte Communica-  
tions - 10 CFR 2

NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

Separation of Functions and Ex Parte Communications  
in On-The-Record Adjudications

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Proposed Rule.

SUMMARY: The Nuclear Regulatory Commission is proposing to amend its Rules of Practice regarding Separation of Functions and Ex Parte communications in on-the-record adjudications. Two options are presented.

DATES: Comment period expires \_\_\_\_\_\*, 1982. Comments received after this date will be considered if it is practical to do so but consideration cannot be assured except as to comments received on or before this date.

ADDRESSES: Written comments should be submitted to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555,

ATTN: Docketing and Service Branch. Copies of all comments received may be examined and copied for a fee in the Commission's Public Document Room at 1717 H Street, N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: James R. Tourtellotte, Chairman, Regulatory Reform Task Force, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555; Telephone: (202) 634-3300.

\*Insert date 30 days after date of publication in Federal Register.



SUPPLEMENTARY INFORMATION:

The Commission is considering changing its rules pertaining to separation of functions and ex parte to allow greater flexibility to the Commission in communicating with its staff. Specifically, the objective is to relax the restrictions on Commission-staff communications in initial licensing cases so that the Commissioners will have better access to the expertise of their staff.

The concepts of separation of functions and ex parte are similar in that both are designed to minimize the possibility that a decisionmaker in an adjudicatory proceeding may be unduly influenced by off the record communications. They are different because, in theory, separation of functions applies only to the staff and ex parte applies to all others outside the agency. To some extent, this distinction has been lost in past and current Commission rules and practice. The two concepts have been mixed both in the rules and in common parlance. For clarification, the following explanation is offered.

Separation of functions is precisely what the name implies. Commission operations can be divided into separate functions, such as, investigation, review, prosecution and decisionmaking. The purpose of the rule is to assure that in adjudication, the investigator or prosecutor neither serve as nor unduly influence the decisionmaker. There is an exception to this rule for initial licensing cases, however, which will be discussed more fully below.

The ex parte concept applies in adjudications to preclude communications between persons outside the agency and the agency decisionmaker during the time a controversy is under consideration.



The problem which has persisted for many years has centered around the fact that the Commissioners and their immediate advisory staff have been regarded as decisionmakers in an adjudication during contested initial licensing cases. Concomitantly, the technical staff has been regarded as investigators and prosecutors. Consequently, under its own rules the Commission has been unable to receive the expert advice of its technical staff in resolving technical problems. Some regard it as true irony that a government agency whose reason for being is to use its expertise to protect the public health and safety is prohibited by its own rules from realizing the full potential of that expertise so vital to the accomplishment of its mission.

The Administrative Procedure Act (APA), 5 U.S.C. § 554(d), is the primary statutory authority which imposes the requirement for a separation of functions rule on federal administrative agencies. As may be seen, it also provides an exception for initial license cases.

Section 554(d) reads as follows:

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not--

- (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
- (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agency engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply--

- (A) in determining applications for initial licenses;
- (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
- (C) to the agency or a member or members of the body comprising the agency. (Emphasis added.)

The Attorney General's Manual on the Administrative Procedure Act (1947), a recognized authoritative source and part of the legislative history of the APA, offers an explanation of the initial licensing exception at pages 50-53.

Exceptions. Section 5(c),<sup>\*/</sup> like the rest of section 5, applies only to cases of adjudication "required by statute to be determined on the record after opportunity for an agency hearing", and if the subject matter of the proceeding is not exempted by the first paragraph of section 5. Rule making, of course, is not subject to section 5(c). Section 5(c), in addition, provides that the provisions of that subsection "shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers".

Section 5(c) does not apply to agency proceedings to determine applications for initial licenses--regardless of whether the agency grants or denies the license. "License" is defined in section 2(d). The phrase "initial license" must be interpreted from the context and legislative history.

The Administrative Procedure Act is based upon a broad and logical dichotomy between rule making and adjudication, i.e., between the legislative and judicial functions. See Chapter I. The legislative history of section 5(c) reveals that "determining applications for initial licenses" was exempted from the requirements of the subsection on the ground that such proceedings are similar to rule making. In the Committee reports, it is explained that "The exemption of applications for initial licenses frees from the requirements of the section such matters as the granting of certificates of convenience and necessity, upon the theory that in most licensing cases the original application may be much like rule making. The latter, of course, is not subject to any provision of section 5." Sen. Rep. p. 17; H.R. Rep. p. 30

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<sup>\*/</sup> Now section 554(d).

(Sen. Doc. pp. 203, 262). The rationale for the exemption was further developed by Representative Walter on the floor of the House, as follows: "However, the subsection does not apply in determining applications for initial licenses, because it is felt that the determination of such matters is much like rule making and hence the parties will be better served if the proposed decision--later required by section 8--reflects the views of the responsible officers in the agencies whether or not they have actually taken the evidence." 92 Cong. Rec. 5651 (Sen. Doc. p. 361).

In view of the function of the exemption, the phrase "application for initial licenses" must be construed to include applications by the licensee for modifications of his original license. In effect, this gives full meaning to the broad definition of "license" in section 2(e), i.e., "the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission". [Italics supplied] In other words, the definition clearly suggests that any agency "approval" or "permission" is a license, regardless of whether it is in addition to or related to an earlier license. Only by such a construction can the appropriate procedures be made applicable to those aspects of licensing which are dominated by policy making

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- 5 Any other interpretation of the exemption will largely destroy it and will result in an erratic application of section 5(c). For example, the function of the Civil Aeronautics Board with respect to certificates of public convenience and necessity increasingly relates to applications for modifications or extensions of existing routes rather than to original applications for entirely new routes. Thus, A, with a certificate for a route from New York to Chicago with a stop at Cleveland, may apply for a modification of the certificate to permit an additional stop at Pittsburgh. The considerations involved in determining such an application for modification of A's certificate are the same as those involved in his original application--traffic flow, availability of facilities, effect on competing carriers, etc. The accusatory and disciplinary elements are entirely lacking. Another example clearly illustrates the inconsistent results of such a narrow construction of the exemption for initial licensing: A has a certificate for a route from New York to St. Louis, and he applies for a modification which will authorize extension of the route to Omaha: B applies for a new certificate authorizing him to operate a route between St. Louis and Omaha. Under the narrow construction of the exemption, section 5(c) would apply to the Board's determination of A's application, but would not be applicable with respect to B's application. Similar anomalies would exist under the Federal Power Act, the Communications Act and the Natural Gas Act, particularly the latter.

considerations and in which accusatory and disciplinary factors are absent. Senate Hearings (1941) p. 1451. In this way, the basic dichotomy of the Act between rule making and adjudication is preserved, because section 5(c) will remain applicable to licensing proceedings involving the renewal, revocation, suspension, annulment, withdrawal or the agency-initiated modification or amendment of licenses--i.e., all those phases of licensing in which the accusatory or disciplinary factors are, or are likely to be, present.

This interpretation of the scope of the exemption is consistent with the remainder of its legislative history. When the administrative procedure bill (S. 7) was introduced by Senator McCarran in January 1945, the provision that was then section 5(b) contained an exemption for "determining applications for licenses". When S. 7 was reported by the Senate Committee on the Judiciary in November 1945, section 5(c) contained the present language exempting "determining applications for initial licenses". In the discussion of the definitions of "adjudication" and "licensing" in the Committee reports, it is stated that "licensing is specifically included [in adjudication] to remove any question, since licenses involve a pronouncement of present rights of named parties although they may also prescribe terms and conditions for future observance. Licensing as such is later exempted from some of the provisions of sections 5, 7 and 8 relating to hearings and decision. \* \* \* Later provisions of the bill distinguish between initial licensing and renewals or other licensing proceedings." [Italics supplied] Sen. Rep. p. 11; H.R. Rep. p. 20 (Sen. Doc. pp. 197, 254). It is apparent from the legislative history that the word "initial" was inserted in the exception to distinguish original applications for licenses, i.e., any agency "approval" or "permission", from applications for renewals of licenses. This is entirely consistent with the underlying analogy of initial licensing to rule making, because renewal proceedings frequently involve a review of the licensee's past conduct and thus resemble adjudication rather than rule making.

The insertion of "initial" similarly distinguishes applications for licenses from modifications or limitations imposed by an agency upon an existing license. Thus, the Senate Committee Report also contains a memorandum from the Attorney General in which it is stated that "The section does apply, however, to licensing, with the exception that section 5(c), relating to the separation of functions, does not apply in determining applications for initial licenses, i.e., original licenses as contradistinguished from renewals or amendments of existing licenses." Sen. Rep. p. 40 (Sen. Doc. p. 226). In referring to "amendments", the quoted language contemplated amendments or modifications imposed by the agency on the ground that in such proceedings, as in renewal proceedings, the issues would often relate to the licensee's past conduct.

It is concluded, therefore, that the exemption from the provisions of section 5(c) of proceedings to determine "applications for initial licenses" extends not only to applications for original licenses but also to applications by licensees for modification of licenses.

Notwithstanding the exception, the legislative history of the APA and the position of the Attorney General clearly stated in the manual, the separation of functions rule promulgated by the Atomic Energy Commission and adopted by its successor, the Nuclear Regulatory Commission, has been very restrictive. This has been the subject of some criticism from both outside and inside the agency.

For example, in 1979 the Commission on Law and Economy of the American Bar Association noted in its final report at page 94:

Despite provisions in the APA permitting reduced formality,<sup>6</sup> primarily in initial licensing and ratemaking, agencies have taken only slight advantage of these provisions.

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- 6 The APA permits initial licensing and ratemaking decisions to be made without regard to separation of functions requirements (Section 554(d)) and it permits rulemaking, claims for money or benefits and initial licensing to be decided on written submissions (Section 556(d)). It also permits, in rulemaking and initial licensing, the omission of a decision by the presiding officer (Section 557(b)).

Internally, individual Commissioners and members of their advisory staff are concerned that the inability to confer directly with experts may impede their ability to consider issues in a qualitative manner and delays their ultimate decision. It is for these reasons that the Commission is considering alternatives for resolving this difficult administrative problem.

Two options are presented. Option one enlarges the number of staff members with whom the Commission may communicate in initial licensing



proceedings by eliminating restrictions on supervisory personnel.

Specifically, it permits a Commissioner or a Commission level advisor to communicate off-the-record with any staff member, except with those who "directly participate as investigator, witness, attorney, or administrative judge in the planning, execution, or decision of the staff case." The wording permits a Commissioner to consult off-the-record with a supervisor, director, chief, leader, or other person who directs or participates in the planning, execution or decision of the staff case, so long as that person does not participate directly as an investigator, witness or attorney. This result is accomplished through a combination of amendments to 10 CFR §§ 2.719(b) and 2.780(e), (f).

Option two takes full advantage of the initial license exception under the APA by simply providing like the APA, that the separation of functions rule does not apply in determining applications for initial licensing.

Closely associated with option two is a proposed revision of the ex parte rule in 10 CFR § 2.780. It would provide that nothing in that rule would be interpreted in such a manner as to preclude the exercise of the initial licensing exception to the separation of functions rule.

Both options and the proposed revision to the ex parte rule are susceptible to argument. Perhaps the most novel argument concerns the interpretation of what may be a conflict within the statutory framework the APA which creates the initial licensing exception.

Section 554(d) of the APA grants an exception in initial licensing cases to the separation of functions rule. Section 557(d) of the APA governing ex parte contains no such exception. The argument is that

once the technical staff exercises its prerogative under § 554(d) to communicate with the Commission or its advisors on a matter in controversy, the staff becomes a part of the decisional process. If so, § 557(d) would prohibit them from thereafter communicating with an applicant or licensee. Since communications between the staff and applicants or licensees is absolutely essential to regulatory review and communications may be stopped in this case, regulatory review would be stopped. To say that this outcome would be undesirable would be a gross understatement.

Some doubt may be cast upon this argument by applying generally accepted rules of statutory construction. One fundamental rule is that contemporaneous sections of a statute should be interpreted to be consistent rather than inconsistent. This rule is related to what has been termed "the principle of harmony" in statutory law. Continuity and consistency are generally regarded as essential to stability in the regulation of human affairs.

Another rule is the plain meaning rule. It declares that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, the sole function of the courts is to enforce it according to its terms."

The plain meaning of 5 U.S.C. § 554(d)(A) is to grant an exception to the separation of functions rule. On the other hand, § 557(d) is silent about how ex parte is to be applied to initial license cases. This silence could be interpreted as not being inconsistent with § 554(d)(A) since there are no words which convey a plain meaning that ex parte considerations are to supercede the exception to the separation of functions rule.

In addition, examination of the problem in light of the underlying reason for the initial licensing exception could also lead to a result that the two rules are not inconsistent. As explained fully in the Attorney General's Manual on the APA, the initial license exception was created because the framers of the Act regarded such actions as being more like rulemaking than adjudication. In order for the ex parte rule to be applied in such a way as to negate the initial licensing exception, initial licensing must necessarily be regarded as being like adjudication rather than rulemaking. If so, the "broad and logical dichotomy between rulemaking and adjudication" upon which the Attorney General distinguishes initial licensing would be shattered. Moreover, within a single statute Congress would explicitly be giving one meaning to initial licensing while implicitly giving it another. It is at least questionable that Congress would intend such a result, particularly where the effect would be to concomitantly create a right and preclude its exercise.

This somewhat novel question aside, there are other concerns which might be raised. Fairness, impartiality and legality are also concerns which should be addressed. For example, even though the ex parte rule would still apply to parties outside the Commission, a question may be raised as to whether those parties might try to indirectly influence the Commission on contested issues by influencing the staff, who could talk to the Commission. The question is not easily answered.

In this regard, it is worth noting that for some time Commission policy has required meetings between applicants or licensees be noticed

so that the public has an opportunity to attend. This openness of communications may offer a measure of protection against undue ex parte communications. The ex parte rule also provides sanctions which would continue to serve as a deterrent against improper communications. Moreover, additional safeguards could be devised, as necessary, to minimize the likelihood of unwarranted communications.

Finally, it should be noted that the Commission is considering another rulemaking: "Participation of the NRC Staff in Initial Licensing Proceedings". If adopted, this rule would eliminate the role of the staff as a party in safety proceedings except in unusual circumstances. To the extent that the staff may not be a party, neither the separation of functions rule nor the ex parte rule would come into play. Comments are invited on the interrelationship between these two rulemakings.

#### PAPERWORK REDUCTION ACT STATEMENT

The proposed rules, which deal with the NRC's ex parte and separation of functions requirements, contain no application/reporting/recordkeeping or other collection of information requirements and therefore are not subject to Office of Management and Budget clearance under the Paperwork Reduction Act of 1980, Pub. L. 96-511, 44 U.S.C. §§ 3501-3520.

#### REGULATORY FLEXIBILITY ACT CERTIFICATION

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605(b), the Commission hereby certifies that the proposed rules, if promulgated, will not have a significant economic impact on a substantial

number of small entities. The proposed rules affect the Commission's procedures and rules of practice by establishing parameters within which communications between NRC adjudicatory employees and NRC staff members or those outside the agency will be deemed proper.

#### 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 pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. § 553, notice is hereby given that adoption of the following amendments to 10 CFR Part 2 and certain related conformaing amendments is contemplated.

NOTE: The following heading and authority citation are the same for all three options.

#### 10 CFR PART 2 - RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for 10 CFR Part 2 continues to read as follows:



Authority: Secs. 161, 181, 68 Stat. 948, 953 (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, Pub. L 93-438, 88 Stat. 1242 as amended by Pub. L 94-79, 89 Stat. 413 (42 U.S.C. 5841); 5 U.S.C. 552.

(Section 2101 also issued under secs. 53, 62, 81, 103, 104, 105, 68 Stat. 930, 932, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2093, 2111, 2133, 2134, 2135); sec. 102, Pub. L 91-190, 83 Stat. 853 (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2102, 2104, 2105, 2721 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 2200-2206 also issued under sec. 186, 68 Stat. 955 (42 U.S.C. 2236); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Section 2600-2606, 2730, 2772 also issued under sec. 102, Pub. L 91-190, 83 Stat. 853 (42 U.S.C. 4332). Sections 2700a, 2719 also issued under 5 U.S.C. 554. Sections 2754, 2760, 2770 also issued under 5 U.S.C. 557. Section 2790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133). Sections 2800-2807 also issued under 5 U.S.C. 553. Section 2808 also issued under 5 U.S.C. 553 and sec. 102, 83 Stat. 853 (42 U.S.C. 4332). Section 2809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L 85-256, 71 Stat. 579, as amended by Pub. L. 95-209, 91 Stat. 1483 (42 U.S.C. 2039). Appendix A is also issued under sec. 6, Pub. L 91-560, 84 Stat. 1472 (42 U.S.C. 2135).

#### OPTION 1

1. In § 2.719, paragraph (b) is revised to read as follows:

##### § 2.719 Separation of Functions

(b) In any adjudication, the presiding officer may not consult any person other than a member of his staff or a special assistant as provided for in § 2.722 on any fact in issue unless on notice and opportunity for all parties to participate, except: (1) as required for the disposition of ex parte matters as authorized by law, (2) as provided in paragraph (c) of this section, and (3) as provided in § 2.780(e).

2. In § 2.780, paragraphs (e) and (f) are revised to read as follows:

§ 2.780 Ex parte Communications

(e) In any adjudication for the determination of an application for initial licensing, Commissioners, members of their immediate staffs and other NRC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions may consult the staff, and the staff may communicate with Commissioners, members of their immediate staffs and other NRC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions: (1) in any uncontested proceeding; (2) in any contested proceeding provided that the staff member consulted did not directly participate as investigator, judge, attorney or witness in the planning, execution or decision of the staff case; and (3) in any contested proceeding with direct participants representing any party: provided that such communications are on the record (and statements of fact and expert opinion not otherwise in the record are under oath), at a public meeting to which all parties are given appropriate notice as well as the opportunity to attend and to respond to the communication prior to a decision on the merits. The Secretary of the Commission shall be promptly informed of any intentional or unintentional communication not authorized by this paragraph, will assure that the communication is publicly disclosed, will notify the parties to the proceeding and will authorize responses to be filed within a reasonable time.

(f) Except as provided in paragraphs (e)(2) and (e)(3) of this section, the provisions and limitations of this section applicable to Commissioners, members of their immediate staffs, and other NRC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions are applicable to members of the Atomic Safety and Licensing Appeal Board, members of their immediate staffs, and other NRC officials and employees who advise members of the Appeal Board in the exercise of their quasi-judicial functions.

OPTION 2

1. 10 C.F.R. § 2.719, paragraph (c) is revised to read as follows:

§ 2.719 Separation of Functions

(c) This section shall not apply in determinations for initial licenses.

2. 10 C.F.R. § 2.780, paragraph (e) is revised to read as follows:

§ 2.780 Ex parte Communications

(e) Nothing in this section shall be interpreted as precluding the exercise of the initial licensing exception to the Separation of Functions Rule set out in 10 C.F.R. § 2.719(c).

Dated at Washington, D.C., this            day of            1982.

For the Nuclear Regulatory Commission

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Samuel J. Chilk  
Secretary of the Commission



## Chapter 6

Proposed Rulemak  
to amend Commiss  
policy on Partic  
pation of the NR  
staff in initial  
licensing procee  
- 10 CFR 2



NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

Participation of the NRC Staff in  
Initial Licensing Proceedings

AGENCY: U. S. Nuclear Regulatory Commission.

ACTION: Proposed Rule.

SUMMARY: The Nuclear Regulatory Commission is proposing to amend its Rules of Practice to limit its staff's participation as a party in contested initial licensing proceedings to issues on which the staff disagrees with the license applicant. The proposed rule also permits the Commission staff to provide on the record advice to presiding officers on any matter in the proceeding, either upon request of the presiding officer or on the staff's initiative.

DATES: Comment period expires \_\_\_\_\_, 1982. Comments received after this date will be considered if practical to do so but consideration cannot be assured except as to comments received on or before this date.

ADDRESSEES: Written comments should be submitted to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D. C. 20555  
Attn: Docketing and Service Branch. Copies of all comments received may be examined and copied for a fee in the Commission's Public Document Room at 1717 H Street, N. W., Washington, D. C.

FOR FURTHER INFORMATION CONTACT: James R. Tourtellotte, Chairman,  
Regulatory Reform Task Force, U.S. Nuclear Regulatory Commission,  
Washington, D. C. Telephone: (202) 634-3300.

SUPPLEMENTARY INFORMATION: The Commission is considering a rule change to its Rules of Practice for Domestic Licensing Proceedings, 10 CFR Part 2, that would modify the role of the Nuclear Regulatory Commission staff ("staff") in its administrative adjudicatory proceedings. The proposal would alter the staff's current role as a full party advocate in all formal licensing adjudications by limiting staff participation as a party in contested initial licensing proceedings to those controverted factual issues on which it disagrees with the technical bases, rationale or conclusions of the license applicant. The proposal also permits the staff to advise presiding officers on the record regarding any other matter in the proceeding, either on its own initiative or upon request of the presiding officer. Staff's role as a full party in all other proceedings, primarily enforcement matters, would remain unchanged by the adoption of the proposed modification.

The proposed rule change responds in large measure to suggestions made over an extended time from a variety of sources both within and outside NRC for the Commission to re-examine staff's role in the adjudicatory licensing process.<sup>1/</sup> Those suggestions reflected a diversity of beliefs, including

<sup>1/</sup> Marcus A. Rowden, Report: Achieving a More Effective Licensing Process--Basic Reform Within Existing Law, Atomic Industrial Forum, 6-8, November, 1981. See also Nuclear Regulatory Commission Office of General Counsel Study of NRC Staff's Role in Contested Nuclear Power Reactor Initial Licensing Proceedings, June 3, 1982. These reports are available for inspection and copying for a fee in the Commission's Public Document Room at 1717 H Street, N.W., Washington, D.C. 20555.

views that staff's participation unnecessarily slows down the hearing process, typically lends insurmountable support to the case in favor of the application, and often misplaces the focus of the proceeding which should properly be directed at disputes between applicants and intervenors who oppose the application.

