It is ordered: 1. SSW shall compensate the Rock Island estate for the use of RI tracks and related facilities, operated under Directed Service Order Nos. 1453 and 1456, in accordance with the terms of this decision.

2. This decision shall be effective on the date it is served (April 28, 1980).

By the Commission. Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, Alexis and Gilliam. Vice Chairman Gresham not participating. Commissioner Stafford absent and not participating. Commissioner Trantum concurring with a separate expression. Commissioner Gilliam not participating.

Agatha L. Mergenovich,

Secretary.

Commissioner Trantum, Concurring:

I reluctantly concur in this decision because the Commission is in the unfortunate position of having to set compensation. If either the RI trustee or the SSW disagrees with the formulas adopted today, I would welcome hearing about a more reasonable solution.

[FR Doc. 80-15733 Filed 5-21-80; 8:45 am]

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49 CFR Part 1033

[Service Order No. 1471]

The Atchison, Topeka & Santa Fe Railway Co. Authorized To Operate Over Tracks of Chicago, Rock Island & Pacific Railroad Co., Debtor (William M. Gibbons, Trustee) at Alva, Okla.

AGENCY: Interstate Commerce Commission.

ACTION: Service Order No. 1471.

SUMMARY: This order authorizes the Atchison, Topeka and Santa Fe Railway Company (ATSF) to operate over tracks of Chicago, Rock Island and Pacific Railroad Company (RI) located at Alva, Oklahoma, for the purpose of serving industries located adjacent to such tracks, and provides for continuation of service to shippers which would otherwise be deprived of essential railroad service.

EFFECTIVE: 12:01 a.m., May 17, 1980, and continuing in effect until 11:59 p.m., May 31, 1980.

FOR FURTHER INFORMATION CONTACT: M. F. Clemens, Jr., (202) 275-7840.

Decided: May 16, 1980.

The embargo of the lines of Chicago, Rock Island and Pacific Railroad Company (RI) is depriving shippers located adjacent to those tracks of essential railroad service. The Atchison, Topeka and Santa Fe Railway Company (ATSF) connects with the RI and has consented to operate over these tracks in order to serve the industries.

It is the opinion of the Commission that an emergency exists requiring the operation by ATSF over tracks formerly operated by RI in the interest of the public; that notice and public procedure are impracticable and contrary to the public interest; and that good cause exists for making this order effective upon less than thirty days' notice.

It is ordered,

§ 1033.1471 The Atchison, Topeka & Santa Fe Railway Co. authorized to operate over tracks of Chicago, Rock Island & Pacific Railroad Co., debtor (William M. Gibbons, trustee) at Alva, Okla.

(a) The Atchison, Topeka and Santa Fe Railway Company (ATSF) is authorized to operate over tracks of the Chicago, Rock Island and Pacific Railroad Company (RI) at Alva, Oklahoma for the purpose of serving industries located adjacent to such tracks.

(b) *Application.* The provisions of this order shall apply to intrastate, interstate and foreign traffic.

(c) Compensation will be on terms established between the Trustee and the affected carrier(s); or upon failure of the parties to agree as hereafter fixed by the Commission in accordance with pertinent authority conferred upon it by Section 11123 (b)(2) of the Interstate Commerce Act.

(d) *Rate applicable.* Inasmuch as this operation by the ATSF over tracks previously operated by the RI is deemed to be due to carrier's disability, the rates applicable to traffic moved over these lines shall be the rates applicable to traffic routed to, from, or via these lines which were formerly in effect on such traffic when routed via RI, until tariffs naming rates and routes specifically applicable via ATSF become effective.

The operator under this temporary authority will not be required to protect transit rate obligations incurred by the RI or the directed carrier, Kansas City Terminal Railway Company, on transit balances currently held in storage.

(e) In transporting traffic over these lines, ATSF and all other common carriers involved shall proceed even though no contracts, agreements, or arrangements now exist between them with reference to the divisions of the rates of transportation applicable to that traffic. Divisions shall be, during the time this order remains in force, those voluntarily agreed upon by and between the carriers; or upon failure of the carriers to so agree, the divisions shall be those hereafter fixed by the Commission in accordance with pertinent authority conferred upon it by the Interstate Commerce Act.

(f) *Employees.* On March 4, 1980, a number of rail carriers and labor unions reached an agreement regarding the proper level of employee protection entitled *"Labor Protective Agreement Between Railroads Parties Hereto Involved in Midwest Rail Restructuring and Employees of Such Railroads Represented by the Rail Labor Organizations operating through the Railway Labor Executives' Association"* (Negotiated Labor Protection Agreement). We have reviewed the negotiated labor protection agreement and find that it adequately safeguards the interests of affected employees.

Accordingly, if ATSF chooses to exercise the authority granted by this decision, it shall afford affected employees the protection contemplated by the negotiated labor protection agreement and any subsequent amendments to it.

(g) *Effective date.* This order shall become effective at 12:01 a.m., May 17, 1980.

(h) *Expiration date.* the provisions of this order shall expire at 11:59 p.m., May 31, 1980, unless otherwise modified, amended, or vacated by order of this Commission.

This action is taken under the authority of 49 U.S.C. 10304-10305 and 11123 (a)(3).

This order shall be served upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and car hire agreement under the terms of that agreement and upon the American Short Line Railroad Association. Notice of this order shall be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register.

