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PETITION RULE PRM 7-2
(49 FR 43070)

NUCLEAR REGULATORY COMMISSION

10 CFR Part 7

(Docket No. PRM-7-2)

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USNRC

John L. Nantz; Denial of Petition for Rulemaking

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OFFICE OF SECRETARY
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AGENCY: Nuclear Regulatory Commission.

ACTION: Denial of petition for rulemaking.

SUMMARY:

The Nuclear Regulatory Commission is denying a petition for rulemaking submitted by John L. Nantz. The petitioner requested that the Commission adopt regulations to establish a formal procedure for Commission review of decisions to close advisory committee meetings or portions of those meetings. The petition is being denied on the grounds that current procedures are adequate to assure that advisory committees' use of exemptions from the requirement for open meetings are adequately justified and because Commission review would be an inefficient and unwarranted use of the Commission's resources.

ADDRESSES: Copies of correspondence and documents cited in this document are available for public inspection and copying for a fee at the NRC's Public Document Room at 1717 H Street, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Marjorie S. Nordlinger, Office of the General Counsel, Telephone: 202-634-1493; or John C. Hoyle, Office of the Secretary, Telephone: 202-634-3255, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

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SUPPLEMENTARY INFORMATION:

On October 26, 1984, the Commission published notice of receipt of a petition for rulemaking from John L. Nantz in which he requested that the Commission amend its regulations to establish a formal procedure to allow interested persons to petition the Commission for review of decisions to close advisory committee meetings or portions of those meetings (49 FR 43070). That notice fully explicated the petitioner's view on why a change was desirable and set forth the rule change that the petitioner had proposed.

In brief, the petitioner maintains that current Commission rules do not establish authority for ruling on appeals of closure determinations for meetings of advisory committees made, pursuant to the Commission's delegation and with the advice of the General Counsel,¹ by the Assistant Secretary as the Advisory Committee Management Officer.

The Commission sought public comment on the petition during a two-month period.

¹The petition also suggests that such a delegation may be improper, reasoning that because Section 8(b) of the Federal Advisory Committee Act (FACA) permits delegation of certain specific functions to the Advisory Committee Management Officer (ACMO), it is implied that other functions may not be delegated; but the requirement of that section that the head of an agency "designate," not "delegate," an ACMO to perform certain functions does not speak to, let alone answer, the question whether the function of deciding meeting closings may be delegated by the agency head to another. In the absence of any prohibition, the Commission concludes that its delegation is a proper exercise of its authority pursuant to Section 161n of the Atomic Energy Act of 1954, as amended.

The Commission received four comment letters on this proposal. Three commenters supported the petition in light of broad principles favoring open meetings and public participation; however, none of the three addressed specifically the appeal process proposed by the petitioner or any problems related specifically to any unwarranted closing of advisory committee meetings.

The remaining commenter, Yankee Atomic Electric Co., asserted that under current practice there are adequate procedures to assure that advisory committees' use of exemptions from the requirement for open meetings are adequately justified. In particular, this commenter referred to the Federal Advisory Committee Act's requirement that any determination to close an advisory committee meeting "...shall be in writing and shall contain the reasons for such determination. [5. U.S.C., Appendix 1, Section 10(d)]". The commenter properly deduced that the written basis for closing must be sufficient for a reviewing court to determine whether the meeting was properly closed. See e.g., Nader v. Dunlop, 370 F.Supp 177 (D.D.C. 1973). In sum, the commenter concluded that "it is not apparent that the petitioner's recommended procedures are a necessary or preferred substitute for proper enforcement of current provisions in the Act."

The Commission agrees with Yankee Atomic Electric Co. that the current procedures are adequate for the reasons stated. Moreover, the practice whereby the Advisory Committee Management Officer reconsiders his own decisions on appeal parallels the procedure for appeal of closure of

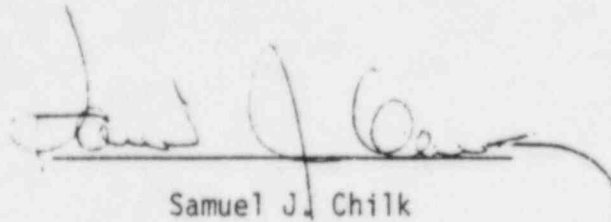
Commission meetings where it is the Commission itself that reconsiders its earlier decision. In addition, the Commission notes that the procedure Mr. Nantz supports would be impractical and would diverge from a strong policy of the Commission to extricate itself from nonessential procedural matters in order to conserve its resources for health and safety matters and matters of common defense and security which are its paramount responsibilities.

The petitioner argued that because the Commission makes the ultimate decision with respect to its own meeting closures, it should be the final level of review for advisory committee closures as well. This ignores the practical distinction that for its own meetings the Commission is already thoroughly cognizant of what is expected to be discussed and the analysis underlying closure. In order to rule on advisory committee closures, the Commission would have to be thoroughly briefed on the specific purpose of the particular meeting in question, what discussion was anticipated, and what analysis supported the closure decision. In the Commission's view, the expenditure of its resources on this undertaking would be unwarranted. Absent any contrary statutory provision, the Commission believes that any necessary review would more reasonably be undertaken by its delegate, the Assistant Secretary, with the advice of the General Counsel. The Commission notes that the Assistant Secretary, in his capacity as Advisory Committee Management Officer, would be informed already of the anticipated meeting content and could more efficiently and more expeditiously conduct any review or reconsideration. Accordingly, the Commission determines that

rulemaking is neither necessary nor desirable at this time and denies the petition.

Dated at Washington, DC this *26th* day of *July* 1985.

For the Nuclear Regulatory Commission.

A handwritten signature in dark ink, appearing to read "Samuel J. Chilk", is written over a horizontal line. The signature is fluid and cursive, with a long, sweeping tail that extends to the right.

Samuel J. Chilk

Secretary of the Commission.