The Commission has recently received a study prepared by its Office of General Counsel<sup>2/</sup> that analyzes the costs and benefits to the regulatory process of a rule change such as that proposed here. The study recognizes that the chief benefit to be sought from the change would be enhancement of the public's perception of the Commission's regulatory process as a fair and neutral one that considers opposing viewpoints. Thus, the Commission is particularly interested in learning whether in the public's view the credibility of NRC's regulatory process would be enhanced by effecting the proposed change. Specific comment on the proposed regulatory language is also invited.

The heart of the proposal is contained in proposed §§ 2.700(a) and (b). The staff would become a party to contested proceedings involving initial licensing on a discretionary basis. Should the staff disagree with a party's technical basis, rationale or conclusions, the staff may provide notice to the parties and introduce evidence at the hearing which articulates its position and its basis for disagreement. The staff would thus become a party to the proceeding, but only with respect to the particular issue(s) regarding which it elects to participate. The proposed

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<sup>2/</sup> See footnote 1.

rule also provides an opportunity for the parties to rebut the staff's evidence. Cross-examination by and of the staff would also be permitted to the extent otherwise allowed. Several points should be emphasized.

First, § 2.700b would apply only to initial licensing proceedings. Initial licensing is defined in proposed § 2.4(r) of the Proposed Reform Amendments as including any proceeding on an application for a construction permit, operating license, or any other license for a facility or other activity, including any amendment or modification. Normally excluded from initial licensing are proceedings involving the renewal, revocation, suspension, annulment, withdrawal or agency-initiated modifications of licenses. Thus the staff will remain a full party in all agency enforcement actions as well as in license renewal and withdrawal proceedings.

Second, the proposed rule permits discretionary participation by the staff on one or more issues in a proceeding. There may be instances where the public interest would be better served through staff participation as a party. For example, the staff may take exception to a methodology, analysis or conclusion of a party and, therefore, may find it necessary to function as a formal party on selected issues in order to fully develop the record. It is anticipated that staff participation as a party in such an instance would be the exception rather than the rule, but the provision is necessary to give the staff the flexibility to carry out the agency mission as circumstances may require.

Third, it should be emphasized that when the staff becomes a party to the proceeding it does so only with respect to the particular issue(s) as elected by the staff. Thus, while the staff may submit evidence, file proposed findings of fact, take appeals, and otherwise exercise party rights on matters relating to those elected issues the staff would not participate on other matters except to the extent it acts as an amicus pursuant to proposed §§ 2.700b(c) and (d), discussed below.

Proposed §§ 2.77b(c) and (d) permit the staff to participate in the proceeding to a limited extent as an amicus. The staff may provide on the record advice "on any matter in the proceeding" to the presiding officer, either on its own initiative or upon the request of the presiding officer. "On any matter" is intentionally broad to permit the staff and presiding officers the greatest flexibility in providing or requesting advice. The only exception is that advice may not be requested or provided on issues on which the staff is already participating as a party because of a disagreement with the license applicant.

While advice on any procedural or substantive matter pending before a presiding officer would be permitted, the Commission does not expect its staff to offer advice on routine procedural or substantive matters, nor does it expect its presiding officers to routinely solicit staff views. Rather, it expects this mechanism to be used sparingly for unusual, important or complex questions in which the staff perspective could be of significant benefit to the presiding officer. For example, a presiding officer may wish to request staff views on the merits of a motion for summary disposition which concerns a key issue in a proceeding, or the



staff may wish to provide its views to a presiding officer when a particular procedural request or substantive issue may have unexpected or unforeseen implications for other proceedings or invites a departure from past practice. The parties to the proceeding would be given a reasonable opportunity to comment on the staff views.

Conforming changes are also proposed for several provisions of the Rules of Practice. First, § 2.701, Filing of Documents, would be modified slightly to ensure that the staff will continue to be served with all documents filed in the proceeding, regardless of whether or not it participates as a party. Second, § 2.719, Separation of Functions, would be modified to permit the presiding officer to receive or request advice from the staff pursuant to §§ 1.700b(c) and (d). Third, paragraph (h)(2)(iii) of § 2.720, Subpoenas, would be changed to eliminate in initial licensing proceedings the deposition of named NRC employees and the answering of interrogatories by NRC personnel except as to issues on which the staff participates as a party. Finally, § 2.743, Evidence, would be modified to ensure that any ACRS report, safety evaluation and environmental impact statement are deemed admitted as part of the hearing record of the proceeding without being offered into evidence by the staff.

Although this rulemaking has its own merit, it also may bear a relationship to the rulemaking on Separation of Functions and Ex Parte Communications. In the circumstance, comments are invited on the rule individually and as it may affect or be affected by the other rule.

# PAPERWORK REDUCTION ACT STATEMENT:

Pursuant to the provisions of the Paperwork Reduction Act of 1980 (Pub.L. 96-511), the NRC has determined that this proposed rule neither imposes new nor affects existing information collection requirements.

## REGULATORY FLEXIBILITY CERTIFICATION:

The proposed rule will reduce the procedural burden on all participants in NRC adjudications involving initial licensing by removing the NRC staff as a full party advocate. 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.

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and Section 553 of Title 5 of the United States Code, notice is hereby given that adoption of the following amendments to 10 CFR Part 2 are contemplated:

It is proposed that 10 CFR Part 2 be amended as follows:

1. The authority citation for 10 CFR Part 2 continues to read as follows:  
Authority: Secs. 161, 68 Stat. 948, 953 (42 U.S.C. 2201, 2231);  
sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241);  
01, Pub. L. 93-438, 88 Stat. 1242, as amended by Pub. L. 94-79, 89  
Stat. 413 (42 U.S.C. 5841); 5 U.S.C. 552.

(Section 2.101 also issued under secs. 53, 62, 81, 103, 104, 105, 68 Stat. 930, 932, 935, 936, 938, as amended (42 U.S.C. 2073, 2093, 2111, 2133, 2134, 2135); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332);

sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Sections 2.200-2.260 also issued under sec. 186, 68 Stat. 955 (42 U.S.C. 2236); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600-2.606, 2.730, 2.772 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853 (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). Sections 2.800-2.807 also issued under 5 U.S.C. 553. Section 2.808 also issued under 5 U.S.C. 553 and sec. 102, 83 Stat. 853 (42 U.S.C. 4332). Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 95-209, 91 Stat. 1483 (42 U.S.C. 2039).

2. Section 2.700 is added to read as follows:

§ 2.700b Staff participation in initial licensing proceedings.

(a) The NRC staff shall not be a party to contested initial licensing proceedings except with respect to the issue(s) on which it introduces evidence pursuant to subsection (b) of this section. The staff shall not otherwise participate in adjudications involving initial licensing except as provided in subsections (c) and (d) of this section.

(b)(1) The staff may, in its discretion, participate as a party on one or more issues in a proceeding. Where the staff elects to participate as a party, it shall introduce written or documentary evidence on each controverted factual issue

regarding which it elects to participate whether admitted in the proceeding pursuant to § 2.714 or each issue examined sua sponte by the presiding officer pursuant to § 2.785(b)(2).

(2) At least 30 days prior to the date established for the license applicant to file its direct testimony on said issue(s) or at such other time as the Commission or the presiding officer may specify, the staff shall serve a written notice of intent to introduce evidence upon the presiding officer and the parties to the proceeding. The notice shall specify the issue(s) on which the staff intends to introduce evidence and shall generally state the nature of its disagreement with the license applicant.

(3) The staff evidence shall be filed no later than 20 days after the license applicant files its direct testimony on such issue(s). Any party may submit rebuttal evidence with respect to any evidence submitted by the staff. Rebuttal evidence shall be filed no later than 20 days after the staff files its testimony.

(4) Subject to the requirements of § 2.743(b), any party may cross-examine the staff with respect to any issue(s) on which the staff submits evidence and the staff may cross-examine any party with respect to such issue(s).

(c) Except as to matters described in subsection (b), the staff may at any time advise the presiding officer in writing with respect to any matter in the proceeding on its own initiative

when it considers such advice important to the proceeding. The staff views shall be served on all parties to the proceeding. The presiding officer shall afford the parties an opportunity to comment on the staff views.

(d) Except as to matters described in subsection (b), the presiding officer may request the written views of the staff with respect to any matter in the proceeding. Any such request shall be in writing and directed to the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate. The presiding officer shall afford the parties an opportunity to comment on the staff views.

3. In § 2.701, paragraph (b) is revised to read as follows:

§ 2.701 Filing of documents.

\* \* \* \* \*

(b) All documents offered for filing shall be accompanied by proof of service upon all parties to the proceeding or their attorneys of record as required by law or by rule or order of the Commission. ~~[The staff of the Commission shall be deemed to be a party.]~~ All such documents shall also be served on the NRC staff whether or not it participates as a party.

\* \* \* \* \*

4. In § 2.719, paragraph (b) is revised to read as follows:

§ 2.719 Separation of functions.

\* \* \* \* \*



(b) In any adjudication, the presiding officer may not consult any person other than a member of his staff or a special assistant as provided for in § 2.722 on any fact in issue unless on notice and opportunity for all parties to participate, except: (1) As required for the disposition of ex parte matters as authorized by law and (2) as provided in paragraph (c) of this section. This subsection does not apply to advice requested or received from the staff pursuant to §§ 2.700b(c) or (d).

\* \* \* \*

5. In § 2.720, paragraph (h)\*2)(iii) is revised to read as follows:  
s 2.720 Subpoenas.

\* \* \* \*

(h) \* \* \*  
(2) \* \* \*

(iii) No deposition of a particular named NRC employee or answer to interrogatories by NRC personnel pursuant to paragraphs (h)(2)(i) and (ii) of this section shall be required before the matters in controversy in the proceeding have been identified by order of the Commission or the presiding officer, pursuant to § 2.751a, or after the beginning of the prehearing conference held pursuant to § 2.752, except upon leave of the presiding officer for good cause shown. No such deposition or answer to interrogatories shall be permitted in initial licensing proceedings except as to matters in which the staff participates as a party pursuant to §§ 2.700b(a) and (b).

\* \* \* \*

6. In § 2.743, paragraph (g) is revised as follows:

§ 2.743 Evidence.

\* \* \* \*

(g) Proceedings involving [~~applications~~] initial licensing. In any [~~involving-an-application~~] initial licensing proceeding, [~~there-shall-be-offered-in-evidence-by-the-staff~~] the following documents are deemed to be admitted as part of the hearing record: i) any report submitted by the ACRS in the proceeding in compliance with section 182b of the Act, (ii) any safety evaluation prepared by the staff, and (iii) any detailed statement on environmental considerations prepared by the Director of Nuclear Reaction Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, or his designee in the proceeding pursuant to Part 51 of this chapter.

\* \* \* \*

LIST OF SUBJECTS IN 10 CFR PART 2

Part 2 - Rules of Practice: Administrative practice and procedures; byproduct material; classified information; environmental protection; nuclear materials; nuclear power plants and reactors, penalty, sec discrimination; source material; special nuclear material; waste treatment and disposal.

For the Nuclear Regulatory Commission

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Samuel J. Chilk  
Secretary

Dated at Washington, D. C.  
this \_\_\_\_ day of \_\_\_\_\_, 1982

UNITED STATES NUCLEAR REGULATORY COMMISSION

DRAFT REPORT  
of the  
REGULATORY REFORM TASK FORCE  
on  
NUCLEAR LICENSING REFORM

PART II

James R. Tourtellotte  
Chairman, RRTF  
November 1982

**REGULATORY REFORM TASK FORCE MEMBERS**

**James R. Tourtellotte, Chairman**

**Peter G. Crane, OGC**

**Joseph R. Gray, ELD**

**Frank J. Miraglia, NRR**

**John M. Montgomery, OPE**

**Robert C. Paulus, I&E**

**Seymour Wenner, ASLBP**

**Patricia Woolley, ADM**



Part I - Regulatory Reform Task Force Proposals

Chapter 1 - Introduction

Chapter 2 - Nuclear Licensing Reform Act of 1983

Chapter 3 - Proposed Rulemaking on Backfitting

Chapter 4 - Proposed Rulemaking on Amendments to 10 CFR 2  
and 10 CFR 50 - Hearing Process

Chapter 5 - Proposed Rulemaking to amend Commission policy  
on Separation of Functions and Ex Parte  
Communications - 10 CFR 2

Chapter 6 - Proposed Rule to amend Commission policy on  
Participation of the NRC staff in initial  
licensing proceedings - 10 CFR 2

Part II - 1982 Legislative Initiatives

Chapter 1 - Nuclear Standardization Act of 1982

Chapter 2 - Analysis of Public Comments received on NSA of 1982

Chapter 3 - Ad Hoc Committee Report on NSA

Chapter 4 - Ad Hoc Committee Report on Proposed Nuclear  
Licensing Reform Act of 1983 (to be provided)

Part III - Statements of the Regulatory Reform Task Force

(To be provided)

CHAPTER 1

Nuclear Standardization  
Act of 1982

## PROPOSED LEGISLATION: NUCLEAR STANDARDIZATION ACT OF 1982

AGENCY: U.S. Nuclear Regulatory Commission

ACTION: Proposed Legislation: "Nuclear Standardization Act of 1982"

SUMMARY: The Nuclear Regulatory Commission proposes to submit the "Nuclear Standardization Act of 1982" to Congress for legislative consideration. The proposal provides for design approval and stability of design for standardized nuclear power plants, one-step licensing, and early site approval. The proposed legislation is being issued to inform the public and to provide an opportunity for public comment. The Commission expects that further revisions may be needed and is, accordingly, requesting comments on the proposed "Nuclear Standardization Act of 1982."

Commissioners Ahearne, Gilinsky and Roberts have filed separate comments on the proposed legislation. Those comments are incorporated as a part of this notice for public information and comment. Differing opinions of members of the Regulatory Reform Task Force are also included, and public comment is invited on these opinions as well. Public comments on these separate views will be considered by the Commission.

The Regulatory Reform Task Force is also considering presentation of further legislative proposals for Commission approval. Such proposals may include but are not necessarily limited to: (1) amendment of §189 a. of the Atomic Energy Act of 1954, as amended, to clarify the scope of the Commission's discretion in selecting hearing formats; (2) elimination of mandatory requirement for construction permit hearings; (3) a stability of design amendment to apply to all nuclear power plants; and (4) amendment of

§201 (a)(1) of the Energy Reorganization Act of 1974, 42 U.S.C. 5841(a)(1) to eliminate the "present" requirement in the quorum rule. A brief description of these further legislative proposals follows.

Four alternatives for amending 189 a. are currently being considered. The first alternative would incorporate the Sholly amendment and add a new subsection 189 c. to provide for a hybrid hearing process.

The second alternative is the same as the first except it would delete the mandatory requirement for construction permit hearings and require 30 days notice prior to granting applications for construction or operation of nuclear power plants or testing facilities.

Alternative three is the same as two except it would give the Commission broad discretion in selection of a hearing format. Alternative four would be a variation on three with the primary thrust being to give the Commission maximum discretion in selecting the type of hearing to be held.

The stability of design proposal would read essentially the same as §196 of the "Nuclear Standardization Act of 1982" except it would apply to all nuclear plants rather than to just standardized nuclear plants.

The proposed change in §201 (a)(1) of the Energy Reorganization Act of 1974 would permit the Commissioners to waive the requirement that a quorum be "present" in order to vote. This amendment would permit the Commission to take decisional action in writing without the necessity of holding a formal meeting where Commissioners would be physically present.

Public comment is also invited on these legislative proposals. It is conceivable that other proposals will be suggested through public comment. The Commission will consider such proposals in making its ultimate

determination on the content of the legislative package to be sent to Congress.

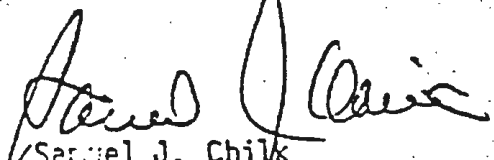
DATES: Comments are due on or before July 16, 1982.

ADDRESSES: All interested persons who desire to submit written comments or suggestions for consideration in connection with this proposed legislation should send them to: Chairman, Regulatory Reform Task Force, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. Copies of public comments on this proposed legislation may be examined at the Commission's Public Document Room at 1717 H Street, N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: The Regulatory Reform Task Force, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555; Telephone: 202-634-3258

Dated at Washington, D. C. this 27<sup>th</sup> day of May 1982.

FOR THE U.S. NUCLEAR REGULATORY COMMISSION

  
Samuel J. Chilk  
Secretary of the Commission



## BACKGROUND AND SECTION BY SECTION ANALYSIS

I. BACKGROUNDA. The Present Licensing Process

The Atomic Energy Act of 1954 in its present form provides for a two-stage facility licensing process. First, a construction permit must be obtained from the Commission authorizing construction of the proposed facility at the site where it will be operated. This stage of review has focused on the preliminary design of the facility and the suitability of the proposed site. A public hearing must be held by the Commission prior to the issuance of any construction permit for a facility for industrial or commercial purposes, such as a nuclear power plant, or for a testing facility.

The second stage of the process concerns operating licenses. No person may operate a facility without first obtaining an operating license from the Commission. This second stage of review is focused on the final design of the facility, and a public hearing must be held before issuance of an operating license if one is requested by any person whose interest may be affected. The Commission is also authorized by the Act to issue a license to manufacture one or more facilities. Thus, in some situations the first step in the facility licensing process may be issuance of a license to manufacture, followed by issuance of a construction permit and operating license authorizing installation and operation of the facility on-site. It may be noted that no manufacturing licenses have been issued although provision for issuance of such licenses is made in the Commission's regulations and a proceeding is in progress.

In addition, the Advisory Committee on Reactor Safeguards, a statutory committee of independent experts on nuclear facility safety, is required by the Act to review each application for a construction permit or an operating license for a nuclear facility for industrial or commercial purposes, such as a nuclear power plant, or for a testing facility, and submit a public report to the Commission.

The overall lead-time involved for this two-stage licensing process covers approximately a 12 year period consisting of three basic phases:

1. Utility Planning Phase,
2. Construction Permit Review and Hearing Phase, and
3. Construction and Preoperational Testing Phase.

The utility planning phase begins at the time the utility decides to add power to its system and continues until an application consisting of a Preliminary Safety Analysis Report (PSAR) and an Environmental Report (ER) is submitted to the NRC by the applicant and docketed for review. The construction permit review and hearing phase begins at the docketing of the application and continues until a decision is made regarding the issuance of a construction permit. This phase consists of a plant safety review, a safeguards review, an environmental review, an antitrust review by the NRC staff and public hearings on the construction permit application.

Normally, the applicant's Preliminary Safety Analysis Report and Environmental Report are tendered at about the same time and proceed on parallel review paths, beginning with a review for completeness. If the application is reasonably complete, it is docketed. The docketing of an application launches the safety review by the Commission's technical branches, issuance of the NRC staff's Safety Evaluation Report,

consideration by the Advisory Committee on Reactor Safeguards (ACRS), and issuance of supplemental Safety Evaluation Reports by the NRC staff, as required, to address any issues raised by the ACRS or any other appropriate issues. In addition, an environmental review is conducted by NRC technical specialist branches and by special teams from national laboratories, and draft and final environmental statements are published and widely distributed to municipal, State, and Federal agencies, and the general public.

Following the conclusion of the safety and environmental reviews and issuance of appropriate supplements to the Safety Evaluation Report and the Final Environmental Statement, a public hearing takes place. Under the Atomic Energy Act, hearings are mandatory for all power reactor construction permit applications. At the conclusion of these hearings a decision is made whether or not to issue the construction permit.

A Limited Work Authorization (LWA) may be granted by the Director of Nuclear Reactor Regulation for limited construction work to be carried out prior to a decision on the construction permit. Two types of LWA's are granted. One type authorizes site preparation work, installation of temporary construction support facilities, excavation, construction of service facilities and certain other construction not subject to quality assurance requirements. The second type of LWA authorizes the installation of structural foundations.

An LWA may be granted only after the licensing board has made all of the required NEPA findings and has determined that there is reasonable assurance that the proposed site is a suitable location for a nuclear power reactor from a radiological health and safety standpoint. The second type

of LWA may be granted if, in addition to the findings described above, the board determines that there are no unresolved safety issues relating to the work to be authorized.

The antitrust review and hearing process proceeds in a parallel path with the safety and environmental reviews and the hearing process, except that a hearing on antitrust matters is required only: (1) when requested by the Attorney General; (2) when any person whose interest may be affected files a timely petition requesting a hearing; or (3) when the Commission determines on its own initiative that a hearing should be held.

The construction phase continues until the plant is built, preoperationally tested, and is ready for fuel loading. While the plant is being constructed, typically when construction is about 50% completed, the applicant submits a Final Safety Analysis Report and an Environmental Report-OL Stage. Then, the NRC staff prepares its Safety Evaluation Report and updates its prior environmental review and analysis. Public hearings on the operating license are offered. If hearings are conducted, findings are made by a licensing board subject to Commission review. If no hearing is requested, findings are made by the Director of Nuclear Reactor Regulation, also subject to Commission review. If a favorable decision is ultimately rendered, the operating license is issued.

#### B. One-step vs. Two-step Licensing

The two-step licensing process was a prudent course to follow when the nuclear power industry process was in its early conceptual and developmental years. In the early years there were many first-time nuclear plant applicants, designers and constructors and many unproven design concepts. The concern about the ability of a new industry to meet construction permit

stage commitments for the final design was justified, as was the reevaluation for this purpose at the operating license stage.