By the Commission, Railroad Service Board, members Joel E. Burns, Robert S. Turkington and John R. Michael.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 80-15678 Filed 5-21-80; 8:45 am]

BILLING CODE 7035-01-M

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49 CFR Parts 1243 and 1249

[No. 37117]

Elimination of Requirement To File Quarterly Report Form QL&D

AGENCY: Interstate Commerce Commission.

ACTION: Final rule.

SUMMARY: The Commission is eliminating the requirement that all Class I railroads, and all motor common and contract carriers of property with average annual operating revenues of $1 million or more, file Form QL&D–R&M, the quarterly report of freight loss and damage claims. The Commission does not use the data contained in the report, and we do not believe that the use others make of the data justifies continuing to require carriers to bear the considerable burden of filling out the form. To give other users time to adjust to our action, form QL&D will still have to be filed for each quarter of 1980, but schedule B, which contains data no one uses, will not have to be filed with the form.

DATES: The requirement that carriers file form QL&D will be eliminated for the reporting year beginning January 1, 1981. The requirement that carriers file Schedule B of Form QL&D–M is eliminated, effective May 22, 1980.

FOR FURTHER INFORMATION CONTACT: Bryan Brown, Jr. (202) 275–7448.

SUPPLEMENTARY INFORMATION: On September 25, 1979, the Commission published a notice (44 FR 55218) which proposed to eliminate the requirement that all Class I railroads, and all motor carriers of property with average annual operating revenues of $1 million or more, file Form QL&D–R&M, the quarterly report of loss and damage claims. The action was proposed to implement a recommendation of a Commission data task force which had concluded that the Commission did not make sufficient use of the data contained in the report to justify continuing to require carriers to supply it. We asked for public comment on the proposal, and we made the Department of Transportation (DOT), which does use the data in the report, a party to the proceeding. We asked them to demonstrate a "justifiable need for the data" and to discuss alternative methods for obtaining it.

In response to our NPR, we received nineteen comments, all but three of which favored our proposal. Of the carriers responding, there was near unanimous agreement that the elimination of the reporting requirement would relieve them from an unjustifiable expense. They believe that little benefit is reaped from the considerable amount of time that is required to complete the report form.

Two carrier associations, the Association of American Railroads (AAR) and the American Trucking Associations, Inc. (ATA), filed comments supporting our proposal. AAR surveyed claims departments of railroads and found that they did not use the loss and damage data. The National Freight Claim Council (NFCC), a division of ATA, is considering establishing a voluntary reporting requirement, using the present Commission form for the first year and a revised form in subsequent years. The revised form would be in line with methods used by most carriers to collect data for internal use. NFCC would make the collected data available to DOT. ATA believes that the NFCC data would be more timely and more meaningful than the data DOT presently obtains from our form.

The three comments in opposition to our proposal came from the Inland Marine Underwriters Association (IMUA), the Shippers National Freight Claim Council, Inc. (SNFCC), and DOT. IMUA contends that the present form gives insurance companies information that is essential to handle loss and damage claims. These companies are required by law to assume full responsibility for all losses, both insured and uninsured, which are unpaid by their motor carrier policy holders. IMUA asserts that the requirement to file form QL&D–R&M serves as an impetus for carriers to file claims promptly, rather than letting a large amount of claims build up at once.

SNFCC claims that the Commission is the only organization capable of collecting statistics which are meaningful. SNFCC uses the data in the report to detect trends in causes of losses, to detect changes in carriers' protection of freight, to detect unlawful claim practices, to determine rates and charges based on ratios, and to reveal reasons for non-payment of freight claims. They do not believe that the responsibility for collecting the data should be left to the discretion of carriers and "self-serving organizations."

DOT reports that it uses the data from Form QL&D–R&M in its National Cargo Security Program, which was established by Executive Order No. 11836. DOT uses the data to determine loss trends, on which it reports in an annual report to the President on the cargo security program. According to DOT, the program has reduced the cost to the public of losses from cargo thefts. DOT does not have the authority to require that the data it needs be filed with it, and it asserts that loss of the data would significantly damage its program. DOT further asserts that the data is useful to the transportation industry and that continuing to require carriers to file the form does not represent a continuing burden on the industry since carriers will still be required to keep the data, whether or not the report is eliminated. Thus, DOT claims that reporting the data constitutes an "insignificant" paperwork burden for carriers. As to alternative sources for the data, DOT believes that voluntary reporting through carrier associations would not be reliable since associations cannot require timely or accurate reporting. As result, DOT does not believe that the data base would be as reliable or useful as that obtained from the present report.

We do not believe that the arguments of DOT, SNFCC, and IMUA justify our continuing to require carriers to file Form QL&D–R&M. Although we agree that the data is useful, we do not agree that adequate data cannot be obtained elsewhere. For example, insurance companies which insure the losses of Class II railroads and motor carriers with less than $1 million in revenue have not had Commission quarterly report data, and they have developed alternative means of satisfying their data needs at a minimal expense to the carriers.

The question of the expense to the carriers seems to us to be the key determinant in this proceeding. Although DOT contends that reporting the data is an insignificant burden, the carriers associations participating in this proceeding say that it is a considerable burden. The Commission has looked into this matter itself and has determined that it requires 339,000 man hours for carriers to fill out and file Form QL&D–R&M. We cannot in good conscience continue to require carriers to expend this kind of effort to supply data which our agency does not use.

Consequently, we have determined that Form QL&D–R&M should be eliminated. We urge DOT and other interested parties to work with the carriers and their associations to try to find a method for providing reliable data in a way which will be easier and less costly for carriers than the present procedure. To assist the DOT, IMUA, and SNFCC in adjusting to our action, we are deferring the elimination of the reporting requirement until next year. Carriers will still be required to file Form QL&D–R&M for each quarter of 1980. This will give the parties time to explore alternatives.