The situation, however, has been altered substantially in the intervening 28 years since the enactment of the Atomic Energy Act of 1954. Final designs for most plants could be described at the construction permit stage. Even though preliminary designs may be proposed for valid reasons, experience obtained in designing and licensing nuclear plants provides a sound basis for moving from the existing two-step licensing process to a one-step process.

Experience has demonstrated that the two-step process exacerbates construction scheduling problems because design of the plant, regulatory design review and the hearing process occur during construction. The one-step process would place design, design review and hearing before construction begins thereby making construction scheduling more certain. Experience also suggests that the two-step process has a negative effect on the creditability of the process, i.e., the granting of a construction permit has been interpreted by some as being so conclusive as to render the issuance of an operating license pro forma. Under a one-step process construction and operation will be considered concomitantly.

Moreover, the two-step licensing process was put in place years before the enactment of environmental laws such as NEPA. The objectives of these laws could be better served by a one-step licensing process which encourages earlier identification and resolution of licensing issues, particularly regarding the siting of a nuclear power plant. Such a process would also accommodate participation by states on matters in which they have both an interest and responsibility.



The problems created by the two-step licensing process can best be resolved by a one-step process. The concept of a combined CP-OL reflects the fact that in a more mature technology, applicants for a license to construct and operate a commercial nuclear power plant should be able to submit the final design information at the outset. This would significantly change the principal purpose to be served by the NRC review prior to the commencement of operation. The rationale is that if the Commission can make a one-step determination on site suitability and the final design of a plant early in the licensing process, it should do so and should not be required to perform the same exercise a second time.

Early site reviews, standardized plant approvals, stability of plant design and one-step licensing go to the very heart of the proposed legislation.

## II. SECTION-BY-SECTION ANALYSIS

### Section 101. Construction Permits and Operating Licenses.

This amends section 185 by deleting language providing that a construction permit must specify the earliest and latest dates for completion and that failure to complete a facility by the stated date shall result in forfeiture of the permit, absent good cause shown. This section also adds two new subsections to section 185.

Subsection a. of section 185 authorizes the NRC to grant a construction permit for a production or utilization facility and, upon additional findings and absent any good cause shown to the Commission to the contrary, to grant an operating license. This subsection is also amended by deleting the requirement for specification of the earliest and latest completion dates for construction permits. This provision is not useful and tends to produce unnecessary paperwork and expenditure of resources. Presumably, the intent of such a provision is to see that construction is diligently pursued once a construction permit is granted. In fact, the large investment required to construct nuclear plants is a more substantial driving force in that same direction. By eliminating the requirement, the impetus for diligence in construction is not lost and the need to process applications for extensions of time, along with all the attendant administrative problems, is obviated.

A new subsection b. of section 185 authorizes the Commission to rely upon certification of need for power made by the Federal Energy Regulatory Commission. The importance of subsection b. is that it eliminates the

necessity of the Commission to duplicate need for power studies wherever need for power is a determining factor in reaching a licensing decision.

Subsection c. of section 185 permits issuance of a combined construction permit and operating license for a standardized nuclear power plant. This, in effect, is one-step licensing for standardized nuclear power plant designs. A combined construction permit and operating license could be issued only if the application contains sufficient information to support the issuance of both the construction permit and operating license. In short, the application must include an essentially complete final design for a whole nuclear power plant usable at multiple sites.

Subsection c., like subsections 193d.(1) and 194d.(1), provides an opportunity for public hearing. In all three instances the hearing provision was inserted to assure flexibility of the hearing process for standardized plants. Section 189a. has various interpretations. Some suggest that it requires very formal adjudicatory procedures while others urge that nothing in section 189a. precludes a more flexible approach to establishing hearing procedures. In order to avoid unfavorable consequences which could result by reason of the uncertain meaning of section 189a., independent opportunities for hearing are spelled out in sections 185, 193 and 194. This is done with a view toward establishing hearing procedures which are flexible enough to optimize the balance among public participation, accuracy of decisionmaking and efficiency of process. Unencumbered by the confusion surrounding the interpretation of section 189a., the Commission is free to establish rules and regulations on hearings for standardized plants considering only the applicability of the Administrative Procedure Act and established case law. In this circumstance, the

Commission has a range of options to adopt rules which could establish a hearing process as simple as requiring only written submission of the entire case or as complex as the formalized hearing process now used by the Commission pursuant to section 189a. By separately providing the opportunity for hearing under sections 185, 193 and 194, use of the formal procedures currently employed by the Commission under 189a. is not required, but, on the other hand, is not precluded. Thus, under this proposal, the advantage of flexibility is gained and the potential for use of procedures pursuant to 189a. are not lost. This type of flexibility is necessary to assure that procedures can be developed commensurate with the evolution of standardization.

The new subsection c. also provides that after issuance of a combined construction permit and operating license for a standardized nuclear power plant, the Commission shall assure through inspections and tests that construction and operation are conducted in conformity with the combined construction permit and operating license. The principal purpose of this provision is to guarantee that the conceptual design submitted is the one that is actually put in place for operation. It is anticipated that the NRC will conduct its inspections and tests during both construction and preoperational testing. Additionally, prior to full power ascension, pursuant to appropriate rules and regulations, the utility would certify to the Commission that the plant had been constructed and would operate in conformity with the combined construction permit and operating license.

Section 102. Early Site Approval.

This is a new section 193 which authorizes the approval of one or more sites for nuclear power generation facilities prior to the filing of any application to construct or operate such facility or facilities. The purpose of this authorization is to permit the resolution of site-specific questions at an early stage in the licensing process. This would serve to focus public participation on a crucial aspect of the overall facility planning and construction process at an early point in time when public participation can be most effective. This provision is an integral part of the effort to promote the early, effective and efficient resolution of issues in the licensing process.

Subsection a. of section 193 provides that an application for early site approval may be filed by any Federal, State, regional or local governmental agency, or a utility, and the NRC is authorized to issue a site permit even though no application for a construction permit or a combined construction permit and operating license has been filed. This provision permits an early and specific focus on the suitability of a site for nuclear power plant construction without requiring the development of custom design.

Subsection b. of section 193 provides for the waiving of fees for an application for a site permit, an amendment, or a renewal of a site permit under section 193 and provides that the Commission is authorized to allocate the costs among applicants which later propose to use the approved site. The early development of sites is essential to the overall standardization program and can materially enhance the use of time and resources of the Commission.



Subsection c. of section 193 provides that each application under subsection a. shall contain such information as is required by the Commission in its rules and regulations to determine the suitability of the site for its intended use. It is currently envisioned that the application would set forth an envelope of plant parameters including: (1) the number, type or types and thermal power level of the facilities with respect to which the application for site approval is made; (2) the boundaries of the site; (3) the proposed general location of each facility on the site; (4) the proposed maximum levels of radiological and thermal effluents that each such facility will produce; (5) the type or types of cooling systems, intake and outflow, that may be employed by each facility; (6) the seismic, meteorological, hydrologic, and geologic characteristics of the proposed site as well as population density of the surrounding area; and (7) such other information as the Commission may by rule or regulation require. By describing the site in such a way, the Commission could determine the site suitability for one or several generic designs that may be developed pursuant to section 194, the provision for standardized plant designs.

Subsection d.(1) of section 193 authorizes the Commission to approve an application and issue a site permit with appropriate conditions if, after considering all the information in the application and providing an opportunity for a public hearing, the NRC finds that the proposed site is suitable for the construction and operation of the type of facility described in the application consistent with the public health and safety. The opportunity for hearing and the hearing, if held, would be in accordance with the rules and regulations of the Commission, the appropriate provisions of the Administrative Procedure Act and applicable case law.

Subsection d.(2) of section 193 provides that any final determination of the Commission on an application filed under this section shall be a final order of the Commission for the purposes of judicial review. This provision specifies the point of time in the administrative process when review by the courts is appropriate.

Subsection e.(1) of section 193 provides that a site permit shall be valid for a facility to be constructed on the site if an application has been filed within a period of ten years from the date of issuance of the site permit. The effect of this provision is that the rights accruing under a site permit are effectively exercised upon the filing of either a construction permit or a combined CP/OL application. In such a case, a request for renewal would be unnecessary to continue the effectiveness of the site permit.

Subsection e.(2)(A) of section 193 authorizes the Commission to renew site permit for not less than five or more than ten years from the date of renewal. Renewal would be based only upon the application of a permit holder. The minimum period of five years is set to assure that the resources used to review a renewal request are directed toward meaningful results. For example, allowing repeated renewals for only six months or a year could cumulatively tax the resources of the agency and industry alike. Moreover, it is contemplated that information necessary to form a sound basis for the decision to renew for periods of five to ten years will be readily available and well within the state-of-the-art.

Subsection e.(2)(B) of section 193 sets out the criteria the Commission shall apply in deciding whether to renew a site permit. In the absence of significant new information relevant to the site, and in the absence of a

showing that the site will not comply with this Act or NRC regulations, it is mandatory that the Commission renew the site permit.

Subsection f. of section 193 assures that a site approved under this section may be used for any other purpose.

Subsection g. of section 193 provides for a request to the Commission for a determination with respect to limited aspects of the suitability of a site for its intended purpose. This provision assures that the Act will not be construed as eliminating the effect of current Commission rules and regulations concerning limited site suitability, 10 CFR § 2.600 et seq.

Section 103. Approval of Standardized Facility Designs:

This is a new section 194, which provides for approval of standardized nuclear power plant designs. As with early site approvals, this section is intended to facilitate early resolution of design related issues with full opportunity for participation by interested persons. Although the NRC currently has procedures for approving standardized designs, this section gives explicit statutory support to the standardization concept and establishes requirements for NRC approval of standardized facility design. This section will encourage the development and use of standardized designs, will enhance safety, and will contribute to a better utilization of time and resources. A key incentive is the provision allowing the NRC initial waiver of application and issuance fees and allocation of those fees to users.

Because of the dynamic state of the technology and the variety of circumstances in which the standardization concept may be applied, a technical definition and explication of standardization in the Bill would be inappropriate. The flexibility to deal with this problem could be better accommodated in the Commission's rules and regulations. For the purposes of this section and this Bill, however, it is generally contemplated that a standardized design will be an essentially complete final design for a whole nuclear power plant usable at multiple sites. The final design should be described in such a way as to provide a reciprocal envelope of parameters for sites selected pursuant to section 193 to assure that the plant could be constructed on a site of given general characteristics. Typically, a final design should be described in such a manner that it could be used at most sites with a minimum of adaptations because of specific site characteristics. The Commission contemplates and encourages development and use of whole

plant standardized designs as an effective means of improving both efficiency and the public health and safety.

The application requirements for approval of a standardized design will be set out in the Commission's rules and regulations. If, after NRC review of the information in the application, and after providing the opportunity for a public hearing, the Commission determines that the design is suitable for construction and operation, it will issue an approval and the design may be banked for future use. Regarding the combination of a pre-approved standardized design with a pre-approved site, it is contemplated that there may be a hearing if there are outstanding issues, i.e., issues raised by the matching of the site with the design or by significant new information which has come to light since either the site or design hearings. However, issues would not trigger new opportunities for hearing at the time the site and design are matched unless it could be demonstrated that, through the exercise of diligence, the basis for such issues was not and could not have been known at the time when site hearings or design hearings were appropriate.

Subsection a. of section 194 authorizes the NRC to approve standardized designs even though no application for a construction permit or combined construction permit and operating license has been filed by an applicant. This provision permits design applications and approvals to be made before initiation of construction of a nuclear plant. It is a key feature in removing design review and approval from the construction schedule phase.

Subsection b. of section 194 provides that notwithstanding section 161w. of the IEA or the Independent Officers Appropriation Act of 1952, no application filing or issuance fees shall be required for an application for



approval or for an amendment or renewal of an approval of a complete standardized facility. The NRC is authorized to allocate the costs ordinarily defrayed by fees collected among future applicants for permits or licenses which propose to use the approved standardized design. This provision is added as an incentive to vendors and architect-engineer firms to develop and seek approval for standardized designs. However, if fees cannot be defrayed because a design is not used during the initial ten year approval, the applicant must pay the full amount plus accrued interest.

Subsection c. of section 194 provides that applications for standardized design approval shall be in writing and shall contain information necessary to enable the Commission to determine the suitability of the design for its intended purpose. The information should constitute an essentially complete final design for a whole nuclear power plant useable at multiple sites.

Subsection d.(1) of section 194 authorizes the Commission to approve an application and issue a standardized design approval with appropriate conditions if, after considering all the information in the application and providing an opportunity for a public hearing, the NRC finds that the design is suitable for the construction and operation of the type of facility described in the application consistent with the public health and safety. The opportunity for hearing and the hearing, if held, would be in accordance with the rules and regulations of the Commission, the appropriate provisions of the Administrative Procedure Act and applicable case law.

Subsection d.(2) of section 194 provides that any final determination of the Commission on an application filed under this section shall be a final order of the Commission for the purposes of judicial review. This

provision specifies the point of time in the administrative process when review by the courts is appropriate.

Subsection e.(1) of section 194 provides that a design approval shall be valid for a facility to be constructed on the site if an application has been filed within a period of ten years from the date of issuance of the design approval. The effect of this provision is that the rights accruing under a design approval are effectively exercised upon the filing of either a construction permit or a combined CP/OL application. In such a case, a request for renewal would be unnecessary to continue the effectiveness of the design approval.

Subsection e.(2)(A) of section 194 authorizes the Commission to renew a design approval for not less than five or more than ten years from the date of renewal. Renewal would be based upon the application of a permit holder. The minimum period of five years is set to assure that the resources used to review renewal requests are directed toward meaningful results. For example, allowing renewals for only six months or a year could cumulatively tax the resources of the agency and industry alike. Moreover, it is contemplated that information necessary to form a sound basis for the decision to renew for periods of five to ten years will be readily available and well within the state-of-the-art.

Subsection e.(2)(B) of section 194 sets out the criteria the Commission shall apply in deciding whether to renew a design approval. Renewal shall be granted unless it can be demonstrated that the design will not comply with the Atomic Energy Act or the Commission's applicable regulations in existence at the time that renewal is requested or that without a change to the design the overall risk of plant operation to the public health and

safety, or common defense and security, will be substantially greater than that estimated to exist at the time of the initial issuance of the approval for which renewal is applied and the design change is necessary to bring the plant within acceptable levels of risk. This provision allows for updating designs at the time a request for renewal of an approval is made.

Section 104. Stability of Standardized Plant Design.

Section 196 establishes a standard for providing stability of standardized plant designs once those designs have been approved. The standards set forth in section 196 are essentially the same as the standards set forth for renewals under section 194 except that the application of the standard is to plants which have already been approved and are not being considered for renewal, or are under-construction or in operation. Section 196 also permits the licensee to make voluntary design changes subject to appropriate Commission review for the purpose of improving plant safety or operations. This provision would allow changes to be made as appropriate and necessary to conform with emerging codes and technological improvements. The key element of this section is the emphasis on overall risk of plant operation as the standard for safety.

This section provides protection from unnecessary piecemeal changes for standardized designs giving finality to design approvals and, therefore, greater certainty in the stability of the review process. This section should serve as an incentive for the development and use of standardized designs.



## DRAFT BILL

To amend the Atomic Energy Act of 1954, as amended, to improve the nuclear siting and licensing process, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Nuclear Standardization Act of 1982."

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Enclosure 1



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Sec. 301. Effective Dates

FINDINGS AND PURPOSES

SEC. 2. (a) The Congress, recognizing that a clear and coordinated energy policy consistent with public health and safety must include an effective and efficient licensing process for siting, construction, and operation of nuclear power reactors which meet applicable criteria, finds and declares that:

- (1) standardization of nuclear power plant designs can enhance the public health and safety;
- (2) the licensing and construction of nuclear power plants should be facilitated by the use of previously approved standardized plant designs which reduce the need for individual plant licensing reviews;
- (3) the national interest requires improved planning for future energy supply and demand;
- (4) interstate commerce is substantially affected by the siting, construction, and operation of nuclear power reactors;
- (5) the national interest requires an opportunity for public participation in siting and licensing of nuclear power reactors;
- (6) it is efficient and in the public interest for the Nuclear Regulatory Commission to rely upon determinations respecting the need for new electric generating facilities made by competent Federal, State or regional authorities;
- (7) it is in the national interest that planning for energy facility siting and need for power determinations be made consistent with national and regional energy needs;

(8) the licensing process should produce greater stability in licensing standards and criteria for standardized plants;

(9) licensing decisions should be rendered in a timely manner in order to assure an adequate and reliable source of electricity consistent with public health and safety;

(10) it is appropriate and in the public interest for the Commission to consider the economic consequences of its regulatory practices;

(11) licensing decisions should be made final at the earliest feasible phase of the licensing process and should not be subject to duplicative adjudication in the absence of a showing that without a change to the design, the overall risk of plant operation to the public health and safety, or the common defense and security will be substantially greater than that estimated to exist at the time of the initial issuance of the design approval and the design change is necessary to bring the plant within acceptable levels of risk;

(12) procedures should be adopted to permit site selection and approval at the earliest practicable time in advance of a commitment to a specific facility design and in advance of an application for a construction permit;

(13) the Nuclear Regulatory Commission should continue to exercise its independent statutory responsibilities to protect the public health and safety and the common defense and security, taking into account that perfect safety is an unattainable goal for any energy source and that the cost of safety requirements should

be given consideration consistent with the public health and safety.

(b) The purposes of this Act are:

(1) to improve the effectiveness and efficiency of the nuclear power reactor licensing process, through encouraging the use of standardization of designs for nuclear power plants, consistent with sound public health and safety principles;

(2) to provide for early site selection and approval;

(3) to improve the stability of licensing standards and criteria for standardized plants; and

(4) to improve the quality of public participation in the nuclear power plant licensing process.

TITLE I - PLANNING, SITING, AND LICENSING  
CONSTRUCTION PERMITS AND OPERATING LICENSES

SEC. 101. Section 185 of the Atomic Energy Act of 1954, as amended, is amended to read as follows:

"SEC. 185. CONSTRUCTION PERMITS AND OPERATING LICENSES. --

"a. All applicants for licenses to construct or modify production or utilization facilities shall, if the application is otherwise acceptable to the Commission, be initially granted a construction permit. Upon the completion of the construction or modification of the facility, upon the filing of any additional information needed to bring the original application up to date, and upon finding that the facility authorized has been constructed and will operate in conformity with the application as amended and in conformity with the provisions of this Act and of the rules and regulations of the Commission, and in the absence of any good cause being shown to the Commission why the granting of an operating license would not be in accordance with the provisions of this Act, the Commission shall thereupon issue an operating license to the applicant. For all other purposes of this Act, a construction permit is deemed to be a 'license'.

"b. In making a determination on the issuance of any permit or license, the Commission is authorized to rely upon the certification of need for power made by the Federal Energy Regulatory Commission or its successor. If the Commission declares its reliance upon such certification, it shall constitute a definitive determination of need for the



power to be provided by the facility for the purposes of any other provision of Federal law administered by the Commission.

"c. Notwithstanding any other provision of this section, the Commission shall issue to the applicant a combined construction permit and operating license for a standardized nuclear power plant after providing an opportunity for public hearing, if the application contains sufficient information to support the issuance of both a construction permit and operating license in accordance with the rules and regulations of the Commission and to enable the Commission to make the determinations relating to the common defense and security and the public health and safety required by sections 103 and 182. After issuance of a combined construction permit and operating license for a standardized nuclear power plant, the Commission shall assure through inspections and tests that construction and operation is conducted in conformity with the application and the combined construction permit and operating license consistent with the rules and regulations of the Commission. Prior to the commencement of operation, the Commission shall find that the facility has been constructed and will operate in conformity with the combined construction permit and operating license, the provisions of this Act, and the rules and regulations of the Commission".

## EARLY SITE APPROVAL

SEC. 102. The Atomic Energy Act of 1954, as amended, is amended by adding a new section 193 to read as follows:

"SEC. 193. EARLY SITE APPROVAL. --

"a. The Commission is authorized to issue a site permit approving use of a site or sites for one or more utilization or production facilities upon the application of any Federal, regional, State or local governmental agency, or a utility, notwithstanding the fact that no application for a construction permit or a combined construction permit and operating license for such facility or facilities has been filed. For all other purposes of this Act, a site permit is a 'license'.

"b. Notwithstanding section 161 w. of this Act or the Independent Offices Appropriation Act of 1952, no application filing or issuance fees shall be required for an application for a site permit, an amendment, or a renewal of a site permit under this section.

The Commission is authorized to allocate the costs that would otherwise have been defrayed by fees required of applicants under this section among applicants for permits or licenses which propose to use the approved site. If no application for construction of a nuclear power plant is filed within the initial ten year approval period, the fee shall become immediately due and payable by the applicant for the site permit.

"c. Each application under subsection a. shall be in writing and shall contain information required by the Commission in its rules and regulations to determine the suitability of the site for its intended purpose.

"d. (1) If, after considering all information submitted in the application, and after providing an opportunity for public hearing, the Commission determines that the proposed site is suitable for the construction and operation of the facility or facilities described in the application consistent with public health and safety, it shall approve the application and issue a site permit with appropriate conditions as necessary.

"(2) Any final determination of the Commission on an application filed pursuant to this section shall be a final order of the Commission for purposes of judicial review.

"e. (1) A site permit issued by the Commission under this section shall be valid with respect to an application for a construction permit or a combined construction permit and operating license which meets the conditions of the site permit and is filed within a period of ten years from the date of issuance of the site permit.

"(2) (A) No less than twelve or more than thirty-six months prior to the expiration of the ten year period, the holder of the site permit may apply for a renewal of the site permit. Upon review by the Commission, the Commission may renew for good cause shown a site permit for an additional period of time of not less than five or more than ten years from the date of renewal, pursuant to appropriate Commission rules and regulations.

"(B) Upon application for renewal of a site permit pursuant to subparagraph (A), the Commission shall renew the site permit unless it finds that significant new information relevant to the site has become available and it is likely that the site will not comply with this Act or the Commission's rules and regulations for protection of the public health and safety or the common defense and security.

"f. Approval of a site under this section shall not preclude its use as a site for an alternate or modified type of energy facility or for any other purpose. Other uses may, however, affect the validity of the site permit or the conditions of its use for nuclear power plant siting as the Commission may determine.

"g. Nothing in this section shall preclude the Commission from inviting a request for a determination with respect to limited aspects of the suitability of the site for its intended purpose".

APPROVAL OF STANDARDIZED PLANT DESIGNS

SEC. 103. The Atomic Energy Act of 1954, as amended, is amended by adding a new section 194 to read as follows:

"SEC. 194. APPROVAL OF STANDARDIZED PLANT DESIGNS. --

"a. The Commission is authorized and directed to establish procedures permitting the approval of standardized nuclear power plant designs, notwithstanding the fact that no application for a construction permit or combined construction permit and operating license for such facility has been filed.

"b. Notwithstanding section 161 w. of this Act or the Independent Offices Appropriation Act of 1952, no application filing or issuance

fees shall be required for an application for a design approval, an amendment, or a renewal of an approval of a complete standardized plant design under this section. The Commission is authorized to allocate the costs that would otherwise have been defrayed by fees required of applicants under this section among applicants for permits or licenses which propose to use the approved standardized plant design. If no application for construction of a nuclear power plant is filed within the initial ten year approval period, the fee shall become immediately due and payable by the applicant for the design approval.

"c. Each application for an approval under subsection a. shall be in writing and shall contain information required by the Commission in its rules and regulations to determine the suitability of the design for its intended purpose.

"d. (1) If, after considering all information submitted in the application, and after providing an opportunity for public hearing, the Commission determines that the proposed standardized plant design is suitable for the construction and operation of the facility or facilities described in the application consistent with public health and safety, it shall approve the application and issue an approval with appropriate conditions as necessary.

"(2) Any final determination of the Commission on an application filed pursuant to this section shall be a final order of the Commission for purposes of judicial review.

"e. (1) Any approval issued by the Commission under this section shall be valid with respect to an application for a construction permit or a combined construction permit and operating license which meets the



conditions of the approval and is filed within a period of ten years from the date of approval.

"(2) (A) No less than twelve or more than thirty-six months prior to the expiration of the ten year period provided under paragraph (1), the entity to whom the approval was issued may apply for renewal of the approval. Upon review by the Commission, the Commission may renew the approval for an additional period of time of not less than five or more than ten years from the date of renewal pursuant to such rules and regulations as the Commission may deem appropriate.

"(B) Upon application for renewal of an approval issued pursuant to subsection a., the Commission shall renew the approval unless it finds that significant new information relevant to the design has become available subsequent to its approval and that as a result it is likely that: (1) the design will not comply with this Act or the Commission's applicable regulations; or (2) without a change to the design, the overall risk of plant operation to the public health and safety, or the common defense and security will be substantially greater than that estimated to exist at the time of the initial issuance of the approval for which renewal is applied and the design change is necessary to bring the plant within acceptable levels of risk".

STABILITY OF STANDARDIZED PLANT DESIGNS

SEC. 104. The Atomic Energy Act of 1954, as amended, is amended by adding a new section 196 to read as follows:

"SEC. 196. STABILITY OF STANDARDIZED PLANT DESIGNS. --

"No licensee of, or license applicant for a production or utilization facility shall be required to change an approved final standardized plant design unless it can be demonstrated that without a change to the design, the overall risk of plant operation to the public health and safety, or the common defense and security will be substantially greater than that estimated to exist at the time of the initial issuance of the approval and the design change is necessary to bring the plant within acceptable levels of risk. This provision shall not preclude the imposition of design change requirements for renewal of and approval of a design nor shall it preclude a licensee from making voluntary design changes subject to appropriate Commission review for the purpose of improving plant safety or operations".

## TITLE II -- CONFORMING AMENDMENTS

## ANTITRUST PROVISIONS

SEC. 201. Section 105 c. of the Atomic Energy Act of 1954, as amended, is amended in the first sentence of paragraph (2) by inserting "and/" after the word "construct".

## GENERAL PROVISIONS

SEC. 202. Section 161 o. of the Atomic Energy Act of 1954, as amended, is amended by inserting the words "or approvals authorized by sections 193 and 194" after the number "104".

## REVOCATION

SEC. 203. Section 186 a. of the Atomic Energy Act of 1954, as amended, is amended by inserting the words "or section 193" after the words "section 182".

## TITLE III -- EFFECTIVE DATES

SEC. 301. All sections of this Act shall take effect as of the date of enactment, and shall apply to all proceedings pending as of the date of enactment or commenced on or after the date of enactment.



## ATOMIC ENERGY ACT OF 1954, AS AMENDED

## "SEC. 105. ANTITRUST PROVISIONS. -

\* \* \*

"c. \*\*\*

"(2) Paragraph (1) of ~~this~~ subsection shall apply to an application for a license to construct and/ or operate a utilization or production facility under section 103: Provided, however, That paragraph (1) shall not apply to an application for a license to operate a utilization or production facility for which a construction permit was issued under section 103 unless the Commission determines such review is advisable on the ground that significant changes in the licensee's activities or proposed activities have occurred subsequent to the previous review by the Attorney General and the Commission under this subsection in connection with the construction permit for the facility".

SEC. 161. GENERAL PROVISIONS. - In the performance of its functions the Commission is authorized to -

\* \* \*

"o. Require by rule, regulation, or order, such reports, and the keeping of such records with respect to, and to provide for such inspections of, activities and studies of types specified in section 31 and of activities under licenses issued pursuant to sections 53, 63, 81, 103, and 104, or approvals authorized by sections 193 and 194, as may be



necessary to effectuate the purposes of this Act, including section 105; and"

"SEC. 185. CONSTRUCTION PERMITS AND OPERATING LICENSES. --

"a. All applicants for licenses to construct or modify production or utilization facilities shall, if the application is otherwise acceptable to the Commission, be initially granted a construction permit. [The construction permit shall state the earliest and latest dates for the completion of the construction or modification. Unless, the construction or modification of the facility is completed by the completion date, the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date.] Upon the completion of the construction or modification of the facility, upon the filing of any additional information needed to bring the original application up to date, and upon finding that the facility authorized has been constructed and will operate in conformity with the application as amended and in conformity with the provisions of this Act and of the rules and regulations of the Commission, and in the absence of any good cause being shown to the Commission why the granting of [a] an operating license would not be in accordance with the provisions of this Act, the Commission shall thereupon issue [a] an operating license to the applicant. For all other purposes of this Act, a construction permit is deemed to be a 'license'.

"b. In making a determination on the issuance of any permit or license, the Commission is authorized to rely upon the certification of

need for power made by the Federal Energy Regulatory Commission or its successor. If the Commission declares its reliance upon such certification, it shall constitute a definitive determination of need for the power to be provided by the facility for the purposes of any other provision of Federal law administered by the Commission.

"c. Notwithstanding any other provision of this section, the Commission shall issue to the applicant a combined construction permit and operating license for a standardized nuclear power plant after providing an opportunity for public hearing, if the application contains sufficient information to support the issuance of both a construction permit and operating license in accordance with the rules and regulations of the Commission and to enable the Commission to make the determinations relating to the common defense and security and the public health and safety required by sections 103 and 182. After issuance of a combined construction permit and operating license for a standardized nuclear power plant, the Commission shall assure through inspections and tests that construction and operation is conducted in conformity with the application and the combined construction permit and operating license consistent with the rules and regulations of the Commission. Prior to the commencement of operation, the Commission shall find that the facility has been constructed and will operate in conformity with the combined construction permit and operating license, the provisions of this Act, and the rules and regulations of the Commission".

"SEC. 186. REVOCATION. -

"a. Any license may be revoked for any material false statement in the application or any statement of fact required under section 182 or section 193, or because of conditions revealed by such application or statement of fact or any report, record, or inspection or other means which would warrant the Commission to refuse to grant a license on an original application, or for failure to construct or operate a facility in accordance with the terms of the construction permit or license or the technical specifications in the application, or for violation of, or failure to observe any of the terms and provisions of this Act or of any regulation of the Commission".

"SEC. 193. EARLY SITE APPROVAL. --

"a. The Commission is authorized to issue a site permit approving use of a site or sites for one or more utilization or production facilities upon the application of any Federal, regional, State or local governmental agency, or a utility, notwithstanding the fact that no application for a construction permit or a combined construction permit and operating license for such facility or facilities has been filed. For all other purposes of this Act, a site permit is a 'license'.

"b. Notwithstanding section 161 w. of this Act or the Independent Offices Appropriation Act of 1952, no application filing or issuance fees shall be required for an application for a site permit, an amendment, or a renewal of a site permit under this section.

The Commission is authorized to allocate the costs that would otherwise have been defrayed by fees required of applicants under this section among applicants for permits or licenses which propose to use the approved site. If no application for construction of a nuclear power plant is filed within the initial ten year approval period, the fee shall become immediately due and payable by the applicant for the site permit.

"c. Each application under subsection a. shall be in writing and shall contain information required by the Commission in its rules and regulations to determine the suitability of the site for its intended purpose.

"d. (1) If, after considering all information submitted in the application, and after providing an opportunity for public hearing, the Commission determines that the proposed site is suitable for the construction and operation of the facility or facilities described in the application consistent with public health and safety, it shall approve the application and issue a site permit with appropriate conditions as necessary.

"(2) Any final determination of the Commission on an application filed pursuant to this section shall be a final order of the Commission for purposes of judicial review.

"e. (1) A site permit issued by the Commission under this section shall be valid with respect to an application for a construction permit or a combined construction permit and operating license which meets the conditions of the site permit and is filed within a period of ten years from the date of issuance of the site permit.

"(2) (A) No less than twelve or more than thirty-six months prior to the expiration of the ten year period, the holder of the site permit may apply for an extension or renewal of the site permit. Upon review by the Commission, the Commission may extend for good cause shown or renew a site permit for an additional period of time of not less than five or more than ten years from the date of extension or renewal, pursuant to appropriate Commission rules and regulations.

"(B) Upon application for extension or renewal of a site permit pursuant to subparagraph (A), the Commission shall extend or renew the site permit unless it finds that significant new information relevant to the site has become available and it is likely that the site will not comply with this Act or the Commission's rules and regulations for protection of the public health and safety or the common defense and security.

"f. Approval of a site under this section shall not preclude its use as a site for an alternate or modified type of energy facility or for any other purpose. Other uses may, however, affect the validity of the site permit or the conditions of its use for nuclear power plant siting as the Commission may determine.

"g. Nothing in this section shall preclude the Commission from inviting a request for a determination with respect to limited aspects of the suitability of the site for its intended purpose".

"SEC. 194. APPROVAL OF STANDARDIZED PLANT DESIGNS. --

"a. The Commission is authorized and directed to establish procedures permitting the approval of standardized nuclear power plant



designs, notwithstanding the fact that no application for a construction permit or combined construction permit and operating license for such facility has been filed..

"b. Notwithstanding section 161 w. of this Act or the Independent Offices Appropriation Act of 1952, no application filing or issuance fees shall be required for an application for a design approval, an amendment, or a renewal of an approval of a complete standardized plant design under this section. The Commission is authorized to allocate the costs that would otherwise have been defrayed by fees required of applicants under this section among applicants for permits or licenses which propose to use the approved standardized plant design. If no application for construction of a nuclear power plant is filed within the initial ten year approval period the fee shall become immediately due and payable by the applicant for the design approval.

"c. Each application for an approval under subsection a. shall be in writing and shall contain information required by the Commission in its rules and regulations to determine the suitability of the design for its intended purpose.

"d. (1) If, after considering all information submitted in the application, and after providing an opportunity for public hearing, the Commission determines that the proposed standardized plant design is suitable for the construction and operation of the facility or facilities described in the application consistent with public health and safety, it shall approve the application and issue an approval with appropriate conditions as necessary.

"(2) Any final determination of the Commission on an application filed pursuant to this section shall be a final order of the Commission for purposes of judicial review.

"e. (1) Any approval issued by the Commission under this section shall be valid with respect to an application for a construction permit or a combined construction permit and operating license which meets the conditions of the approval and is filed within a period of ten years from the date of approval.

"(2) (A) No less than twelve or more than thirty-six months prior to the expiration of the ten year period provided under paragraph (1), the entity to whom the approval was issued may apply for renewal of the approval. Upon review by the Commission, the Commission may renew the approval for an additional period of time of not less than five or more than ten years from the date of renewal pursuant to such rules and regulations as the Commission may deem appropriate.

"(B) Upon application for renewal of an approval issued pursuant to subsection a., the Commission shall renew the approval unless it finds that significant new information relevant to the design has become available subsequent to its approval and that as a result it is likely that: (1) the design will not comply with this Act or the Commission's applicable regulations; or (2) without a change to the design, the overall risk of plant operation to the public health and safety, or the common defense and security will be substantially greater than that estimated to exist at the time of the initial issuance of the approval for which renewal is applied and the design change is necessary to bring the plant within acceptable levels of risk".

"SEC. 196. STABILITY OF STANDARDIZED PLANT DESIGNS. --

"No licensee of, or license applicant for a production or utilization facility shall be required to change an approved final standardized plant design unless it can be demonstrated that without a change to the design, the overall risk of plant operation to the public health and safety, or the common defense and security will be substantially greater than that estimated to exist at the time of the initial issuance of the approval and the design change is necessary to bring the plant within acceptable levels of risk. This provision shall not preclude the imposition of design change requirements for renewal of and approval of a design nor shall it preclude a licensee from making voluntary design changes subject to appropriate Commission review for the purpose of improving plant safety or operations".

COMMISSIONER ROBERTS' SEPARATE VIEWS  
REGARDING THE PROPOSED NUCLEAR STANDARDIZATION ACT OF 1982

Administrative agencies generally should strive for three goals in their decisionmaking process: efficiency, accuracy, and acceptability. I believe that this proposed legislation will admirably assist the NRC in achieving these goals. The procedures outlined in the proposed Act enable the agency (1) to undertake early site reviews and issue early site permits if the sites are found satisfactory, (2) to combine the construction permit and operating license reviews, and (3) to review and approve, if satisfactory, standardized plant designs. The agency's efficiency will obviously be increased with no concomitant adverse effect on the high level of accuracy already existent in the agency's decisions or on the acceptability of the agency's decisions. Moreover, like Commissioner Ahearne, I believe that the proposed Act will enhance safety through its provisions for plant standardization. Enhanced safety should flow from the greater familiarity of both licensees and the NRC with fewer plant designs. Thus, I conclude that the proposed Act furthers both the general administrative and specific safety goal of the NRC.

As noted by Commissioner Ahearne, any licensing reform legislation inevitably touches upon the NRC hearing process. This proposed legislation is no different. I believe that the proposed Act's provision for more flexible hearing procedures will greatly enhance the efficiency and acceptability of the agency's decisions without adversely affecting their accuracy. It is my observation that the agency's present highly-formalized, court-room procedures frustrate those members of the public who genuinely want to learn about the health and

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environmental effects of generating electricity by nuclear reactors assist those who wish to delay the licensing of these reactors. More flexible hearing procedures should enable members of the public to explore their concerns without the present interference of traditional trial-type procedures.

Due to my interest in extending informal hearing procedures in situations not covered in the proposed legislation, I would like to receive comments on what types of hearing procedures Section 189a of Atomic Energy Act (AEC) does require. In my mind, the assertion in proposed legislation that the section's interpretation is encumbered with confusion is an understatement. Since coming to the Commission have understood from various sources (1) that Section 189a does not, its face, require adjudicatory hearings, (2) that the legislative history of this section does not indicate that Congress intended NRC hearings to be adjudicatory, (3) that while the legislative history the first sentence in Section 189a does not suggest adjudicatory hearings, the legislative history of the second and third sentences suggest Congress intended adjudicatory hearings, (4) that inaction

by the Joint Committee on Atomic Energy demonstrates that Congress intended NRC hearings to be adjudicatory, and (5) that the Joint Committee on Atomic Energy concluded that the Atomic Energy Act (AEA) did not require adjudicatory hearings and thus that the AEC (the NRC predecessor) did not need legislation to change the AEA in order to informal hearings. I am thus interested in the views of the commission on these interpretations and on what precisely Section 189a requires. Beyond that, I am interested in the views of the commenters on whether



legislation is needed to protect the Commission from court challenges if the Commission changes its rules to permit informal hearings.

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# Separate Views, and Request for Comments, by Commissioner Ahearne

In addressing a legislative proposal, the major question should be what does the proposal accomplish -- in this case, what could be done if this proposal were law that cannot be done now.

The present proposal would make the following changes:

- (1) Modify the fee schedule.
- (2) Rely on the Federal Energy Regulatory Commission for need-for-power determinations.
- (3) Provide for a one-stop construction and operating license.
- (4) Provide for a standard plant approval.
- (5) Provide for an early site permit.
- (6) Allow modification of the hearing procedures now in use.

The NRC can almost do (3) to (6) by appropriate rule changes. However, I believe the current proposal can have two significant benefits: it can give strong emphasis to standardized plants and could serve to improve the hearing process.

The concept of standardization of plants has been under discussion for at least fifteen years. During this time, there has been continuing expressions of support from the AEC and the NRC and, at various times, industry interest. As the once thought large market for nuclear plants evaporated, the interest on the part of the industry similarly declined. During the last several years, several licensing reform bills have been proposed, some including support for standardization. More recently, the Office of Technology Assessment produced a study supporting standardization. It is difficult to analytically demonstrate that standardization will improve safety. I personally have reached the conclusion it will. I believe that safety improvement will come from having a few types of plants built and operated, manufacturers, construction managers, and operators becoming more familiar with those plants, and allowing NRC staff review to focus upon more critical questions rather than, for the sake of completeness, going through extensive reviews of lesser important items. Consequently, I have concluded that for purposes of safety it is appropriate for the NRC to

strongly support moving towards requiring standardization. This is particularly true at a time when a decreasing potential market and increasing financial pressures make taking shortcuts in maintenance and operation more likely.

Improving the hearing process is a goal long sought after. Therefore, licensing reform legislation always addresses the NRC hearing process. Section 181 of the Atomic Energy Act requires that "the provisions of the Administrative Procedure Act shall apply to all agency actions taken under this act . . . .". Section 189a of the Atomic Energy Act requires "[i]n any proceeding under this Act for the granting, suspending, revoking, or amending of any license or construction permit . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding. . . . The Commission shall hold a hearing after thirty days notice and publication once in the Federal Register, on each application under Section 103 or 104b for a construction permit for a facility . . . . In cases where such construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefore by any person whose interest may be affected, issue an operating license without. . . a hearing but upon thirty days notice and publication once in the Federal Register of its intent to do so." Section 189a has been interpreted by many within and without the NRC to require a formal adjudicatory hearing for granting of construction permits and operating licenses for nuclear power reactors. Substantial debate has focused on whether the statute or the legislative history developed prior to passage of the Act and its amendments support such a requirement. Nevertheless, for several decades both the NRC and its predecessor, the AEC, have supported the position through the actual practice of its boards and in a brief filed with the Court of Appeals that 189a does require a formal on-the-record adjudicatory hearing for the licensing of power reactors. Consequently, a modification of this practice is a substantial policy issue and one which I believe now requires a change in the Atomic Energy Act to assure that any modification will withstand legal challenge.

Consequently, I believe any final package that the Commission would propose supporting standardization should include an explicit discussion and description of the revised licensing hearing process, including a proposed amendment to the Atomic Energy Act to amend 189a. I would be interested in receiving public comment on the hybrid

hearing that has been discussed in the Senate: initial filings are based upon the information available and are done in writing; subsequent issues may be handled in writing or by oral argument; and cross-examination may be allowed, depending upon the type of issue that is being examined.

In addition, I have several modifications to the proposal which, although not accepted by the Commission, I believe should be considered:

(1) Since this bill would strongly support standardized plants, it seems odd not to include a definition of standardization. I would accept Commissioner Gilinsky's proposed definition:

An essentially complete final design for a whole nuclear power plant, intended for use at multiple sites.

I would be interested in comments on this definition or suggestions of another.

(2) Even if the pre-approved site and standardized design approaches were accepted, the NRC must have procedures for use when a non-standardized plant is proposed for use on a pre-approved site, and for when a standardized plant is proposed for use on a site that has not been reviewed. These procedures should be outlined. I would also outline revised procedures for a non-standardized plant used at a site that has not been reviewed since I believe the entire formal hearing process should be modified and legislation would help avoid extended legal battles.

(3) I would modify Subsection e. (2) (B) of Section 194, the associated section-by-section analysis, and (10) of the Findings and Purposes as follows:

"(B) Upon application for extension or renewal of an approval issued pursuant to subsection a., the Commission shall extend or renew the approval unless it finds that significant new information relevant to the design has become available subsequent to its approval and that as a result it is likely that: (1) the design will not comply with this Act or the Commission's applicable regulations; or (2) ~~without a change to the design, the overall risk of plant operation to the public health and safety,~~



~~or the common defense and security will be substantially greater than that estimated to exist at the time of the initial issuance of the approval for which renewal is applied and~~ the design change is necessary to bring the plant within acceptable levels of risk."