In the course of this proceeding, we have determined that no one uses the data contained in Schedule B of Form QL&D–R&M. Consequently, we are eliminating the requirement that Schedule B be filed with the form. We are making this change effective immediately so that carriers will not have to file the schedule with their

reports for the first quarter of 1980. We find that there is good cause for this action, since it will reduce carriers costs and since there is no need for the information contained in the schedule.

Accordingly, 49 CFR 1243.4 and 1249.15, which contain the requirement that Form QL&D–R&M be filed, are rescinded, effective January 1, 1981 and Schedule B—"Analysis of theft—all carriers" is deleted from Form QL&D–R&M, effective immediately.

This action will not affect significantly either the quality of the human environment or conservation of energy resources.

This action is taken under the authority of 5 U.S.C. 553 and 49 U.S.C. 10321.

Decided: May 8, 1980.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, Alexis and Gilliam.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 80–15570 Filed 5–21–80; 8:45 am]

BILLING CODE 7035–01–M

Proposed Rules

Federal Register
Vol. 45, No. 101
Thursday, May 22, 1980

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2, 50

Possible Amendments to "Immediate Effectiveness" Rule

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Proposed rulemaking.

SUMMARY: The Commission is considering amendments to its "immediate effectiveness" rule. That rule provides that construction on a nuclear power plant can begin on the basis of an initial decision by an Atomic Safety and Licensing Board even though that decision is subject to further review within the Commission. The Commission is concerned that the present rules often prevent it from reviewing a case until construction is well underway. The Commission is considering three alternative amendments to that rule, and is also considering retaining the present rule unchanged.

DATES: Comments must be received on or before July 7, 1980.

ADDRESSES: All persons who desire to submit written comments or suggestions for consideration in connection with the proposed amendments should send them to the Secretary, United States Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch. copies of all comments received may be examined in the Commission's Public Document Room at 1717 H Street, NW., Washington, DC. Persons who have commented previously on this subject in connection with the work of the Federal Advisory Committee, mentioned below, may wish to make reference to their previous comments, and to direct their further remarks to the specific features of the three options for change which are now presented.

FOR FURTHER INFORMATION CONTACT: Peter Crane, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, (202) 634–1465.

SUPPLEMENTARY INFORMATION: In its *Seabrook* opinion of January 6, 1978, the Commission announced that it intended to monitor more effectively the proceedings of its lower boards. *Public Service Company of New Hampshire*, 7 NRC 1, 7. It stated that in practice its current rules often prevent it from reviewing a case until construction is well underway and that this might adversely affect either the quality of its decisionmaking process or the public's perception of that process, or both. It directed that a study be made of the following questions:

1. "The effect which would be achieved by relaxation of our stay standards so that site-related issues in potentially troublesome cases may be taken up before large sums of money are committed and sites irrevocably altered; and

2. Ways in which our appellate administrative procedures may assure earlier resolution of all the issues arising out of a licensing and cut relitigation and piecemeal review to a minimum."

In January of 1979 the Commission established a Federal Advisory Committee to conduct the study; on December 12, 1979 the Advisory Committee submitted its final report (NUREG–06436) to the Commission. Single copies of NUREG–0646 may be obtained without charge by writing to the Director, Division of Technical Information and Document Control, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. The report contained three options for altering the Commission's "immediate effectiveness" rule (10 CFR 2.764), together with a discussion of the advantages and disadvantages of retaining the present licensing system unchanged. It should be noted that the report, and the options which it presented, dealt only with the issue of construction during adjudication, and not with the issue of operation during adjudication. The Commission is now considering whether to retain the present system or to adopt one of several possible options for change.

In January 1980, the Commission's Office of General Counsel completed and presented to the Commission a separate but related study, entitled "The Nuclear Regulatory Commission's Appellate System", (NUREG–0648). The study discussed the history and capabilities of the present appellate system, and the practices of other agencies; analyzed the workload of the Atomic Safety and Licensing Appeal Panel; evaluated options available to the Commission; and presented conclusions, including some recommendations for change of the appellate system. Persons who are interested in the proposed rules set forth below may wish to provide comments in light of the discussions and conclusions in both studies. Copies of that study are available for public inspection in the Commission's Public Document Rooms. Single copies of the appellate study (NUREG–0648) may be obtained by written request addressed to the Director, Division of Technical Information and Document Control, Nuclear Regulatory Commission, Washington, D.C. 20555. Notice of the availability of NUREG–0648 was published in the **Federal Register** on January 30, 1980 (45 FR 6873). The notice solicited public comment on NUREG–0648, to be forwarded to the Commission by March 17, 1980.

Summary of the Present Licensing System

To construct a nuclear power plant an applicant must file with the Commission a detailed application addressing both the design of the proposed facility and its potential environmental impacts. Once that application has been thoroughly reviewed by the Commission staff, an adjudicatory hearing is held on the application before an Atomic Safety and Licensing Board. Full adjudicatory procedures, including the right to present and cross-examine witnesses, are available in the hearing and, in addition to NRC staff and the applicant, any persons whose interests may be affected by the proposed plant may participate as parties. The Licensing Board's decision must be based solely on the record compiled before it. If the Board finds reasonable assurance that the plant as designed will not be inimical to the health and safety of the public, and that the overall cost-benefit balance mandated by the National Environmental Policy Act (NEPA) favors granting the application, it will authorize a construction permit. The permit will be effective immediately unless a party has shown the Board good cause why it should not be. 10 CFR 2.764 provides that the NRC staff must issue the permit

within 10 days after the Board's decision. construction may then begin.