This deletion is appropriate because the struck section adds nothing. This result follows from the form of the requirement: renewal will be granted unless "(2) without . . . is applied and the design change . . . risk." (emphasis added) According to the proposed provision, both factors are necessary for renewal not to be granted. Thus, if the NRC does not find such change is necessary to bring the plant within an acceptable level of risk, then renewal will be granted, even if without a change the overall risk will be substantially greater than originally thought. However, under the general requirements of the Atomic Energy Act the NRC cannot grant approval if we find that the plant is not within acceptable levels of risk. Thus if "the design change is necessary to bring the plant within acceptable levels of risk," renewal will not be granted whether or not the overall risk is substantially greater. Therefore, the struck phrase is irrelevant at best and probably misleading.



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COMMISSIONER GILINSKY'S SEPARATE VIEWS REGARDING THE  
PROPOSED NUCLEAR STANDARDIZATION ACT OF 1982

I agree with the proposal to broaden the basis upon which early site approvals can be obtained, by authorizing entities other than the utility which will build a reactor, such as the Federal, State, or local governments, to seek approval of a site well in advance of the time when the utility would generally apply for such approval. However, it is not clear to me that the other provisions of the proposed bill are necessary. Indeed, it seems that the only objective of this legislation, apart from broadening early site approvals, is to undermine the Commission's hearing procedures. If that is so, this bill is mistitled.

As far as I can determine, the Atomic Energy Act presently authorizes the Commission to take virtually all the actions which would be authorized by the proposed Nuclear Standardization Act of 1982.<sup>1</sup> It is not the Commission's lack of legal authority which is holding back standardization. Indeed, several reactor vendors and

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<sup>1</sup> The only exception is the proposal to postpone payment of application fees for early site approval reviews and standardized plant design reviews until the site or design is actually used or until NRC approval lapses. This modest encouragement to applicants hardly justifies enactment of such an extensive bill.

architect-engineering firms have already asked the Commission to approve various standardized designs. It seems to me that the Commission could make better use of its time by reviewing its regulations and the staff's practices than by developing legislation.

Going beyond this, I would note that the Commission could, by amending its regulations, go much further than the proposed bill and require that all applicants, and not just those using a standardized design, submit an essentially complete plant design as part of the construction permit application. The Operating License hearing could then be limited to issues which were not covered in the Construction Permit proceeding or which relate to the construction of the plant. This approach would, for all practical purposes, be the equivalent of one-step licensing.

I would be interested in comments which discuss whether the objectives of the proposed bill could be more satisfactorily achieved by revising the Commission's regulations and the staff's procedures. I would also be interested in views which address the issue of restructuring the present construction permit and operating license hearings by requiring an essentially complete design to be submitted with the application for a construction permit.

Assuming that some version of the proposed bill will be submitted to Congress, I would be interested in comments on several aspects of, and modifications to, the bill drafted by the Commission's task force:<sup>2</sup>

- (1) The background statement asserts that the type of hearing required by Section 189a of the Atomic Energy Act is uncertain and that, in order to avoid this uncertainty, the Commission should have the discretion to prescribe any type of hearing it wishes for standardized plant design applications, subject only to the limitations of the Administrative Procedure Act.

The statement's remarks on the interpretation of section 189a as it relates to power reactor initial licensings are, at best, disingenuous. As a number of members of the Regulatory Reform Task Force have noted, the Commission has for 28 years consistently interpreted section 189a to require adjudicatory hearings in power reactor initial licensing cases. Throughout this period, the

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<sup>2</sup> The exact language of the modifications to sections 2, 102, 103 and 104, is shown in the mark-up of those sections which follows.

Congress, and most particularly the Joint Committee on Atomic Energy, was aware of this agency's practice. It would take an act of Congress to overturn this long standing interpretation of the Act. The approach advocated in the background statement would only serve to increase, rather than to reduce, confusion.

If the hearing requirements of the Atomic Energy Act are to be revised, it should as part of a systematic review of the hearing process rather than as a back-stairs effort to dismantle the hearing process.

- (2) Section 101 of the bill initially provided that the Commission could rely on a need for power finding made by any governmental entity which has a colorable interest in the plant. The Commission has agreed to my suggestion that the bill should instead vest the Federal Energy Regulatory Commission ("FERC") with the responsibility for making this finding. As the Federal agency with broad responsibility for the economic regulation of power generation, FERC is in the best position to evaluate the need for power in terms of the Federal government's concerns. It should be noted that this finding would in no way supplant the

various findings regarding need for a plant which are currently required under applicable state law.

- (3) Section 102 should be modified to require that issues relating to the match between an early approved site and the reactor design be heard in the construction permit hearing. A separate hearing to resolve these issues should be required where a plant with a standardized design is to be built at a site which received an early NRC approval.
- (4) Section 102 provides that the Commission may postpone the collection of fees associated with the review of an early site approval application until an application to use the site is filed or until the site approval expires. This section should be amended to authorize the Commission to charge accrued interest on the postponed fees. Otherwise, applicants using sites which have received early approval will be the beneficiaries of a reduced fee schedule as a result of inflation.
- (5) Section 103, which specifies when an applicant for an extension or renewal of an approval can be required to modify its design, should be changed



to provide that the Commission may require a standardized design to be modified not only where the design fails to comply with the Atomic Energy Act or the Commission's regulations, or where it is discovered to pose a greater risk than was originally estimated, but also where it is demonstrated that a change will reduce the overall risk of plant operation by some sufficiently large margin.

The approach taken by the proposed act appears to assume that there will be no significant improvements in knowledge or technology during the ten year life of the original license and that the level of risk found acceptable at the time of the original licensing will continue to be acceptable over the fifteen to twenty year term of an extended license. Since our experience tends to belie the notion that major improvements are unlikely, I would suggest that the act be modified to preserve the option of requiring some innovations where it can be shown that such changes will substantially reduce the overall risk of plant operation.

(6) In addition, Section 103 should, like Section 102, be modified to authorize the Commission to collect accrued interest on deferred licensing fees.

(7) A new section 104, defining "standardized design" to mean an essentially complete final design for a whole nuclear power plant, intended for multiple use should be added to the act. The proposed act currently defines this term only in the background statement. It would be better practice to define such a crucial term in the body of the statute.

(8) Section 105, which specifies when a licensee can be required to modify an approved final standardized design, should be amended to conform to the terms of section 103, as modified pursuant to paragraph five above.

## FINDINGS AND PURPOSES

SEC. 2. (a) The Congress, recognizing that a clear and coordinated energy policy consistent with public health and safety must include an effective and efficient licensing process for siting, construction, and operation of nuclear power reactors which meet applicable criteria, finds and declares that:

(1) the licensing and construction of nuclear power plants should be facilitated by the use of previously approved standardized plant designs which reduce the need for individual plant licensing reviews;

(2) the national interest requires improved planning for future energy supply and demand;

(3) interstate commerce is substantially affected by the siting, construction, and operation of nuclear power reactors;

(4) the national interest requires an opportunity for early public participation in siting and licensing of nuclear power reactors;

(5) it is efficient and in the public interest for the Nuclear Regulatory Commission to rely upon determinations respecting the need for new electric generating facilities made by competent Federal, State or regional authorities;

(6) it is in the national interest that planning for energy facility siting and need for power determinations be made consistent with national and regional energy needs;

(7) the licensing process should produce greater stability in licensing standards and criteria for standardized plants;

(8) licensing decisions should be rendered in a ~~safe~~ timely manner in order to assure an adequate and reliable source of electricity consistent with public health and safety;

(9) it is appropriate and in the public interest for the Commission to consider the economic consequences of its regulatory practices;

(10) licensing decisions should be made final at the earliest feasible phase of the licensing process and should not be subject to duplicative adjudication in the absence of a showing that without a change to the design, (1) the design will not comply with this Act or the Commission's applicable regulations; (2) the overall risk of plant operation to the public health and safety, or the common defense and security will be significantly substantially greater than that estimated to exist at the time of the initial issuance of the design approval and the design change is necessary to bring the plant within acceptable levels of risk; or, (3) it can be demonstrated that the design change is necessary to reduce substantially the overall risk of plant operation.

(11) procedures should be adopted to permit site selection and approval at the earliest practicable time in advance of a commitment to a specific facility design and in advance of an application for a construction permit;

(12) the Nuclear Regulatory Commission should continue to exercise its independent statutory responsibilities to protect the public health and safety and the common defense and security, taking into account that perfect safety is an unattainable goal for any energy source and that the cost of safety requirements should be given consideration consistent with the public health and safety.

(b) The purposes of this Act are:

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(1) to improve the effectiveness and efficiency of the nuclear power reactor licensing process, through encouraging the use of standardization of designs for nuclear power plants, consistent with sound public health and safety principles;

(2) to provide for early site selection and approval;

(3) to improve the stability of licensing standards and criteria for standardized plants; and

(4) to improve the quality of public participation in the nuclear power plant licensing process.

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#### EARLY SITE APPROVAL

SEC. 102. The Atomic Energy Act of 1954, as amended, is amended by adding a new section 193 to read as follows:

"SEC. 193. EARLY SITE APPROVAL. --

"a. The Commission is authorized to issue a site permit approving use approval of a site or sites for one or more utilization or production facilities upon the application of any Federal, regional, State or



local governmental agency, or a utility, notwithstanding the fact that no application for a construction permit or a combined construction permit and operating license for such facility or facilities has been filed. For all other purposes of this Act, a site permit is a 'license'.

"b. Notwithstanding section 161 w. of this Act or the Independent Offices Appropriation Act of 1952, no application filing or issuance fees shall be required for an application for a site permit, or an amendment, extension or renewal of a site permit under this section.

The Commission is authorized to allocate the costs ; and the accrued interest thereon that would otherwise have been defrayed by fees required of applicants under this section among applicants for permits or licenses which propose to use the approved site. If no application for construction of a nuclear power plant is filed within the initial ten year approval period, the fee ; and the accrued interest thereon, shall become immediately due and payable by the applicant for the site permit.

"c. Each application under subsection a. shall be in writing and shall contain information required by the Commission in its rules and regulations to determine the suitability of the site for its intended purpose.

"d. (1) If, after considering all information submitted in the application, and after providing an opportunity for public hearing, the Commission determines that the proposed site is suitable for the construction and operation of the facility or facilities described in the

application consistent with public health and safety, it shall approve the application and issue a site permit with appropriate conditions as necessary.

"(2) Any final determination of the Commission on an application filed pursuant to this section shall be a final order of the Commission for purposes of judicial review.

"e. (1) A site permit issued by the Commission under this section shall be valid with respect to an application for a construction permit or a combined construction permit and operating license which meets the conditions of the site permit and is filed within a period of ten years from the date of issuance of the site permit. Issues relating to the match between the site parameters and the reactor design will be heard in the construction permit hearing. Where a combined construction permit and operating license has been issued for a standardized design, a separate hearing will be held to resolve any issues relating to the match between the site parameters and plant design.

"(2) (A) No less than twelve or more than thirty-six months prior to the expiration of the ten year period, the holder of the site permit may apply for an extension or renewal of the site permit. Upon review by the Commission, the Commission may extend for good cause shown or renew a site permit for an additional period of time of not less than five or more than ten years from the date of extension or renewal, pursuant to appropriate Commission rules and regulations.

"(B) Upon application for extension or renewal of a site permit pursuant to subparagraph (A), the Commission shall extend or renew the site permit unless it finds that significant new information relevant to the site has become available and it is likely that the site will not comply with this Act or the Commission's rules and regulations for protection of the public health and safety or the common defense and

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"f. Approval of a site under this section shall not preclude its use as a site for an alternate or modified type of energy facility or for any other purpose. Other uses may, however, affect the validity of the site permit or the conditions of its use for nuclear power plant siting as the Commission may determine.

"g. Nothing in this section shall preclude the Commission from inviting a request for a determination with respect to limited aspects of the suitability of the site for its intended purpose".

#### APPROVAL OF STANDARDIZED PLANT DESIGNS

SEC. 103. The Atomic Energy Act of 1954, as amended, is amended by adding a new section 194 to read as follows:

"SEC. 194. APPROVAL OF STANDARDIZED PLANT DESIGNS. --

"a. The Commission is authorized and directed to establish procedures permitting the approval of standardized nuclear power plant designs, notwithstanding the fact that no application for a construction permit or combined construction permit and operating license for such facility has been filed.

"b. Notwithstanding section 161 w. of this Act or the Independent Offices Appropriation Act of 1952, no application filing or issuance fees shall be required for an application for approval or for an amendment, extension or renewal of an approval of a complete standardized plant design under this section. The Commission is and accrued interest thereon, authorized to allocate the costs that would otherwise have been defrayed by fees required of applicants under this section among applicants for permits or licenses which propose to use the approved standardized plant design.

"c. Each application for an approval under subsection a. shall be in writing and shall contain information required by the Commission in its rules and regulations to determine the suitability of the design for its intended purpose.

"d. (1) If, after considering all information submitted in the application, and after providing an opportunity for public hearing, the Commission determines that the proposed standardized plant design is suitable for the construction and operation of the facility or facilities described in the application consistent with public health and safety, it shall approve the application and issue an approval with appropriate conditions as necessary.

"(2) Any final determination of the Commission on an application filed pursuant to this section shall be a final order of the Commission for purposes of judicial review.

"e. (1) Any approval issued by the Commission under this section shall be valid with respect to an application for a construction permit or a combined construction permit and operating license which meets the conditions of the approval and is filed within a period of ten years from the date of approval.

"(2) (A) No less than twelve or more than thirty-six months prior to the expiration of the ten year period provided under paragraph (1), the entity to whom the approval was issued may apply for an extension or renewal of the approval. Upon review by the Commission, the Commission may extend or renew the approval for an additional period of time of not less than five or more than ten years from the date of extension or renewal pursuant to such rules and regulations as the Commission may deem appropriate.

"(3) Upon application for extension or renewal of an approval issued pursuant to subsection a., the Commission shall extend or renew the approval unless it finds that significant new information relevant to the design has become available subsequent to its approval and that as a result it is likely that: (1) the design will not comply with this Act or the Commission's applicable regulations; or (2) without a change to the design, the overall risk of plant operation to the public health and safety, or the common defense and security will be significantly ~~substantially~~ greater than that estimated to exist at the time of the initial issuance of the approval for which renewal is applied and the design change is necessary to bring the plant within acceptable levels of risk"; or (3) it can be demonstrated that the design change is necessary to reduce substantially the overall risk of plant operation.

DEFINITIONS

SEC. 104. The Atomic Energy Act of 1954, as amended, is amended by adding a new subsection to Section 11 to read as follows, and by renumbering the existing subsections of Section 11 to accommodate this change,:

"bb. The term "standardized design" means an essentially complete final design for a whole nuclear power plant, intended for multiple use."



STABILITY OF STANDARDIZED PLANT DESIGNS

105.

SEC. 104. The Atomic Energy Act of 1954, as amended, is amended by adding a new section 196 to read as follows:

"SEC. 196. STABILITY OF STANDARDIZED PLANT DESIGNS. --

"No licensee of, or license applicant for a production or utilization facility shall be required to change an approved final standardized plant design unless it can be demonstrated that without a change to the design: (1) the design will not comply with the Atomic Energy Act or the Commission's applicable regulations in existence at the time that the license was granted; or (2) the overall risk of plant operation to the public health and safety, or the common defense and security be significantly substantially greater than that estimated to exist at the time of the initial issuance of the approval and the design change is necessary to bring the plant within acceptable levels of risk; or (3) the overall risk posed by plant operation will be substantially greater than if the change to the design were made. This provision shall not preclude the imposition of design change requirements for renewal of and approval of a design nor shall it preclude a licensee from making voluntary design changes subject to appropriate Commission review for the purpose of improving plant safety or operations".

\* \* \* \* \*

SEPARATE VIEWS OF TASK FORCE MEMBERS PETER CRANE & SEYMOUR WENNER  
REGARDING THE PROPOSED NUCLEAR STANDARDIZATION ACT OF 1982

The draft "Nuclear Standardization Act of 1982," forwarded to the Commissioners in SECY-82-128, is in our view a generally desirable piece of legislation. We wish to state, however, our disagreement with the portions of the legislation which describe the type of hearing to be held on site permits, standardized designs, and combined construction permits/operating licenses.

Under the proposed bill, as described on pages 8 and 9 of the "Background," such hearings could be formal or could be so informal as to permit the entire case to be handled on the basis of written submissions. According to the "Background," the meaning of Section 189a. of the Atomic Energy Act is uncertain, and by providing for hearings governed only by the Administrative Procedure Act and applicable case law, the bill would result in a hearing process "unencumbered by the confusion surrounding the interpretation of Section 189a."

We do not believe that there is any significant confusion surrounding the meaning of Section 189a., which provides in pertinent part: "In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit ... the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." The statute, to be sure, speaks only of a "hearing," without specifying that the hearing is to be adjudicatory. However, 28 years of consistent agency practice, effectively ratified by years of close

oversight by the Joint Committee on Atomic Energy, have firmly embedded the adjudicatory nature of Section 189a. hearings in the law. In our view, it would require explicit Congressional action to alter the meaning of Section 189a. from that which has been accepted by the agency and the courts for so long a period of time.

Furthermore, neither the draft bill nor the "Background" mentions the Atomic Energy Act in this connection; the "Background" merely states that the hearings on CP/OLs, site permits, and standardized designs will be governed by the Administrative Procedure Act and applicable case law. Without an unequivocal statement in the bill -- or at the very least, in the accompanying analysis -- that these hearings are not to be governed by Section 189a., a reviewing court might well find that these were proceedings "for the granting ... of any license or construction permit" and as such, subject to the requirements of Section 189a. Thus, the result of this section of the bill may be to increase confusion rather than reduce it.

In our view, the question of the type of hearing most likely to accomplish the Commission's purposes is a serious and complex issue, worthy of careful study. If any legislative change in the existing process is deemed to be desirable, we believe that it should be made across the board, rather than confined to site permits, standardized designs, and combined CP/OLs, and that it should be the subject of a legislative proposal separate from the present standardization-oriented bill.

Finally, on a separate matter, we believe that the discussion of "One-step vs. Two-step Licensing" on pages 5 and 6 of the "Background" overstates the shortcomings of the two-stage licensing process.



## Chapter 2

### Analysis of Public Comments on NSA



COMMENTS ON ANALYSIS OF PROPOSED "NUCLEAR STANDARDIZATION

ACT OF 1982"

Pursuant to the Federal Register Notice issued on June 2, 1982 (47 Fed. Reg. 24044) a number of comments were received on the proposed Nuclear Standardization Act (NSA) which was published for comment. Comments were provided by representatives of the nuclear industry and industry groups (17 submittals), by intervenors and representatives of intervenors or intervenor organizations (19 submittals), and by others who cannot be properly categorized as either industry or intervenors (9 submittals).

Industry comments were generally favorable to the concepts embodied in the NSA but, by and large, indicated industry's view that the proposals do not go far enough and took issue with specific provisions of the NSA. In general, industry commentators indicated that:

- The proposed legislation should also address existing operating plants and plants currently under review ("in the pipeline");
- Backfit standards should be revised now and should apply to all facilities, not just those involving standardized designs;
- The proposed legislation should address the hearing process in greater detail and clarity;

- Appropriate state entities, rather than FERC, should be relied upon regarding need for the facility;
- The NSA proposal to eliminate completion of construction dates in CPs should be adopted;
- The NSA proposal to eliminate the Commission quorum requirement should be adopted; and,
- There is a need for a better statutory definition of "standardized design".

Intervenors' comments were generally unfavorable to the concepts embodied in the NSA (with the notable exception of provisions for early finalization and consideration of standardized designs) and were most concerned with, and opposed to, any provisions that would affect full, formal, trial-type adjudicatory hearings on any aspect of licensing.

Intervenors' comments also generally opposed any statutory standards that would modify the requirements for imposing design changes or backfits relative to today's requirements for backfitting under the currently existing 10 CFR § 50.109.

Comments by others (non-industry and non-intervenor entities) cannot be generally characterized. The major, significant and recurring comments on

the NSA are set out below. General comments are recounted first, followed by the comments on specific sections of the NSA.

### GENERAL COMMENTS ON LEGISLATIVE PROPOSALS

#### I. General

Several individual intervenors (Hafner, Vadas, Clift, O'Neill, Fraser, Holden, Kounthils) as well as intervenor organizations (Indiana Sassafras Audubon Society, Environmental Law Project of the University of North Carolina) strongly oppose the entire NSA bill on the grounds that, in their view, it would generally streamline and speed-up the licensing process to the benefit of the nuclear industry at the expense of intervenors. They have provided no specific comments or objections except as noted infra. The Wisconsin Public Service Commission expressed the view that, in light of the current financial climate and the demand growth for electricity, the legislation proposed in the NSA is unnecessary now.

In contrast, industry groups in general favor the general licensing reform concepts set out in the NSA but would go further. The American Nuclear Energy Council/Atomic Industrial Forum/Edison Electric Institute (ANEC/AIE/EEI) as well as the Committee on Regulatory Assessment of Scientists and Engineers for Secure Energy (SE<sub>2</sub>) and Commonwealth Edison Company expressed the view that the proposed legislation, which is directed to future licensing concepts, inappropriately fails to address overall

licensing reform and the more pressing problems of licensing for existing operating plants and those currently "in the pipeline." These industry organizations suggest that the NRC substantially expand its proposed legislation to encompass reform of the licensing process for the current facilities.

## II. Hearings

The bulk of the general comments are addressed to hearings and the hearing process and to backfitting (covered infra).

As to the hearing process, both General Electric and a law firm representing nuclear utilities expressed the view that revisions to hearing requirements should be done systematically, that the bill should clearly define all licensing actions (CP, OL, combined CP/OL, standard design approvals, site approval) for which an opportunity for hearing is available and not be limited to addressing hearings simply for the new licensing concepts proposed in the NSA, and that the legislation should clearly define the hearing requirements in all instances, rather than leave the development of hearing requirements to administrative processes. The suggestion is also made that Section 189a of the Atomic Energy Act should be amended to allow informal hearings for all licensing actions and that hearings should be limited to the resolution of matters in controversy among the parties.