There are two avenues available to a party who objects to the Board's initial decision. The primary mechanism is appellate review. All Licensing Board decisions, whether or not appealed, are reviewed on the merits by a three-member Atomic Safety and Licensing Appeal Board which has full authority to review the legal and factual conclusions reached by the Licensing Board. The Appeal Board's decision in turn is subject to discretionary review by the Commission itself, either on its own motion or by the granting of a petition for review (a "certiorari petition") filed by a party pursuant to 10 CFR 2.786. Finally, any party can seek judicial review of a final Commission order in one of the United States Courts of Appeals.

In addition, a party appealing a licensing board decision may seek a stay. The immediate effectiveness rule normally permits construction to proceed during this entire appelate review. The Commission recognized, however, the need for a procedure which would allow a party to seek relief from a decision while that decision was on appeal. Rules were therefore adopted which provide that a stay may be sought, first from the Appeal Board, and if the Board denies the request, then from the Commission. The criteria used to rule on the stay request were taken from those used by courts to judge requests for stay of administrative decisions. The criteria are commonly referred to as the *Virginia Petroleum Jobbers* criteria, after the case in which they were first articulated, *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1958).

Options for changing the present licensing system

The three options which are being considered for changing the present system are as follows:

Option A—Effectiveness as an Additional Issue in Licensing

This option would require the Licensing Board to make a separate ruling on the question whether its initial decision should be immediately effective. The ruling would be based upon the record, and would deny effectiveness if the Board found, at close of hearing, any substantial question on an issue which could be affected by the early stages of construction at the site. Such issues would include, for example, alternative sites, site suitability, and the overall NEPA cost-benefit balance; no issue would necessarily be excluded. The merits of any substantial question on these issues would have to be resolved on appeal before construction at the site could begin. A "substantial question," for these purposes, does not require the Board to find that its own ruling may be incorrect, but rather that the party which did not prevail on the issue has demonstrated substantial, non-frivolous arguments which could be raised on appeal.

In a sense, Option A may be seen as the functional equivalent of retaining the present system of immediate effectiveness, but with liberalized stay standards in place of the strict *Virginia Petroleum Jobbers* standard. Alternatively, the Commission could simply alter its present stay standards to provide that a stay will be granted if a party demonstrates that there is a substantial question as to the correctness of the resolution of an issue which might be prejudiced by construction. (This is the approach taken in Option D.) Option A achieves approximately the same effect, except that in the case of a stay, the burden would be on the proponent of the stay to overcome the presumption in favor of immediate effectiveness; under Option A, however, there would be no presumption for or against immediate effectiveness. As a practical matter, this might be significant only in uncontested cases, where under Option A, effectiveness might be deferred if the Licensing Board found that there was substantial question as to the correctness of its own resolution of a particular issue which might be prejudiced by construction.

Chronologically, Option A would operate as follows:

A. At the hearing:

1. Applicant would advise the Board and parties early by letter of its proposed schedule of construction and expenditure.

2. If the nature of the issues warranted, discovery would be permitted on this schedule, and testimony would be required from applicant and staff (and permitted from intervenors) on the schedule. These steps would be taken toward the end of the hearing, and at the Licensing Board's discretion. The purpose of the testimony would be to identify points in the construction schedule which are critical for particular issues.

B. In the initial decision:

1. The Board would respond to the positions of the parties by ruling on the date when construction may begin. It would identify (and make findings on) any substantial issue which might be prejudiced by construction and note when construction might affect it.

2. The Licensing Board would defer construction whenever, as stated above, it found a substantial question (as defined above) on an issue which could be affected by construction. This decision would be made in light of the construction schedule, so that construction could go forward unless it affected an issue falling into the above categories. For example, where the issue is which is the best of several possible locations in a river bed for a discharge diffuser, early construction unrelated to the diffuser could not affect the ultimate resolution of that issue.

3. No construction could begin sooner than 30 days after the initial decision. This gives parties time to evaluate the decision and file papers before the Appeal Board.

C. On appellate review:

1. If an appeal is taken from the decision on effectiveness, 30 more days would be added to the period during which no construction could occur. During this total of 60 days the Appeal Board would be required to resolve the effectiveness question on appeal. The Appeal Board would use the same criteria for effectiveness as the Licensing Board, and the appeal would be limited to the effectiveness issue alone. Of course, if the Licensing Board had deferred effectiveness in its Initial Decision, these periods would be irrelevant, since construction could not begin until the date set by the Licensing Board. It could begin earlier only if the Appeal Board reversed the Licensing Board's deferral. Since it has the power to make such a reversal, the Appeal Board can, under Option A, take itself off the "critical path"—that is, remove itself as an obstacle to construction.

2. To allow for Commission review of effectiveness, a suitable period of deferral would be added at the conclusion of the Appeal Board's review.

3. Whenever effectiveness is deferred, the Appeal Board would resolve first, on the merits, all issues which had caused the deferral. It would decide other issues later. Construction could begin if and when the effectiveness-related issues were satisfactorily resolved on appeal.

Option B—A Final Decision on LWA Issues Prior to Construction

This option requires a final decision on the merits for construction-related issues before construction can begin. In essence, the Licensing Board would decide construction-related issues first, those issues would be taken up immediately on appeal, and construction would begin only after final appellate review of those issues. The issues are all those which, if resolved adversely to the

applicant, would defeat the plant at the site selected or be prejudiced by the early stages of construction. They are generally the same as those now used for limited work authorizations (LWA_1 and LWA_2) and similar to those used in the standard suggested above in Option A for granting a stay. The main difference between this option and Option A is that here these issues are defined in advance, and must be resolved on the merits before construction, whereas in Option A the issues are not defined in advance and construction depends upon whether effectiveness is stayed pending appeal.

Final decision is required on all issues related to the National Environmental Policy Act (NEPA) and all safety issues related to site suitability and construction of foundations. The NEPA issues would be addressed as they are now for the LWA_1. For the site safety issues, however, the review would go beyond the present site suitability report and determine the design basis or bases for meeting the safety regulation pertinent to each issue. Thus, for each of the site safety issues, the staff and Licensing Board would complete in full the review currently included in the Safety Evaluation Report. This added scope of review should assure that all site-related issues are completely addressed and should solidify the basis for authorizing construction. The site safety issues would include:

(1) Geography and Demography.
(2) Nearby Industrial, Transportation and Military Facilities.
(3) Meteorology.
(4) Hydrology.
(5) Geology and Seismology.
(6) Foundation Engineering
(7) Quality Assurance
(8) Any other issue which, in the opinion of the presiding officer, is related to the commencement of construction at the site.

The remaining issues on the construction permit (CP) would be heard by the Licensing Board while the above issues were on appeal. The remaining CP issues would include:

(1) Design Criteria for Structures, Components, Equipment and Systems
(2) Reactor and Reactor Coolant System
(3) Engineered Safety Features
(4) Instrumentation and Controls
(5) Electrical Power
(6) Auxiliary Systems
(7) Steam and Power Conversion System
(8) Radioactive Waste Management
(9) Radiation Protection
(10) Conduct of Operations
(11) Initial Tests and Operations
(12) Accident Analysis
(13) Technical Specifications

After appellate affirmance of the LWA issues, the applicant could do all the work authorized by LWA_1 and LWA_2. This includes site clearing, preparation and excavation (LWA_1) and safety-related foundations (LWA_2). Before this work is completed, the Licensing Board should have ample time to complete its hearing on the balance of the issues necessary for the construction permit. The grant of an LWA_2, which allows work on safety-related foundations, signifies clearly that all issues related to the safety of the *site* have already been resolved satisfactorily.

Option B would operate as follows:

a. At the hearing:

The Licensing Board takes up the LWA issues first. This is already the Board's practice where an LWA is requested. When decided, these issues are immediately ripe for appellate review. The Board's decision is not immediately effective. After deciding the LWA issues, the Licensing Board turns to the rest of the issues necessary for the CP. The LWA issues are processed on appeal while the rest of the CP issues are heard by the Licensing Board. If the intervenor's attorney is unable to pursue the appeal and continue the CP hearing at the same time, the Licensing Board suspends the CP hearing to allow for briefing time. The CP decision is normally made by the Licensing Board before construction ends under the LWA. If the applicant does not request a separate decision on LWA issues, effectiveness awaits appellate review of the CP decision. The issues which belong in the LWA category have been defined above, and are based upon actual experience in hearings. The Board rules on any dispute over which issues belong in the LWA category.

b. On appellate review:

1. The Appeal Board conducts an immediate review of the LWA issues, including disputes over which issues should be in the LWA category. Upon completing its review on the merits and rendering its opinion, the Appeal Board can authorize construction to begin. It can do so notwithstanding a remand for further proceedings on some minor issue (*e.g.*, additional stations to monitor the effect of construction on muskrats). Basically, the requirement is that all construction-related issues on appeal must go through at least one merits review before construction.

2. To allow for Commission review, an additional period of deferral is added at the conclusion of the Appeal Board's review. The Commission decides whether to accept review during this period. If the Commission does accept review it can defer construction until the review is completed. Under this option, the Commission could review all construction-related issues on the merits before construction begins.

Option C—Repeal the Immediate Effectiveness Rule

This option prevents any construction prior to the agency's final decision on all issues. It does not rely upon stays to discriminate among cases, upon parties or the Licensing Board to identify the grounds for a stay, or upon an LWA or other device to identify certain issues for early treatment. The Commission would be able to pass on the merits of all issues before construction begins. Since construction does not begin until all CP issues are affirmed on appeal, the LWA procedures would not be used.

Option C would operate as follows:

a. At the hearing:

The Licensing Board conducts its usual review, but effectiveness does not attach to its CP authorization. Since construction cannot begin on the strength of an LWA, there is little incentive to seek one. The only possible advantage is to reduce the time required for the Appeal Board to review the CP decision, because by reviewing the LWA issues earlier fewer issues would remain on appeal of the CP.

b. On appellate review:

1. The Appeal Board must resolve all issues on the merits before construction begins. If an issue is remanded for further proceedings, the Appeal Board can, as in Option B above, decide whether to allow construction pending the remand.

2. To allow for Commission review, an additional period of deferral is added at the conclusion of the Appeal Board's review. The Commission decides whether to accept review during this period. If the Commission does accept review, it can defer construction until the review is completed. Under this option the Commission could review all issues in the case before construction begins.

Option D—Retain the Present System but With Significantly Loosened Standards for Obtaining a Stay

Under this approach, the standards for determining whether to grant a stay could be the same as those articulated under Option A, above—whether the party seeking the stay has demonstrated substantial, non-frivolous arguments for the correctness of its position on the merits of its appeal. The functional effect would be similar to that outlined for Option A, except that under this approach, it would be necessary for a party to seek a stay, whereas under

Option A, the Board would examine the issue of effectiveness without the need for a party to make such a request. This would include a period of thirty (30) days after the date of service of the initial decision during which no construction could be commenced, so as to allow a party taking an appeal to prepare and present a stay request to the Appeal Board.