San Diego Gas and Electric Company commented that for all licensing processes, generic NEPA issues should be resolved and excluded from hearings



and that licensing boards should be statutorily restrained in the admission of contentions and in the scope of questioning permitted at hearing. Further industry comments suggest that legislation should raise the threshold for contentions to require a showing that contentions are valid before they are admitted, and that admissible contentions should be limited to issues not previously resolved such that litigation of issues with generic applicability that have been resolved in other proceedings is precluded.

Intervenors on the other hand strongly oppose any changes to the hearing process.

As to the proposals in the NSA which would allow the use of informal hearing procedures for those hearings on combined CP/OLs, site approvals and standardized design approvals provided by the NSA, industry commentators generally favor the proposed statutory provisions based on industry views that such a process would be fair and more efficient than the present process with its oral presentation of evidence and cross-examination, which industry believes to be exceedingly time-consuming and of little value from a safety standpoint. Counsel for the Pa. P.U.C. similarly favors legislative, rather than adjudicatory, hearings on the ground that it is better suited to the resolution of complex technical issues. The primary comment of industry is that the NSA, as proposed, provides little or no guidance on the hearing process and format that should be used and should be modified to be very explicit in allowing informal hearing procedures rather than the formal trial type hearings NRC traditionally uses under Section 189a of the Act.



ANEC/AIF/EEI, the Nuclear Utility Backfitting and Reform Group (NUBARG) and SE<sub>2</sub> specifically recommend that the NSA be modified and Section 189a be amended to explicitly provide for "hybrid" hearings, in accordance with those under consideration in the Regulatory Reform Act (S.1080, 47th Congress, 1st Session), for all licensing under the Atomic Energy Act.

In contrast, nearly all intervenor commentators (UCS; Doggett; Audubon Society of New Hampshire; Hiatt; Southwest Research and Information Center (SRIC); New England Coalition on Nuclear Pollution (NECNP); Nuclear Information and Resource Service (NIRS); Center for Law in the Public Interest (CLPI)) indicated their view that formal trial type adjudicatory hearings with all rights of cross-examination have contributed much to identifying problems and assuring safety in licensing and provide the only method, in many cases, of meaningful public participation in, and input to, the licensing process. Intervenor commentators indicate that intervenors generally are ill-equipped, financially and technically, to participate in an informal proceeding in which the decision is based on written submissions rather than evidence developed orally and through cross-examination. They argue that an informal hearing process with little or no oral presentation will effectively preclude intervenors and the public from participation. Accordingly, intervenors, as well as the New York State Department of Law which provided comments, strongly oppose any legislative provisions that would allow, in any licensing action, anything other than the formal trial type adjudicatory hearings presently used by the NRC. UCS believes that allowing informal hearing procedures for combined CP/OLs, site approvals and

standardized designs, (which will have more generic and far reaching significance than licensing single, custom plants) but not for the licensing of single custom plants, as proposed under the NSA, makes no sense.

The request for comments on mandatory CP hearings elicited the views of industry commentators (ANEC/AIF/EEI; NUBARG; SE<sub>2</sub>; LeBoeuf, Lamb, Leiby & MacRae) that the Atomic Energy Act should be amended to eliminate mandatory CP hearings and to provide for a hearing only when the CP is contested. Other commentators did not provide explicit comments on this matter.

Similarly, while others provided no comments on hearing opportunities for license amendments, industry commentators (ANEC/AIE/EEI; NUBARG; LeBeouf, Lamb, Leiby & MacRae; Yankee Atomic Electric Company) favor amending Section 189a so as to make license amendments immediately effective with no opportunity for prior hearing (going beyond the proposed Sholly amendment) when the license amendment does not involve a significant hazards consideration.

### III. Backfitting

A large number of comments from industry was directed to backfitting. Overall, industry commentators indicated their views that the most immediate need for licensing and regulatory reform is the need for the immediate modification of backfitting policy and regulations applicable to currently operating plants and those in the licensing "pipeline" (ANEC/AIF/EEI, NUBARG,

CRA-SE<sub>2</sub>, Yankee Atomic Electric Co.). Some industry commentators expressed the view that the backfit provisions implied in relation to site permit renewals and proposed for approved standardized designs in the NSA are inadequate and should be applied neither to the new licensing concepts in the NSA nor to existing operating plants or those currently in licensing review.

NUBARG proposed that backfitting be given first priority and that a new backfitting standard be promulgated and made applicable to all modifications, whether imposed by regulation or order, and to changes in procedures and organization. The standard for backfitting proposed by NUBARG would:

require consideration of whether the modification will be effective in substantially increasing the level of overall safety of operation and is necessary to keep or bring the plant within an acceptable level of overall safety for the remaining life of the plant.

SE<sub>2</sub> expressed the view that a backfit standard based on "acceptable levels of risk" is a desirable goal but appears impractical at the present time.

Yankee Atomic Electric Company on the other hand believes that a backfit standard should be promulgated which:

creates the presumption that existing licensed designs are adequate unless the NRC rebuts such presumption with a clear and substantial showing that additional safety provisions are needed with the cost of

equipment, analysis and testing considered and balanced against benefits of the backfit.

Intervenors who commented on backfitting generally did so in the context of backfit type provisions in specific sections of the NSA (discussed infra) and generally favored application of the backfit standard currently set out in the existing 10 CFR § 50.109.

### III. COMMISSION QUORUM REQUIREMENTS

SE<sub>2</sub> favors eliminating the Commission quorum requirements as addressed in the Federal Register Notice for the NSA. The single intervenor commentator (Hiatt) who addressed the matter opposes any legislative amendments that would delete the quorum requirements based on her view that such action is an attempt to silence dissenting Commissioners.

### IV. OTHER GENERAL COMMENTS

Two additional comments from industry are directed to the general concepts embodied in the NSA. NucleDyne Engineering Corporation suggested that reform legislation should establish a mechanism for evaluating the licensability of safety improvements or new and unique design concepts for parts of plants independent of any application for a CP or OL. In essence, what is proposed is a statutory framework for "pre-licensing approval," before detailed designs are completed, so as to give assurance that when a

novel design appears in a license application, it would not be summarily rejected because it is new. The commentator opined that such provisions would give incentive to the development of new, safer, cost-saving concepts.

Finally, San Diego Gas and Electric Company suggested that to provide additional incentive for the development of standardized designs, the NRC should seek legislation relaxing antitrust restrictions on NSSS vendors so as to allow cooperation among such vendors on standardized designs.

#### SECTION BY SECTION COMMENTS ON NSA

##### I. Section 101/185

One industry commentator (ANEC/AIF/EEI) addressed the provision eliminating the earliest and latest completion dates in CPs. That commentator favored the proposal. Intervenor commentators (UCS, NECNP, CLPI, Environmental Law Project) generally opposed deletion of the latest completion date in a CP based on their view that a CP should not be issued in perpetuity. In particular, UCS notes its view that deletion of the latest completion date in a CP, along with certain other provisions in the NSA, might allow a permittee to grandfather a plant against safety-related changes indefinitely.

As to the provisions for a combined CP/OL and one-step licensing process, two independent commentators (Phillips, Davis) support the proposal based on their views that it would speed licensing and reduce the costs of



licensing. Industry commentators generally favor the proposal although a number of industry representatives (ANEC/AIF/EEI; SE<sub>2</sub>; Sargent and Lundy) as well as one intervenor (NECNP) strongly suggest that the provision be modified so that a combined CP/OL is not limited to standardized plants but is also available for other facilities. UCS supports the provision for combined CP/OL for all facilities and suggests that the legislation be modified to require the submission of complete, final, detailed designs as part of the initial application for all facilities. In contrast, Baltimore Gas and Electric Company favors the proposed provision for a combined CP/OL for standardized plants but suggests that the provision be modified to allow applicants for standardized plants to use the traditional two-step licensing if they so choose.

Several intervenors (Spiegel, Leight, Lewis, Environmental Law Project) strongly oppose one-step licensing based on their view that it would inappropriately speed licensing at the expense of safety and a full airing of safety issues in hearings.

Industry commentators (SE<sub>2</sub>; Bechtel) consistently expressed the concern that the level of design detail (as expressed in the section-by-section analysis of the NSA) required for the initial application for a combined CP/OL is too great and impractical. Thus, San Diego Gas and Electric indicated that, to provide such a large volume of detail at the outset, applicants will be required to incur large expenditures in design and development without any indication of licensability. To alleviate the risk, this commentator believes that applicants will first seek an early site

approval, then a combined CP/OL resulting in a modified two-step licensing process in any event. ANEC/AIF/EEI also view the level of design detail for a combined CP/OL as being too great and impractical and suggests that a workable level of detail be established through rulemaking. General Electric suggests that it be established that the level of design detail for a combined CP/OL application should be something more than that in an FSAR, something less than that in an FSAR, and based on the use of design envelopes.

As to hearing requirements on a combined CP/OL, ANEC/AIF/EEI suggest that, in addition to the proposals in the NSA, § 189 of the Atomic Energy Act should be amended to provide that the sole opportunity for hearing on a combined CP/OL application would be prior to issuance of the CP/OL and any issues previously resolved could not be considered in such a hearing unless significant new information substantially affecting conclusions on the previously resolved issues were shown to exist.

Several industry commentators (ANEC/AIF/EEI; SE<sub>2</sub>; GE) expressed a concern that the requirement for a Commission "finding" before operation that the applicant has completed construction and will operate in accord with the terms of the CP/OL might be interpreted as a second stage of NRC review and as a second stage of authorization or licensing, thus defeating the one-step licensing concept. These commentators suggest that Section 101/185 be modified to make it clear that the "finding" is limited to inspection and testing to verify compliance with the CP/OL. ANEC/AIF/EEI suggest that an

alternative provision should be inserted allowing the licensee to certify to the NRC that it has complied with the CP/OL and then begin operation unless the NRC issues an order prohibiting or restricting operation.

All industry entities that commented on the matter (ANEC/AIF/EEI; SE<sub>2</sub>; GE) expressed a concern that the provision for a Commission "finding" before operation could be read to require a second hearing, beyond that held on the issuance of a CP/OL, and suggested that the legislation be modified so as to clearly state that no further hearings, beyond that held regarding initial issuance of the combined CP/OL, is required. In contrast, a number of intervenor commentators (UCS, NECNP, NIRS, Center for Law in the Public Interest) expressed the view that the public should be given the opportunity for a hearing on the Commission finding that the facility was constructed in accord with the CP/OL and on concerns regarding the adequacy of construction. Accordingly, most of these intervenor groups suggested that Section 101/185 should be modified to provide for a second hearing on the findings with regard to adequacy of construction and compliance with the CP/OL. On this matter, the comments on the interpretation as to whether the current version of section 101/185 allows for a second hearing are sufficiently diverse as to indicate some confusion on the question and the need for clarification.

On the provision in Section 101/185 for FERC certification of need for power, two industry commentators (Black & Veatch; Baltimore Gas and Electric Company) favored the proposal. One intervenor (Environmental Law Project) also favored it provided that the section is modified to require periodic

re-review of need for power by FERC. By and large, however, the majority of industry (American Public Power Association; ANEC/AIF/EEI; SE<sub>2</sub>; Sargent & Lundy) and intervenor (Lewis; Indiana Sassafras Audubon Society; UCS; Hiatt; NIRS; New York State Department of Law) commentators expressed the view that FERC is neither currently authorized nor qualified to make such a certification and that the proposal in the bill is inappropriate and, to some intervenors, unacceptable. These commentators generally all suggest that the bill be modified to provide for NRC reliance on state PUCs and energy facility siting councils which are claimed to have the required experience, expertise and knowledge to make certifications on need for power.

## II. Section 102/193

As to the concept of statutory early site approvals, there was no explicit opposition among the commentators except for the Environmental Law Project which indicated its view that Section 102/193 is defective as written in that it fails to prohibit the performance of site work after site approval is given but before a combined CP/OL is issued. Marvin Lewis also expressed his view that legislation providing for early site review is unnecessary since there are currently no new proposals to build nuclear plants.

Several industry commentators questioned the provision designating who could apply for early site approvals. Black & Veatch suggested that the section be modified to eliminate federal, state and local governments as applicants on the ground that these governmental entities would not apply for

an early site approval in any event. The American Public Power Association, noting its view that qualifying sites will likely be scarce and monopolized by large utility holding companies to the detriment of smaller systems, suggested that the legislation should be modified to give preference in early site approvals to public agencies and systems (as is done for hydroelectric permits under the Federal Power Act) and to apply the antitrust provisions of Section 105 of the Atomic Energy Act to site applications. ANEC/AIF/EEI expressed their view that proposed Section 193a inappropriately limits those persons who can apply for a site approval and suggest that the section be modified to allow applications by any "person" as defined in Section 11s of the Atomic Energy Act.

Finally, Baltimore Gas & Electric Company suggests that a provision be added allowing early site approvals for sites with existing operating reactors, with the existing plants at the site to be unaffected by the review and approval process or by subsequent reviews for new plants at the site.

Two industry commentators (San Diego Gas and Electric; ANEC/AIF/EEI) expressed concern over the complexity of the early site approval application implied in the section-by-section analysis accompanying the NSA. ANEC/AIF/EEI indicate that, at the early site approval stage, the detailed plant design seemingly called for in the application may be impossible to provide and suggest that Section 193c be modified to make it clear that only an acceptable "environmental impact envelope", without the need for a



detailed plant design, will be required in the application for early site approval.

As to deferral of fees for site approvals, Black & Veatch suggests that fees should be waived altogether as an incentive to applicants. ANEC/AIF/EEI support fee deferral but question the method of allocation and suggest that Section 193b be modified to simply provide that fee allocation will be resolved in rulemaking. Baltimore Gas & Electric suggests that the fee deferral provisions should be modified to allow further fee deferral into the site permit renewal period and to provide a reasonable assessment of interest on deferred fees.

A number of intervenor commentators (UCS; Hiatt; NECNP; Center for Law in the Public Interest) indicated their views that NRC licensing fees are small relative to an applicant's other costs in preparing a site application and that fee deferral is thus unnecessary and is, in any event, at least a temporary subsidy to the industry. These commentators, therefore, suggest that the fee deferral provision be deleted.

On the ten-year length of an early site approval, two intervenors (UCS; NECNP) expressed concern that this provision, in combination with elimination of the latest completion dates from CPs, could result in a site permit of unlimited duration. These intervenors, therefore, support the provision in Section 102/193 on effective dates of the site approval only if the latest

construction completion date in CPs is not deleted from Section 185 of the Atomic Energy Act.

As to renewal of site approvals, ANEC/AIF/EEI urge that Section 193e(2) be modified to provide that renewal will be presumptive. They suggest further provision to the effect that a renewal application will not occasion re-review of previously resolved problems but NRC will be limited in its review to new site information and may not require changes to the site permit except pursuant to backfit standards.

Several intervenors (UCS, Hiatt, NECNP, Center for Law in the Public Interest) commented that the proposed Section 102/193 implies that site permit renewal will be automatic. These commentators urge that Section 102/193 be modified to make it clear that renewal is not automatic and that renewal can only be granted after a full re-review and a demonstration by the permittee that there have been no significant changes since issuance of the site permit. One intervenor suggests that Section 102/193 be modified to provide an opportunity for a hearing on the renewal application.

Two intervenors (UCS; Center for Law in the Public Interest) commented on Commissioner Gilinsky's suggestion that a provision be added to Section 193e(1) to require a match of site parameters and plant design in the CP hearing. Both intervenors see such a provision to be necessary to assure a proper match of site and facility and urge modification to Section 193 to

provide a separate hearing, independent of the CP or combined CP/OL hearing, on matching the site and the plant.

### III. Section 103/194

There were no comments opposing the general concept of standardized design although one industry commentator (Sargent & Lundy) questioned the need for statutory provisions on standardized design approvals in view of the current lack of interest in the nuclear option. Sargent & Lundy also indicated its view that standardized designs of the sort contemplated in the NSA may be impractical for the balance of plant (BOP) portion of a facility design because the AE must rely on NSSS vendors to assure the proper interface and would be constrained to develop a large number of standardized BOP designs to match the NSSS standardized designs of the reactor vendors.

ANEC/AIF/EEI note that the stated basis for approval of a standardized design differs in language from that in the Atomic Energy Act and current regulations for issuance of a license. They suggest that since current standards have long been in existence and interpreted by the courts, Section 103/194 should be modified to use current standards in the Atomic Energy Act for license issuance.

As to the length of a standardized design approval, one commentator (Phillips) suggested that the NSA be modified to provide a 20 year effective term, whereas another (New York State Department of Law) objects to any

"long-term" (undefined) approval on the ground that it would allow use of an approved design even if safer designs are available. In any event, ANEC/AIF/EEI suggest that the NSA be modified to explicitly provide that an approved standardized design will be assumed valid and will not be re-reviewed in connection with a CP or CP/OL application.

Numerous commentators urged that a definition of standardized design be set out in the statute itself and made suggestions as to the definition. SE<sub>2</sub> noted that the portion of the definition in the section-by-section analysis referring to a design "useable at multiple sites" disregards the potential for use of a standardized design in multiple units at the same site. A number of industry commentators (GE; ANEC/AIF/EEI) urged that the statute contain a definition of standardized design that would allow approval not only of entire plants but also of major and significant portions of plants. They argue that in the absence of such a provision, a significant restructuring of the entire nuclear industry would be required. Bechtel suggests that the definition of standardized plants be revised so that replicate and duplicate plants, as well as replicated and duplicated major plant systems, previously reviewed and approved, would be recognized as "standardized" designs. UCS believes that the definition of standardized design proposed by Commissioner Gilinsky should be incorporated into the NSA. On the other hand, the Center for Law in the Public Interest urges a statutory definition for standardized design simply as "an essentially final design for the complete nuclear facility."

Industry commentators expressed concern over the amount of design detail that might be required in a standardized design approval application. SE<sub>2</sub> believes that requiring a detailed design to be submitted is too inflexible and suggests that, to provide incentive to industry, NRC should give generic approval to major segments of the overall design. San Diego Gas & Electric and ANEC/AIF/EEI similarly comment that requiring submission of an overall, complete design presents an impossible task. Black & Veatch urge that the NSA be modified to require the NRC to develop and define the level of design completeness and detail necessary for an application through rulemaking.

As to fees for standardized design approvals, ANEC/AIF/EEI support fee deferral, argues that actual fees must be based on NRC costs of review, and urges that the allocation of fees be determined in rulemaking and not addressed in the legislation itself. Black & Veatch suggest that NRC fees for standardized design approvals simply be waived so as to provide an incentive to industry.

With regard to the renewal of standardized design approvals, industry and intervenor commentators were at opposite extremes. On the one hand, some industry commentators (San Diego Gas & Electric; ANEC/AIF/EEI) view the renewal provisions of Section 194 to allow NRC to condition renewal on the incorporation of significant changes in the approved standardized design without any cost-benefit determination by NRC. They accordingly urge that Section 194e(2) be modified to provide that renewal of a standardized design approval is presumptive and that NRC's review will be a review only for significant new information.



In contrast, intervenors (UCS; NECNP; NIRS; Center for Law in the Public Interest) view the NSA provisions as making renewal almost automatic and as establishing stricter standards for denying renewal than currently exist for requiring backfitting on operating plants. Both intervenors (UCS; NIRS) and at least one industry commentator (ANEC/AIF/EEI) view the standard for renewal which takes into account "overall risk" and an "acceptable level of risk" as being impractical to implement and unreliable at this time and suggest that risk concepts be deleted from the renewal standard. UCS suggests that, instead, Section 194 should be modified to establish that renewal of a standardized design approval must be conditioned on design changes found to be necessary based on the now existing backfit standard of 10 CFR 50.109.

#### IV. Section 104/196

Most commentators utilized their comments on Section 104/196 of the NSA to express their views on NRC's backfitting. In this regard, ANEC/AIF/EEF was of the view that all aspects of the NSA should be modified to provide a single, unified backfit standard applicable to all situations (including operating plants and those currently in the licensing pipeline). They also noted an absence in the NSA of any backfit standard to be applied to standardized design approval holders (versus licensees and applicants using approved standardized designs). Yankee Atomic Electric Company suggested that Section 196 be modified by deleting the word "standardized" from that

section so that the proposed "backfit" standard applies to currently operating plants.

Most intervenors who expressed a view on the matter appeared to disagree with the basic concept of standardized design stability as provided in Section 196. UCS objects on the ground that, in its view, licensees would not be required to make design changes even if the approved designs were found to violate the Atomic Energy Act or the regulations. Similarly, the Center for Law in the Public Interest believes that the proposed standard for requiring design changes is unachievable. UCS and NIRS believe that the burden regarding design changes is misplaced and that the legislation should require a licensee to demonstrate no need for design changes, rather than require the NRC to show a need for changes.

Many commentators disagreed with the substance of the proposed standard for "backfitting." UCS believes that "risk" concepts are unreliable and should not be used in the standard by which the need for changes in standardized designs are determined (UCS urges that Section 196 be modified to statutorily impose the current backfit standard contained in 10 CFR 50.109). Several industry commentators (ANEC/AIF/EEI; SE<sub>2</sub>) believe that risk concepts are not sufficiently developed at this time and that incorporation of risk concepts into a standard for requiring design changes is now premature. SE<sub>2</sub> urges that Section 196 be modified to contain a backfit standard to the effect that:

backfits may be required where the Commission establishes that the backfit is justified by significantly improved overall plant safety accounting for all factors, and the benefits of the backfit outweigh the costs.