Option E.—Retain the present system unchanged

(See discussion of present system, above.)

Other Devices

In addition to the above options, the Commission is considering two devices—the increased use of referred rulings, and Commission monitoring of Licensing Board proceedings—which could aid either the present system or the implementation of any of the above options. These matters are described both in NUREG–0646 and in NUREG–0648, the study of the Commission's appellate system. (See "Supplementary Information", above.) Persons commenting on these devices may wish to refer to both studies.

Date of Implementation

The above options, if adopted, would be implemented by applying them to all applications for construction permits which have not begun hearings.

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 one of the following alternatives is contemplated.

A. *Option A.*

1. 10 CFR 2.760 is revised to read as follows:

§ 2.760 Initial decision and its effect.

(a) The presiding officer, after hearing, will render an initial decision which will constitute the final action of the Commission forty-five (45) days after its date, when it authorizes the issuance or amendment of a license for a facility, or thirty (30) days after its date in any other case, unless exceptions are taken in accordance with § 2.762, or the Commission directs that the record be certified to it for final decision.

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

(1) Prepare its own initial decision; or

(2) Omit an initial decision on a finding that due and timely execution of its functions imperatively and unavoidably so requires.

(c) An initial decision will be in writing and will be based on the whole record and supported by reliable, probative, and substantial evidence. The initial decision will include:

(1) Findings, conclusions and rulings, with the reasons or basis for them, on all material issues of fact, law, or discretion presented on the record;

(2) All facts officially noticed and relied on in making the decision;

(3) The appropriate ruling, order or denial of relief with the effective date;

(4) A separate finding, together with a statement of the basis for it, establishing the date upon which any construction authorized by the initial decision may begin;

(5) The time within which exceptions to the decision and a brief in support of them may be filed, the time within which briefs in support of or in opposition to exceptions filed by another party may be filed and, in the case of an initial decision which may become final in accordance with paragraph (a) of this section, the date when it may become final.

2. 10 CFR 2.764 is revised to read as follows:

§ 2.764 The commencement of construction under an initial decision authorizing construction or directing issuance or amendment of a construction permit.[1]

(a) Under an initial decision directing the issuance or amendment of a construction permit or a construction authorization for a production or utilization facility subject to the provisions of § 51.5(a) of this chapter.

(1) No person shall effect commencement of construction (as "commencement of construction" is defined in § 50.10(c) of this chapter) unless specifically so authorized by the Atomic Safety and Licensing Board. If the Board finds that no substantial question remains for appeal on an issue[2] related to the commencement of construction during appellate review, the Board shall authorize commencement of construction at the expiration of thirty (30) days after the date of service of the initial decision. In the event an appeal under this chapter is taken from such an initial decision authorizing commencement of construction, construction shall not commence within ninety (90) days after the date of service of the initial decision. If the Atomic Safety and Licensing Board, the Atomic Safety and Licensing Appeal Board, or the Commission finds that there is a substantial question on an issue related to the commencement of such construction, construction shall not commence until the merits of that issue are resolved on appeal. A "substantial question," for these purposes, does not require the Board to find that its own ruling may be incorrect, but rather that the party which did not prevail on the issue has demonstrated substantial, non-frivolous arguments which could be raised on appeal.

(b) The Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, shall where authorized by an initial decision issue a construction permit or an amendment thereto or a construction authorization within 10 days after the date upon which commencement of construction is authorized pursuant to this chapter.

3. A new subparagraph (3) is added to § 2.785(b) of 10 CFR Part 2 to read as follows:

§ 2.785 Functions of Atomic Safety and Licensing Appeal Boards.

* * * * *

(b) * * *

* * * * * *

(3) In a proceeding on appeal from an initial decision by an Atomic Safety and Licensing Board directing the issuance or amendment of a construction permit or construction authorization for a nuclear power reactor or testing facility:

(i) The Atomic Safety and Licensing Appeal Board shall, within 60 days after the date of service of the initial decision, complete its review of exceptions to that part of the initial decision of the Atomic Safety and Licensing Board which, under § 2.764, establishes the date upon which construction may commence. If no such exception is filed, the Atomic Safety and Licensing Appeal Board shall conduct any review of such part of the initial decision within 30 days of the date of service of that decision. The Atomic Safety and Licensing Appeal Board may extend these periods, but if it does so, it shall at the same time extend, by an equivalent amount, the thirty- (30-) day and ninety- (90-) day periods described in § 2.764(a).

(ii) After completing the review in paragraph (b)(3)(i) of this Section, the Atomic Safety and Licensing Appeal Board shall, if it finds that there is a substantial question on an issue related to the commencement of construction, undertake review on the merits of that issue on an expedited basis, and shall order that construction not commence pending completion of that expedited review.

[1] The temporary suspension of this rule in certain proceedings and related matters are addressed in Appendix B to this part.

[2] Such issues include, for example: Alternate sites, site suitability, and the overall NEPA cost-benefit balance.

4. A new paragraph (i) is added to 10 CFR 2.788 to read as follows:

§ 2.788 Stays of decisions of presiding officers and Atomic Safety and Licensing Appeal Boards pending review.

* * * * *

(i) The provisions of this section shall not apply to an initial decision directing the issuance or amendment of a construction permit or a construction authorization.

B. *Option B.*

1. 10 CFR 2.761a is revised to read as follows:

§ 2.761a Separate hearings and decisions.

In a proceeding on an application 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 (3) or 50.22 of this chapter or is a testing facility, the presiding officer shall unless the parties agree otherwise or the rights of any party would be prejudiced thereby, commence a hearing on issues covered by § 50.10(e) and Part 51 of this chapter as soon as practicable after issuance by the staff of its final environmental impact statement and its final report on the site safety issues described in § 50.10(e), but no later than thirty (30) days after issuance of such statement and report, and complete such a hearing and issue an initial decision on such matters. Prehearing procedures regarding issues covered by Part 51 and § 50.10(e) of this chapter, including any discovery and special prehearing conferences and prehearing conferences as provided in §§ 2.740, 2.740a, 2.740b, 2.741, 2.742, 2.751a, and 2.752, shall be scheduled accordingly. The provisions of §§ 2.754, 2.755, 2.760, 2.762, 2.763, and 2.764 shall apply to any proceeding conducted and any initial decision rendered in accordance with this section. This section shall not preclude separate hearings and decisions on other particular issues.

2. 10 CFR 2.764 is revised to read as follows:

§ 2.764 Beginning construction under an initial decision directing issuance or amendment of a construction permit or a construction authorization.[3]

(a)(1) In a proceeding in which a construction authorization is granted by an initial decision rendered pursuant to § 2.761a of this part, no person shall effect commencement of construction (as "commencement of construction" is defined in § 50.10(c) of this chapter) or conduct any of the activities described in § 50.10(e)(1) within 30 days after the date of service of the decision by the Atomic Safety and Licensing Appeal Board reviewing on the merits any appeal filed under § 2.762 from that initial decision. If, after such a review, further proceedings are ordered, no person shall effect commencement of construction until authorized to do so by the Atomic Safety and Licensing Appeal Board. In granting or denying such an authorization, the Atomic Safety and Licensing Appeal Board shall consider the relative importance of the matter or matters remanded, and the extent to which the commencement of construction at the site during the pendency of the remand would cause serious environmental impacts to occur at the site or assets to be placed at risk. If a petition for review is filed with the Commission regarding this authorization, construction shall not commence within thirty (30) days after the date of service of the decision by the Atomic Safety and Licensing Appeal Board which grants the authorization.

(2) In a proceeding in which no construction authorization pursuant to § 2.761a is granted, and in which an initial decision directs the issuance or amendment of a construction permit, no person shall effect commencement of construction (as defined in § 50.10(c) of this chapter) within:

(i) Thirty (30) days after the date of service of the decision by the Atomic Safety and Licensing Appeal Board reviewing on the merits at least that portion of any appeal from the initial decision which contains exceptions relating to the issues described by § 2.761a, or (ii) thirty (30) days after the date of the initial decision if no appeal from the initial decision is taken under this chapter.

(3) The initial decisions described in paragraphs (a) (1) and (2) of this section are appealable immediately in accordance with § 2.762 of this chapter.

(4) The Commission, pursuant to its appellate review under Part 2 of this chapter, may in its discretion extend any of the thirty- (30-) day periods described in paragraphs (a) (1) and (2) of this section.

(b) Where so authorized by an initial decision, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, shall issue a construction permit or an amendment thereto or a construction authorization, as appropriate, within 10 days after the date upon which commencement of construction is authorized pursuant to paragraph (a) of this section.

[3] The temporary suspension of this rule in certain proceedings and related matters are addressed in Appendix B to this part.

3. A new subparagraph (3) is added to § 2.785(b) of 10 CFR Part 2 to read as follows:

§ 2.785 Functions of Atomic Safety Licensing Appeal Boards.

* * * * *

(b) * * *

* * * * * *

(3) In a proceeding on appeal from an initial decision by an Atomic Safety and Licensing Board directing the issuance of a construction permit, the Atomic Safety and Licensing Appeal Board may in its discretion issue an early partial decision confined to the issues described in § 2.761a.

4. A new paragraph (i) is added to 10 CFR 2.788 to read as follows:

§ 2.788 Stays of decisions of presiding officers and Atomic Safety and Licensing Appeal Boards pending review.

* * * * *

(i) The provisions of this section shall not apply to an initial decision directing the issuance or amendment of a construction permit or a construction authorization.

5. Section 50.10(e) of 10 CFR Part 50 is amended to read as follows:

§ 50.10 License required.

* * * * *

(e)(1) The Director of Nuclear Reactor Regulation 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 (3) or § 50.22 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); (v) 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; and (vi) the construction of structures, systems, and components which do not prevent or mitigate the consequences of postulated accidents that could

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, and has completed its safety review so as to determine the design basis or bases for meeting the safety regulation pertinent to each of the following site safety issues: Geography and Demography; Nearby Industrial, Transportation and Military Facilities; Meteorology; Hydrology; Geology and Seismology; Foundation Engineering; and Quality Assurance.

(2) Such an authorization shall be granted only after the presiding officer in the proceeding on the construction permit application has made all the findings required by § 51.52 (b) and (c) of this chapter to be made prior to issuance of the construction permit for the facility, and has determined that there are no unresolved safety issues which relate to the installation of the structural foundations described in paragraph (e)(1)(v) of this section which would constitute good cause for withholding the authorization, and has made the findings under § 50.35 of this part required for the issuance of the construction permit with respect to the following site safety issues:

(i) Geography and Demography

(ii) Nearby Industrial, Transportation and Military Facilities

(iii) Meteorology

(iv) Hydrology

(v) Geology and Seismology

(vi) Foundation Engineering

(vii) Quality Assurance

(viii) Any other issue which, in the opinion of the presiding officer, is related to the commencement of construction at the site.