Provisions for voluntary design changes by a licensee are opposed by San Diego Gas & Electric Company which believes that such provisions would allow the NRC Staff to require "voluntary" changes and are destabilizing. The only other industry commentator (ANEC/AIF/EEI) on this matter did not oppose the provision but suggested that Section 196 be modified to provide that voluntary design changes could be made by licensees without prior NRC approval unless the change involves a license amendment or unreviewed safety question.

Intervenors' sole concern with the provision on voluntary design changes was whether such changes would bring with them the opportunity for hearing. A number of intervenors (UCS; NECNP; NIRS; Center for Law in the Public Interest) object to the provision on voluntary design changes if there is no opportunity for hearing and all suggest that Section 196 be modified to clearly provide a hearing on the sufficiency of licensees' voluntary design changes. In contrast, the counsel for the House Subcommittee on Energy Research and Production suggests that Section 196 should be modified by adding the word "only" after the word "subject" in the last sentence of Section 196 to make it clear that hearings on voluntary design changes are not necessary.

### Chapter 3

#### Ad Hoc Committee Report on NSA

SHAW, PITTMAN, POTTS & TROWBRIDGE

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

1800 M STREET, N. W.  
WASHINGTON, D. C. 20036

(202) 822-1000

TELECOPIER

(202) 822-1000 & 822-1001

TELEX

89-2003 (SHAWLAW WSH)

CABLE "SHAWLAW"

JOHN F. DEALT  
COUNSEL

JOHN H. O'NEILL JR.  
JAY A. EPSTEIN  
RAND L. ALLEN  
TIMOTHY B. MCBRIDE  
ELISABETH M. PENDLETON  
PAUL A. KAPLAN  
HARRY M. GLASSPIEGEL  
JEFFERY L. YASLOW  
JACK MCRAE  
THOMAS H. MCCORMICK  
SUSAN M. FREUND  
JOHN L. CARR, JR.  
PHILIP J. HARVEY  
ROBERT M. GORDON  
BARBARA J. MORGAN  
BONNIE S. GOTTLIEB  
HOWARD H. SHAFERMAN  
DEBORAH S. BAUSER  
SCOTT A. ANENBERG  
CAMPELL KILLEFER  
SETH M. MOOGASIAN  
SHEILA MCC. HARVEY  
DELISSA A. RIDGWAY

KENNETH J. NAUTHMAN  
DAVID LAWRENCE MILLER  
ANNE M. KRAUSKOPF  
FREDERICK L. KLEIN  
GORDON R. KANOFKY  
JEFFREY S. GIANCOLA  
HANNAH E. M. LIEBERMAN  
SANDRA E. FOLSON  
MARCIA R. HIRENSTEIN  
JUDITH A. SANDLER  
EDWARD D. YOUNG, III  
ROBERT L. WILLMORE  
ANDREW D. ELLIS  
WENDELIN A. WHITE  
STANLEY M. BARG  
KRISTI L. LIMBO  
LESLIE K. SMITH  
VIRGINIA S. RUTLEDGE  
KATHERINE P. CHECK  
JANICE LEHRER-STEIN  
TRAVIS T. BROWN, JR.  
GAIL E. CURREY  
RICHARD M. KRONTHAL  
STEPHEN B. HEIMANN  
\*NOT ADMITTED IN D.C.

WRITERS DIRECT DIAL NUMBER  
(202) 822-1032

August 16, 1982

The Honorable Nunzio J. Palladino  
Chairman  
U. S. Nuclear Regulatory Commission  
Washington, D. C. 20555

Dear Chairman Palladino:

I am enclosing the Report of the Ad Hoc Committee for Review of Nuclear Reactor Licensing Reform Proposals. This Report considers the proposed Nuclear Standardization Act of 1982. We hope that our comments will be useful to you in your consideration of the necessary reforms to the regulatory process. We look forward to reviewing the remaining proposals for legislative and administrative reform of the Regulatory Reform Task Force.

-REC'D CHRM-

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Sincerely,

Gerald Charnoff

encl

cc: Commissioner Victor Gilinsky  
Commissioner John F. Ahearne  
Commissioner Thomas M. Roberts  
Commissioner James K. Asselstine



REPORT

of the

AD HOC COMMITTEE  
FOR

REVIEW OF NUCLEAR REACTOR LICENSING REFORM PROPOSALS

August 16, 1982

From: Gerald Charnoff, Chairman  
George L. Edgar  
Stephen Long  
Robert F. Redmond  
Anthony Roisman  
David Stevens

## EXECUTIVE SUMMARY

The attached report represents the consensus of the members of this Committee with minor exceptions noted in the report. The report generally follows the outline of the proposed legislative package. However, a number of themes in the report represent crucial concepts which the Committee believes warrant special emphasis. The purpose of this brief summary is to highlight those themes and assure that their significance is not lost in the body of the report.

### A. Scope of Legislative Proposal

We believe the Commission should send to Congress one comprehensive legislative proposal that addresses all of the licensing reform issues. Matters reportedly contained in the supplemental legislative proposals and administrative proposals being developed by the Regulatory Reform Task Force are so fundamentally interrelated with the present legislative package that they must be viewed in their totality to be properly evaluated. In addition, the proposals should not only address the hypothetical future where all plants are standardized designs proposed for pre-approved sites, but also the range of other possibilities including present plants.

### B. Clarity of Proposals

In a number of instances, most notably the treatment of issues arising under the National Environmental Policy Act and the nature of the licensing hearing, the present package

contains vague language apparently intended to provide a subtle flexibility. We believe a sound legislative proposal must clearly address even the most controversial issues and provide the clearest possible resolution of them. Any time saved in the legislative process by glossing over these hard issues will only produce significantly larger delays in the subsequent judicial process as parties argue over the varying meaning of ambiguous phrases.

### C. Flexibility of Proposals

A major goal of any reform package should be to assure flexibility in order to broaden its potential utility. Thus we have proposed that with respect to early site review, combined CP/OL reviews and standardized plant design, the statutory authority be written to allow the Commission to provide definitive and early resolution not only as to the entire site suitability issue, the entire combined CP/OL issues or the entire standardized design, but also to provide definitive and early resolution for discrete subsets of those issues to the extent they can be independently resolved. Similarly, issues whose final resolutions have to be postponed should not await some artificial future date to be resolved -- such as commencement of the operating license hearing -- but should be resolved as soon as they are ready for resolution. In the first instance, the principal initiator of the early resolution of an issue should be the proponent with respect to the issue.

#### D. Stability of Decisions

Although the legislative proposal more narrowly speaks of stability of standardized designs, it is clear that a principal benefit of the legislative package is stability of all decisions, not only those related to design. The Committee concluded that all decisions whether related to early site issues, design or combined CP/OL should essentially be final and subject to reopening only if very stringent thresholds are met and that the same standard should be applicable to all such issues in order to qualify for enhanced stability. Our standard is that no issue may be reopened, absent a special showing, if at the time of its initial resolution the only remaining regulatory responsibility with respect to such issue would be the verification of the design, and the inspection and testing necessary to determine whether the plant had been constructed in compliance with the approved parameters.

The re-opening of a previously determined issue -- which would include backfitting of new standards or new hardware -- should be allowed only where the proponent of the proposal provides to the extent practicable a fully developed statement of the rational basis for the proposal which demonstrates as a prima facie matter that the proposed change is required to meet statutory requirements.

#### E. Hearings

The Committee believes a full administrative/legislative package regarding modifications in the hearings should be developed as part of a single legislative proposal for licensing reform. We further believe that the first step to develop such a package is a determination of the purpose of the hearing. We believe the purpose of the hearings should be dispute resolution. Determination of the purpose of the hearing first will allow for easier resolution of the other issues related to the structure and procedures for hearings.

#### F. Energy Decisions

In the legislative proposals submitted to the Committee, the full range of energy decisions including need for power, alternative systems, conservation and the like, is to be resolved either by the NRC or the Federal Energy Regulatory Commission (FERC). In our view, states and some regional authorities are far better equipped to resolve these matters and to the extent their hearing procedures are substantially equivalent to NRC hearing procedures and to the extent they certify that they have in fact resolved one or more of these energy issues, the NRC should defer to them. Thus the legislative proposal should be amended to allow the Commission to defer to a variety of potential authorities as to energy issues.



G. Conclusion

This summary is not intended to touch on every point made in our report but only to highlight those aspects of the report which we believe are particularly important.

REPORT OF THE AD HOC COMMITTEE  
FOR  
REVIEW OF NUCLEAR REACTOR REFORM PROPOSALS

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The Ad Hoc Committee for Review of Nuclear Reactor Reform Proposals has reviewed the proposed Nuclear Standardization Act of 1982 ("the proposed Act"). In this connection, we met to discuss the legislative proposals on six occasions; at one such meeting, we had a useful, extended discussion with Mr. Tourtellotte, Chairman of your Regulatory Reform Task Force.

The proposed Act is intended to provide for:

- (a) Early Site Reviews;
- (b) Standardized Plant Design Approvals;
- (c) One-Step Licensing -- Issuance of a Combined Construction Permit/Operating License;
- (d) Stability of Approved Standardized Plant Designs -- Protection Against Unwarranted Backfit Changes;
- (e) Deferral by NRC to FERC with Respect to Need for Power Determinations; and
- (f) Revised Hearing Procedures for Standardized Plant Design Approvals, Early Site Approvals and One-Step Licensing.

While the Ad Hoc Committee endorses the need for change in these areas, we disagree with:

- (a) the scope of the proposed Act;
- (b) important details of each of the provisions of the proposed Act; and
- (c) the failure to make the intended purposes and characteristics of the public hearing processes explicit in the proposed Act.

We understand that the Commission staff intends to propose, later this summer, a package of administrative reforms and supplementary legislation. It is our conclusion that the Commission should not proceed with proposing the Nuclear Standardization Act of 1982 to Congress without full consideration of the supplementary legislation and administrative reforms now under preparation by the Regulatory Reform Task Force. While the broad features of the proposals were sketched for us by Mr. Tourtellotte, we, of course, did not have them before us. With such proposals on the table, it is possible that some of our opinions with respect to the proposed Act would be modified.

#### Scope of the Proposed Legislation

There is at least a hiatus with respect to new nuclear plant proposals. Accordingly, it is reasonable and wise to utilize this time period to develop a revised regulatory framework to accommodate such proposals, when and if they should occur. The proposed Act is prompted by the view that the licensing process would be improved if it encourages proposals to locate pre-approved standardized plant designs on

pre-approved sites. While this concept has much appeal, it presents a number of questions, which are discussed below.

And, if the reform legislation is cast only in such concepts, it begs the question of regulatory reform for the existing nuclear power plants now under construction or in operation.

These amount to more than ten percent of this nation's currently planned electric generating capacity; the uncertainty and inefficiency in the regulatory process surrounding these units is of current, significant national interest.

Moreover, it is possible that a renewal of interest in new nuclear power projects -- in Alvin Weinberg's terminology, a second nuclear era -- may involve plants of very different design, proposed perhaps by new social or economic institutions. In this regard, it is important that any new regulatory framework allow for considerable flexibility and refrain from insisting on formulations which would limit such new proposals only to more mature versions of the present plants. The proposed Act does not provide the desirable flexibility.

#### A. Early Site Reviews and Approvals

The Committee favors revision of the Atomic Energy Act to explicitly allow early consideration and resolution of site-related issues. An essential element of such a program is to assure that, upon their resolution, these matters would not be

subject to reconsideration at downstream stages of the licensing process in the absence of good cause.

The Commission should be authorized to allow proponents of specific sites to request and obtain a range of approvals and determinations, including:

- (a) approval of a site for subsequent installation of a nuclear power plant having specifications within defined limits of design parameters which reflect the site characteristics;
- (b) determination of environmental issues, where appropriate, including alternative sites and their rankings; and
- (c) individual determination of specific site-related characteristics that could affect the design and/or installation of a nuclear power plant at that site.

While the Commission obviously has to define those characteristics of sites which it may consider significant in any specific instance, the proponent of a site should be permitted to selectively request those approvals or determinations it requires at any time for planning purposes.

In our view, the proposed Section 193 does not clearly allow this flexibility to site proponents, although Section 193g would seem to recognize the possibility of limited site characteristic determinations. Our concern is that, as



drafted, Section 193 appears to be focused primarily on overall site suitability determinations.

We believe the Commission should explicitly consider and determine when and how NEPA and environmental matters will be taken into account in the several site suitability determinations. Among the difficult issues to be addressed and resolved are:

- (a) whether and which environmental determinations would necessarily require assessments of the cost of, and the need for power from, facilities which only later may be proposed for installation at the site;
- (b) at what point in a site suitability determination would an environmental impact statement be required; and
- (c) the stability of environmental determinations made prior to the preparation of an environmental impact statement.

The proposed Act implicitly recognizes the advantages to planners and the public alike in early selection and approval of power plant sites. We concur. We recognize too, however, that the planning process often involves sequential consideration of a variety of factors. The Commission's procedures should recognize this and allow for appropriate state agency and public participation in making binding determinations with

regard to such matters. In some states, state agency involvement in early site approval may be a necessity for its practical implementation.

The proposed Act is not sufficiently explicit with respect to the binding nature of such determinations. It addresses the matter only in terms of "validity" of the site permit for a term of years. The determinations and approvals made in the early site review process are essential premises for planners. The statute should clarify the extent to which such determinations and approvals can be reopened prior to or at any subsequent licensing stage, at the initiation of the staff or any party. The present draft is silent on these matters, although it would allow review -- presumably at least by the staff -- of "significant new information" at a renewal of a site permit. A "backfit" standard should be developed for application to these site approvals and individual site characteristic determinations. The standard should also be applicable to applications for renewal of such approvals and determinations. In our view, an appropriately formulated and implemented backfit provision would remove any need for a fixed statutory expiration period for the site approvals and determinations. In this connection, while we address below the matter of public hearings as they might apply to early site reviews and other matters, we note that the proposed Act is silent with respect to public hearing opportunities at the renewal stage of a site permit. The Commission's intent in this regard should be clarified.

B. Standardized Plant Design Reviews and Approvals

The section-by-section analysis of the proposed Act contemplates review and approval under Section 194 of an "essentially complete final design for a whole nuclear power plant usable at multiple sites." This definition is not explicitly included in the draft statute.

The Committee recognizes and endorses the value of standardized design reviews and approvals. Such review could reduce redundant staff review activities, and approved designs of whole nuclear plants could be matched with previously approved sites to expedite the regulatory process for purchasers and operators of such approved plants.

Nevertheless, we believe the limitation of Section 194 to essentially complete final designs for whole nuclear power plants would reduce the value and utility of the proposal. The statute should authorize the Commission to allow the submittal of designs of major safety-related systems or subsystems which represent sufficiently discrete major features of nuclear power plants so as to be amenable to independent review. Similarly, while the statute should facilitate the review of final designs, it should not insist on essentially complete final designs. We believe the value of this more flexible approach outweighs the potential benefit of inducing standardized plant design by limiting Section 194 (and Section 185) to such plants.

For purposes of standardization, the degree of finality should be measured by whether the proposed design can be subject to a reasonable backfit rule and whether, if constructed, the only regulatory responsibility would be the verification of the design, and the inspection and testing necessary to determine whether the plant had been designed and built in compliance with the approved parameters. This may not require at the standardized plant design review stage all of the detail that is now included in an FSAR. But it will require the definition by rule, or in individual case determinations, of detailed performance criteria for all safety-related plant systems and key safety components.

Under the proposed Act, standardized plant design approvals would be "valid" for a term of years. While we believe we understand the concept of validity here to disallow any modifications in the approval except through the backfit or design stability provisions in Section 196, it would be well to be explicit here.

Like the early site approval, the draft is inappropriately silent with respect to public hearing opportunities, if any, to be afforded in connection with amendments or renewals of standardized plant design approvals. In addition, an appropriately formulated and implemented backfit provision would remove any need for a fixed statutory expiration period for the design approval.

Our discussion below of Section 196 is also applicable to the criteria set out in Section 194e(2)(B).

### C. One-Step Licensing

The Committee agreed that in appropriate cases, a single hearing on the principal issues related to whether to construct and operate a nuclear reactor at a proposed site is desirable. Although arguably much of this could be done without new legislation, it would be unwieldy, unreliable, and would cause much litigation and attendant delays to do it without legislation. The legislative proposal presented for review, however, was not deemed adequate, primarily because of its ambiguities and failure to address key concepts central to such a proposal. The justifications provided in the preamble to the legislative proposal were also judged to be inadequate and in some cases inaccurate.

Either a standardized design or a custom design, to the extent it contains the required detail, should be eligible to qualify for a combined CP/OL. To require a standardized design could limit the combined CP/OL to only a handful, if any, of licensing proposals and might have utility only years in the future. There is no apparent safety or environmental concern which would justify limitation of this concept to pre-approved standardized designs only. Although such a limitation might encourage standardization, we believe the flexibility afforded by our proposal outweighs such considerations.



As with standardized plant designs, the Committee is of the view that the Commission should have the authority to allow one-step review and resolution of sufficiently discrete major portions of the plant design which are amenable to independent approval. This would facilitate use of the benefits of combined hearings to the fullest extent possible without waiting for final designs on all parts of the plant.

The Committee also considered the level of design detail which should be required to be eligible for a combined CP/OL determination. Again, as with standardized plant designs, there was agreement that the standard for sufficiency of design detail in standardized plant designs should be sufficient to allow applicability of a reasonable backfit rule, and for those matters considered and determined at the CP/OL proceeding, what should be left would be only the verification of the design, and the inspection and testing necessary to determine whether the plant had been designed and built in compliance with the approved parameters.

The Committee recognized that certain matters, such as emergency planning, may not lend themselves to ultimate determination at the time of issuance of a combined CP/OL. Emergency planning, for example, would involve state and local authorities at a point many years before actual planning would be required, thus involving premature expenditures and possibly changing circumstances. One solution would be to defer this

kind of matter to a later time, considering only at the combined CP/OL stage, or at an earlier site approval proceeding, whether there were any peculiar local circumstances that would make development of an adequate emergency plan impractical. In the absence of such a finding, the CP/OL would issue, subject to a condition providing for later development and consideration of emergency planning. While this is a departure from a full one-step CP/OL proceeding and determination, the inherent flexibility it provides may be necessary for plant operating procedures and other issues. The responsibility for scheduling a timely submittal of such deferred matters would, of course, be that of the applicant initially, although the Commission should be able to establish scheduling guidance for such submissions.

The Committee considered the absence of an explicit backfitting provision applicable to combined CP/OLs. The absence of such a provision undoubtedly reflects the view that a combined CP/OL might only be issued in connection with an approved standardized plant design. While the text doesn't make this explicit, we noted our disagreement with such a limitation above. A combined CP/OL will only be meaningful if it is accompanied by meaningful assurances of design stability. The Committee agreed that all issues once resolved should remain resolved absent a showing which meets the requirements of a reasonable backfit provision.

The Committee also generally agreed that when the staff conducts its design verifications, construction inspection and testing, the details of those reviews and findings should be made publicly available. The Committee believes that any person should be able to obtain a hearing on the issue of whether the plant, as built, complied with the combined CP/OL conditions, if the person establishes by a prima facie showing that a significant safety or environmental issue was involved and that the plant did not meet the CP/OL requirements.

However, the majority of the Committee believes that in such circumstances, the proper procedure to follow is that established in Section 2.206 of the Commission's regulations, under which the initial determination to convene a proceeding is made by the Director of Regulation. One member believes that the initial determination should be made by an independent decision-maker, such as an ASLB or ASLAB member. In any event, this matter merits explicit consideration by the Commission.

D. Stability of Approved Standardized Plant Designs --  
Protection Against Backfit Changes

As is evident from the discussion above, an effective provision regarding design stability is essential to provide a strong incentive for early site approvals, standardized plant design approvals and combined CP/OL issuances. It is also important to the existing power reactors now under construction or in operation. In this regard, the explicit limitation in

the proposed Act of the backfit provision to approved final standardized plant designs only is wanting. Moreover, as a result of a drafting quirk, the intended provision would not seem to protect even the holder of a standardized plant design approval because, by its terms, it would apply only to a "licensee of, or license applicant for a production or utilization facility." To that extent, the incentive for a designer to seek a standardized design approval would be diminished.

The Committee believes that the backfit standard proposed is unworkable because it will not be possible to calculate societal risk with sufficient precision, and because we do not believe that a standard for "acceptable levels of risk" is close at hand. As a concept, the "acceptable level of risk" standard does not appear qualitatively different from the standard in the Commission's existing backfit regulation (10 C.F.R. § 50.109). (In that regard, there is little evidence that the NRC staff is currently abiding by the existing rule.) In our view, it would be a mistake to enact into law a requirement for quantification of risk when the tools for quantification and the standards for acceptance themselves would be likely sources of litigation.

A more workable formulation would be to require the staff to produce a systematic analysis setting forth a rational basis for any required change in design or operating limits (related to safety or environmental concerns), including a discussion of

the objectives of the change; a quantification of the impacts and the benefits of the change, to the extent possible; a consideration of alternatives to the change; and a reasonable implementation schedule. The purpose of such an analysis would be to require the staff to set out whether the proposed change is required to meet the statutory requirements and why. Organizationally, within the NRC an appointed group of senior officials should be charged with reviewing and approving each such analysis. A similar systematic analysis should be required for changes proposed by applicants and third parties, to the extent practicable.

As a final note, there was disagreement within the Committee as to the need for special provisions in regard to backfits proposed by members of the public. Under existing law, a licensee has a right to a hearing on any order imposing a change in a previously approved matter, and as a matter of logic, Section 196 would impose a burden of persuasion on the party, e.g. the Regulatory staff, seeking such a change. On the other hand, when a third party, such as an intervenor, seeks such a change, his remedy is under 10 C.F.R. § 2.206 and he would not have the opportunity for a hearing as a matter of right. One view is that this is fundamentally unfair, contending that it results in an imbalance of rights among parties who may have participated in the initial licensing proceeding. According to this view, the showing of conformance with the



backfit criteria -- when the proponent of the change is a member of the public -- should be considered by a panel convened from the licensing board roster of members rather than by the staff. The majority view is that the Section 2.206 procedure is consistent with longstanding principles of administrative law which recognize a licensee's vested rights and the presumptive validity of an existing license. Moreover, if incentives for standardization are desirable, maintenance of existing law -- notwithstanding the apparent imbalance of rights -- would seem desirable.

E. Deferral to FERC with Respect to Need for Power Determination

The current version of the legislative package provides, in Section 185B, that

In making a determination on the issuance of any permit or license, the Commission is authorized to rely upon the certification of need for power made by the Federal Energy Regulatory Commission or its successor. If the Commission declares its reliance upon such certification, it shall constitute a definitive determination of need for the power to be provided by the facility for the purposes of any other provision of Federal law administered by the Commission.

An earlier version of the legislative package had provided that "the Commission is authorized to rely upon the certification of need for power made by competent Federal, regional, or state government organizations."

The Committee considered at length several ramifications of this proposal, and was able to reach consensus on several points:

- (a) There are benefits of regulatory efficiency and accuracy to be gained by providing to the Commission the authority to rely upon the expertise of other government entities in this subject area.
- (b) The legislation should allow the Commission broad capability to accept need determinations made by state agencies or other competent government organizations, as originally proposed, rather than restrict it to determinations made by the FERC.
- (c) This legislative package is not the appropriate instrument for revision of the extant authority distribution between the federal and state governments in the area of public need certification for electric power units.
- (d) It will be necessary to explicitly delineate (in the administrative package) the necessary content and form of any such certification in order to avoid ambiguity concerning which of the several facets of a need determination are covered.

The Committee considers the need issue to encompass the spectrum of factors inherent to generation planning. Not only must future increases in electric power demand be projected, but means of influencing those increases should be considered and the best means of meeting total future power demand must be addressed. Most of these factors, of course, are utility or region specific; they do not lend themselves readily to broad federal plans. Some members of the Committee believe that the existing system of state regulatory authorities, as supplemented by regional organizations, is best suited to consider these factors in reaching determinations of need for proposed new units. Neither the NRC nor the FERC appears to possess sufficient resources or expertise to assume these duties on a national or regional basis. (Moreover, there is at least some doubt as to FERC's current authority to perform such certifications.) In the case of federally authorized power authorities, however, federal agencies could be utilized as the appropriate sources of need determinations for the Commission. Consequently, the Committee recommends that the Commission be given the authority to accept need certifications from a variety of sources. Of course, there may be circumstances where there is no other agency certification or where a certification may be incomplete; in such circumstances, the NRC will have to determine the matter.

The Committee sees a critical need for the Commission to delineate the necessary content of an acceptable certification in its forthcoming administrative package. This should include, among other things, an explicit statement of the issues considered and the decisions made.

Concern was expressed by some members of the Committee that the variations in procedure, including opportunity for public participation, among such a wide variety of potential certifiers could, in some cases, lead to acceptance of inferior quality "need" determinations, compared to what might be achieved through the NEPA review process and by the ASLB. Specifically with respect to FERC, in the absence of established procedures or practice with regard to "need" certifications, there may be questions concerning whether FERC procedures would provide an airing of the issues equivalent to the current NRC procedures. The Commission, outside the docket of any specific license application, should determine whether the procedures utilized by potential certifiers are substantially equivalent to NRC procedures. That determination should be binding and not subject to review by any court or in any NRC licensing proceeding. One member of the Committee, however, believes that under no circumstances should the Commission put itself in a position of judging the adequacy or fairness of procedures utilized by state agencies.

Concern has been expressed by some members of the  
Committee that new preemption arguments may be made possible  
under the presently proposed legislative package. The  
replacement of the state and local governments by FERC in  
succeeding drafts, coupled with the comments of Commissioner  
Gilinsky at the April 16, 1982 Commission meeting (Tr. pp.  
63-65), could result in future arguments over legislative  
intent. We believe that is not the intention of the Commission  
and it should make this clear.

#### Revised Hearing Procedures

Amendments in 1957 to the Atomic Energy Act of 1954  
provided for mandatory public hearings at both the construction  
permit and the operating license stages for nuclear power  
reactors. Ever since 1957, the focus of legislative reform of  
the nuclear regulatory process has been on the public hearing.  
In the 1960's, the mandatory hearing at the operating license  
stage was deleted and the institution of atomic safety and  
licensing boards was created. More recently, the so-called  
"Sholly" amendments in the NRC authorization legislation  
addressed the requirement of public hearings in connection with  
operating license amendments. And, of course, legislative  
proposals in the 1970's were concerned with the format and  
timing of hearings, particularly at the operating license  
stage.



The proposed Act reflects yet another attempt to integrate the public hearing meaningfully into the licensing process -- at least for standardized plant design approvals, for early site approvals and for issuance of a combined construction permit and operating license for a standardized nuclear power plant. In all three instances, Sections 194d, 193d and 185c, respectively, of the proposed legislation would allow for reform of the public hearing process by inclusion of the phrase "after providing an opportunity for public hearing." The insertion of this phrase, according to the section-by-section analysis, was "to assure flexibility of the hearing process for standardized plants," and to avoid the application of the public hearing provisions in Section 189a of the Atomic Energy Act of 1954, as amended, to the one-step proceedings for standardized plants and to the proceedings for standardized plant design approvals and early site approvals.

Whether Section 189a requires very formal adjudicatory procedures or whether it allows a flexible approach to establishing hearing procedures, in our view a serious effort to reform the public hearing process should involve much more explicit proposals to the Congress.

We understand that the Commission's Regulatory Reform Task Force is developing further legislative proposals which may include, among other things, clarification of the Commission's discretion in selecting hearing formats under Section 189a.

Similarly, the Task Force's development of a package of administrative reforms may also deal with hearing formats. Without having those proposals before us, we are not now in a position to comment specifically on the Commission's intended implementation of Sections 185c, 193d and 194d.

Nevertheless, it is our view that, if the reform package is intended to provide more certainty to the regulatory process, and to thereby lessen the risk of endless litigation involving challenges to the hearing procedures, explicit consideration by Congress of the public hearing process should be encouraged. In this regard, a vague reference in the section-by-section analysis to attaining "flexibility of the hearing process" is not sufficient.

Beyond this, we question whether the lack of specific reference to Section 189a in proposed Sections 185c, 193d and 194d is sufficient to exclude judicial application of Section 189a to such proceedings and particularly to amendments and extensions of such permits/licenses and approvals. If avoidance of unnecessary litigation is the goal, this issue should be addressed directly.

In our view, both the Commission and the Congress should explicitly address such fundamental questions as:

- (a) the purpose of the public hearings;

- (b) the appropriate parties to such hearings;
- (c) the role of the NRC Staff in such hearings and the proper standard for sua sponte reviews by the licensing boards;
- (d) the timing of such hearings;
- (e) the appropriate utilization of formal adjudicatory and less formal processes;
- (f) the desirability of intervenor funding;
- (g) the appropriate threshold level for purposes of defining an issue in dispute; and
- (h) the desirability of applying such reforms only to standardized plants and early site reviews as distinguished from current plant designs.

At the outset, it is important to confront and define the purpose of the public hearings. For out of such definition, guidelines could emerge for responses to the other issues listed above. The definition of the appropriate public hearing process does not carry with it any constitutional requirements. There is no constitutional right to a public hearing and certainly not to a particular form of public hearing, so long as considerations of fairness are satisfied. Surely many -- indeed most -- decisions which affect the lives of many people are made without imposition of particular constitutional concepts. The choice to include an opportunity for public participation in the regulatory process is that of Congress; it

is not dictated by elevated principles of due process. That being the case, the question remains: What is or should be the purpose of the public hearing process?

- (1) Should it be to build public understanding of, and public confidence in, nuclear power and the staff review?

This, at one time, was a stated purpose of the mandatory public hearing procedures. While those procedures probably have resulted in more disclosure of the safety considerations associated with nuclear power as compared with most other industrial activities, it is probable that the Commission's public hearing procedures have not led to a significant level of public understanding of, or confidence in, the regulatory process. Indeed, the formalities of those proceedings, although perhaps necessary to safeguard the rights of participants, may have led to misunderstanding of nuclear power and the nature of the staff review. We urge that this not be adopted as a purpose for the public hearing and that alternate means be considered for educating the public.

- (2) Should it be to test the adequacy of the Regulatory Staff's review of the application?

At one time, this too was a stated function of the hearing process, whether the hearing was contested or not. As contested hearings became routine, licensing boards gradually

focused almost entirely on the contested issues before them and abandoned their independent efforts to test the adequacy of the staff review. While disputes as to specific issues surely result in a testing of the validity of the staff's review process, it is clearly episodic only. The hearing process does not provide a systematic check of the adequacy of the staff review, absent a specific dispute. Other mechanisms for this task should be sought. For example, review groups within the staff and the Advisory Committee on Reactor Safeguards acting openly and in a systematic manner could provide a more efficient means of testing the staff review. Nevertheless, a minority of the Committee holds the view that some limited independent testing of the staff review process could be of benefit.

(3) Should it be to allow the expression of conflicting political views?

Public hearings held before licensing boards cannot, by their nature, resolve the larger political disputes surrounding the societal decision relating to whether to utilize nuclear energy to provide electric power. That type of political decision is uniquely appropriate for legislative bodies. Therefore, public hearings should not be directed at responding to conflicting political views.



(4) Should it be to resolve disputes?

This is the classic function of the public hearing process. Members of the public and competing interests in possession of facts or views contradictory to those of the applicant or license holder could benefit the decision-making process by presenting those facts and views to the agency. The public hearing provides such an opportunity and should allow for the testing of such facts and views. Under the circumstances there should be no opportunity for sua sponte review by licensing boards, nor should the boards be expected to reach conclusions related to matters beyond the scope of the disputes before them. If the sole purpose of the public hearings is the resolution of disputes -- and this is the view of the majority of this Committee -- then absent a matter in dispute, there should be no public hearing.

We have not attempted to be exhaustive with respect to either the purposes of the public hearing or the issues to be addressed in connection therewith by the Congress or the Commission. Nor have we arrived at a consensus on each of these matters. We have unanimously concluded, however, that reform of the regulatory process requires explicit consideration of these matters by the Congress. Applicants, be they private or public bodies, can no longer be expected to commit a few billion dollars to a single power plant without having an adequate appreciation that the hearing process will be better

focused and better managed than it has been in the past and with less risk of contentious litigation and judicial review. Similarly, interested states and third party intervenors cannot be expected to invest the necessary effort to make the process work better without a better appreciation of the focus and purpose of the public hearings. Thus the Commission should first determine the purpose of the public hearing process and then decide the issues affected by that determination.

We find the consideration of the public hearing process in the proposed Act to be unacceptably brief and indirect. Nor are we persuaded that reform of the public hearing process should be initiated only in the context of standardization proposals. The issues listed here transcend such proposals; they apply equally to plants now under construction or in operation.

#### Conclusion

We have concluded that the present hiatus -- if that is an appropriate term -- in new nuclear plant proposals provides an opportune time to review and reform the regulatory process. The reform proposals should address the regulatory process as it applies to both the plants in operation or under construction as well as any prospective new plants.

The Proposed Nuclear Standardization Act of 1982 reflects a serious effort to address the major problems in the

regulatory process as it would apply to prospective new plants. Certainly early site approvals, standard plant design approvals, combined CP/OL's and stabilization criteria reflect serious proposals for consideration by the Congress. In our view, however, the proposals do not adequately address important current problems, nor are they sufficiently comprehensive in their consideration of the problems to which they are addressed. It would be better, in our view, to first develop the remaining legislative proposals and administrative reforms now under consideration by the Regulatory Reform Task Force. In that comprehensive context, the overall reform proposals could be considered in a more meaningful fashion.

SEPARATE VIEWS  
OF  
ANTHONY Z. ROISMAN

The report of this Committee represents a substantial effort to accommodate the views of all of its members and produce a consensus. Each of us on one or more issues would have taken a somewhat different view were it not for our desire to reach a consensus, a desire motivated by our belief that the failings of the present licensing process are so severe and so long-standing that a new and better process, even if not a "perfect" process, is preferable to no change. The principal report focuses on those aspects of the hearing process which if modified will make it operate more smoothly and efficiently. In short, we address proposals which will reduce the total elapsed time required to decide whether to build and operate a nuclear power plant.

While this efficiency will undoubtedly indirectly improve the quality of the presentations at the hearings by allowing each party to better focus its efforts on the principal matters in dispute, it does not directly improve the quality of the hearing. Yet in the last analysis if the primary function of the hearing is dispute resolution, the most important task of the hearing is to assure to the fullest extent possible that the dispute is correctly resolved. This is particularly true here where the incorrect resolution of a safety issue can and has caused significant damage. Thus, for instance, it is now undeniable that all parties would have ultimately benefitted if the hearings on Three Mile Island, Unit 2 had included an



analysis of the incident which had occurred at the Davis-Besse plant several months earlier and which was ultimately the initiator of the Three Mile Island accident. Such an analysis would have slightly lengthened the hearing but the benefits of full knowledge of and remedies for those events before operation began would have far outweighed any conceivable cost of delay.

How then can a licensing reform package not only properly make the hearings more efficient but also make them more effective? On this point the Committee was unwilling to reach a consensus and thus I have prepared and submitted separate views.

The key ingredient to assure better quality in the hearings is to assure that as to legitimate matters in dispute, the decision-makers have the benefit of the most reliable and complete record reasonably attainable. Thus, for instance, a hearing board should not have to conclude that although significant additional evidence was available -- such as the testimony of a particular expert -- nonetheless a disputed issue would be resolved without that evidence because no party offered the expert. Does this happen? Absolutely, as the hearing board or appeal board members will attest. Does the absence of such additional information adversely affect the public? Yes, as Three Mile Island so dramatically illustrates. How can the problem be solved? There are several possible solutions.

First, hearing boards could be given the authority to direct the Staff to retain particular experts or particular types of experts to do an analysis on and present testimony with respect to a disputed issue as to which the board was aware that significant relevant information would not otherwise be presented. Second, the board itself could retain such experts for the purpose of the hearing. Third, upon application of a party who demonstrated its lack of sufficient financial resources, the board could tentatively agree to reimburse that party for the cost of such presentations to the extent the board concluded after hearing the evidence that it was of significant value in resolving the disputes.

The benefits of a system such as this are significant. First, there is a positive incentive to the staff to see to it that its own presentations fully encompass all relevant evidence (not merely that evidence which supports the staff conclusions), thus avoiding the need for the board to invoke any evidence gathering authority. Second, it provides a premium to the party in the hearing that fully develops in a rational way its contention by assuring that such a contention will not fail for lack of competent evidence. Contentions for which no competent technical evidence is reasonably available will be inherently less worthwhile to pursue. Third, by establishing a mechanism that assures a full exploration of disputed issues which have substantive merit, the Commission

can more properly -- both legally and politically -- establish high standards for an issue to be allowed into the process. Since the function of the hearing under this regime would be dispute resolution and not a vehicle to allow every interested person to express his view regardless of the merits of that view, the Commission could probably demand that for a disputed issue to be admitted to the hearing, there must be prima facie evidence that it is valid. Interested parties could focus their limited resources on making that showing on those meritorious issues, confident that if they met that threshold the disputed issue would be fully developed. Finally, and most importantly, the decision whether or not and how to build and operate a nuclear facility would more likely be correct, thus better protecting the public interest and in the end improving the stability of the decisions made.

The majority of the Committee presented essentially philosophical objection to this proposal. It centered on the premise that the process should be "neutral" and avoid favoring one party over any other party. Already the process fails in this neutrality since significant financial help is provided to the industry through taxpayers supporting research and development to better able nuclear facilities to pass muster in the hearings. And, of course, taxes pay for the staff participation and involuntary utility rates pay for the applicant participation. It was also observed that it is the staff's job

to fully explore all relevant issues. If the staff fully presents all relevant data as to a disputed matter, the board will not order production of additional evidence. If not, then the staff has not fulfilled its function and the board must see to it that the gap is filled.

Finally, the majority of the Committee argues that in any event, a contested proceeding is not the best way to resolve these disputes and particularly a contested adjudicatory hearing. This would argue for abolition of all hearings and elimination of all fair mechanisms for resolving what are undeniably real disputes. The majority wisely does not argue this logical extreme and if, as we all acknowledge, a legal mechanism for dispute resolution should exist, then it is far better to assure a full evidentiary presentation as a prerequisite to the dispute resolution. In fact, it is hard to imagine that the "collegial" decision-makers suggested by the majority would be satisfied to decide disputed issues without all the relevant data before them.

In the last analysis, the essential consideration must be that the decision-maker has available a substantially complete record in order to decide the significant issues presented. Only in this way will we achieve the legitimate goal of the hearing: to produce as nearly as reasonably possible a correct result. It is this goal which the present system does not now achieve, but could with the modifications proposed here.

SEPARATE VIEWS

OF

GERALD CHARNOFF, GEORGE L. EDGAR,  
STEPHEN LONG, ROBERT F. REDMOND



In his separate views Mr. Roisman contends that, once a dispute is accepted for resolution by a licensing board, the assigned board should be authorized to (a) direct the staff to retain particular experts to present testimony on the disputed issue, (b) itself retain such experts, or (c) tentatively agree to reimburse a party -- needing such funds -- for the cost of its presentation if it determines that such presentation "was of significant value."

We disagree with this proposal. It is neither necessary nor desirable as public policy; it is not necessary as a stimulus to public participation.

Both we and Mr. Roisman agree that the primary, if not the sole, purpose of the public hearing is the resolution of disputes. And Mr. Roisman apparently agrees that the Commission "could" -- may we say "should" -- "probably demand that for a disputed issue to be admitted to the hearing, there must be prima facie evidence that it is valid," at least if the proposal is accepted. It does not follow, however, that the proposal is sound.

The Roisman proposal is a refined version of intervenor funding proposals which have regularly been rejected by the Congress. The proposal fundamentally is at odds with the philosophy of a regulatory system under which a government agency is staffed and funded at great public expense to assure

the public health and safety. That agency and its staff are charged with making an independent review of licensing requests from the standpoint of the public interest. The proposal is premised on the proposition that the regulatory agency will not be ably staffed or will not obtain the services of competent expert consultants; therefore, the proposal would equip the licensing boards to overcome such alleged agency staff deficits. This, however, would only provide, as noted in the Committee Report, an episodic check on the staff. We would urge a more systematic review program if that is required.

As between private disputants, the law and the process should remain neutral. The funding authority proposed by Mr. Roisman would serve to promote more litigation, further complicate and protract the hearing process, divert public resources, and most likely divert Commission attention from its principal task of managing the agency and its staff.

\* While the adversary process may be well suited to resolving ordinary disputes, we do not believe it is the best way to arrive at fundamental safety and environmental decisions of a technical nature. This is best done by objective and competent experts engaged in direct informal discussion and evaluation of technical analyses and data. The adversary process does not facilitate that kind of interchange or the clarification and resolution of technical issues. The Roisman proposal, on the other hand, would place more emphasis on the

adversary process for these purposes. It is not an appropriate policy.

SEPARATE VIEWS  
OF  
DAVID W. STEVENS

I would like to associate myself with the views of Mr. Roisman relative to the establishment of conditions to improve the quality of the hearing process. I do not necessarily dissent from the views of the Committee relative to the ways which we have explored to improve the hearing process. I subscribe to them. The separate statement of the other members, however, appears to conclude that: (1) there is no need to further improve presentations made under a revised and improved hearing process by making limited financial support available where need is demonstrated, and (2) the adversarial aspect of licensing is found wanting and an atmosphere of information-sharing by experts in a relatively informal atmosphere would be a preferred approach. I doubt that under current conditions of public concern and uneasiness that such a technique, as is suggested by the latter proposal, is achievable. A central point with which we can all agree is that there probably is too much litigation and that in the interests of all, it should be reduced. That is not to say, however, that we can and should eliminate disputes. That will not happen. We can and should, and certainly the Committee has striven to suggest the kind of licensing structure which will, if executed, improve the efficacy of the process. We cannot will an elimination of disputes, but we may be able to confine them in a more appealing framework.



I am also persuaded that the members of the Committee who are hesitant about the impact of intervenor funding may have been persuaded by past, more comprehensive proposals and not by those presently advanced by Mr. Roisman. Funding of intervenors appears to be only a part of the proposal, not the central theme. And such support would not be automatic; it would be conditional.

I suspect that in a "pure" regulatory framework that there ought not to be a need for intervention -- that all analytical work would be comprehensive and inclusive of all relevant information on all substantive issues without added external input. That state may not be achievable in the foreseeable future. It can be argued that there are potential issues that may not have the proper exposure unless some supporting resources are made available. I would not feel comfortable in foreclosing that opportunity during the discussions on regulatory reform. I think that the proposal advanced by Mr. Roisman is cautious, relevant and should be further explored.

The desire of all of us on the Committee is common -- that we encourage a regulatory foundation that will permit identification and resolution of relevant issues on a timely basis. In doing so, we would hope to avoid the emotional contentiousness which permeates much existing regulatory review.

The regulatory process is not suitable for the promotion of philosophic views of individuals or groups. Generic considerations should take place in other, political forums. I would not support the utilization of scarce resources to advance a particular cause or position. I do not feel that is the case in this separate proposal. I think that is a proper concept to raise in our review of the regulatory reform proposals.

~~Chapter 1~~  
Ad Hoc Committee Report  
on Proposed Nuclear  
Licensing Reform Act  
of 1983

(To be provided)

PART III

(To be provided at a later date)



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