C. *Option C.*

1. 10 CFR 2.761a is deleted, and Appendix A to 10 CFR Part 2 is revised accordingly.

2. 10 CFR 2.764 is amended to read as follows:

§ 2.764 Commencement of construction under an initial decision directing issuance or amendment of a construction permit.

(a) In a proceeding in which an initial decision directs the issuance or amendment of a construction permit, no person shall effect commencement of construction (as "commencement of construction" is defined in § 50.10(c) of this chapter) within thirty (30) days after the date of service of the decision by the Atomic Safety and Licensing Appeal Board reviewing on the merits any appeal under § 2.762 from the initial decision. If, after such review, the initial decision is remanded for further proceedings before the Atomic Safety and Licensing Board, no person shall effect commencement of construction within thirty (30) days after the date set for commencement of construction by the Atomic Safety and Licensing Appeal Board. In setting this date, the Atomic Safety and Licensing Appeal Board shall consider the relative importance of the matter or matters remanded, and the extent to which the commencement of construction at the site during the pendency of the remand would cause assets to be placed at risk or serious environmental impacts to occur at the site.

(b) If no appeal is taken from the initial decision in paragraph (a) of this section, no person shall effect commencement of construction within thirty (30) days after the date of any decision by the Atomic Safety and Licensing Appeal Board reviewing the initial decision *sua sponte*, or within thirty (30) days after the date of the initial decision if no review *sua sponte* is undertaken.

(c) The initial decisions described in paragraph (a) of this section are *appealable immediately in accordance with § 2.762 of this chapter.*

(d) The Commission, *pursuant to its appellate review* under Part 2 of this chapter, may in its discretion extend any of the thirty- (30-) days periods in paragraph (a) of this section.

(e) Where so authorized by an initial decision, the Director of Nuclear Reactor Regulation or the Director of Nuclear Material Safety and Safeguards, as appropriate, shall issue a construction permit or an amendment thereto within 10 days after the date which the commencement of construction is authorized pursuant to paragraphs (a), (b) and (d) of this section.

3. A new paragraph (i) is added to 10 CFR 2.788 to read as follows:

§ 2.788 Stays of decisions of presiding officers and Atomic Safety and Licensing Appeal Boards pending review.

* * * * *

(i) The provisions of this section shall not apply to an initial decision directing the issuance or amendment of a construction permit.

§ 50.10 [Amended]

4. Section 50.10(e) of 10 CFR Part 50 is deleted.

D. *Option D.*

1. 10 CFR 2.764 is amended to read as follows:

§ 2.764 Commencement of construction under an initial decision directing issuance or amendment of a construction permit or a construction authorization.

(a) Under an initial decision directing the issuance or amendment of a construction permit or a construction authorization, no person shall effect commencement of construction (as "commencement of construction" is defined in § 50.10(c) within thirty (30) days after the date of service of the initial decision. In the event an appeal under Part 2 of this chapter is taken from the initial decision, no person shall effect commencement of construction within ninety (90) days after the date of service of the initial decision.

(b) The Director of Nuclear Reactor Regulation or the Director of Nuclear Materials Safety and Safeguards, as appropriate, shall where so authorized by an initial decision issue a construction permit, or an amendment thereto, or a construction authorization within ten (10) days after the expiration of the periods described in paragraph (a) of this section.

2. In § 2.788 of 10 CFR Part 2, paragraph (e) is revised and a new paragraph (i) is added to read as follows:

§ 2.788 Stays of decisions of presiding officers and atomic Safety and Licensing Appeal Boards pending review.

* * * * *

(e) Except as provided in paragraph (i) of this section, the Commission, the Atomic Safety and Licensing Appeal Board, or the presiding officer, in determining whether to grant or deny an application for a stay, will consider:

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

(2) whether the party will be irreparably injured unless a stay is granted; (3) whether the granting of a stay would harm other parties; and (4) where the public interest lies.

* * * * *

(i) an application for a stay pending appeal of an initial decision directing issuance or amendment of a construction permit or a construction authorization shall be granted if the appeal presents a substantial question concerning an issue related to the commencement of construction.

Option E. Retain the present system unchanged. Relevant portions of the Commission's existing regulations are as follows:

§ 2.760 Initial decision and its effect.

(a) After hearing, the presiding officer will render an initial decision which will constitute the final action of the

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

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

(1) Prepare its own initial decision, which will become final unless exceptions are filed; or

(2) Omit an initial decision on a finding that due and timely execution of its functions imperatively and unavoidably so requires.

(c) An initial decision will be in writing and will be based on the whole record and supported by reliable, probative, and substantial evidence. The initial decision will include:

(1) Findings, conclusions and rulings, with the reasons or basis for them, on all material issue of fact, law, or discretion presented on the record;

(2) All facts officially noticed and relied on in making the decisions;

(3) The appropriate ruling, order or denial of relief with the effective date;

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

§ 2.760a Initial decision 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. Matters not put into controversy by the parties will be examined and decided by the presiding officer only where he or she determines that a serious safety, environmental, or common defense and security matter exists. Depending on the resolution of those matters, the Director of Nuclear Reactor Regulation or Director of Nuclear Material safety and safeguards, as appropriate, after making the requisite findings, will issue, deny, or appropriately condition the license.

§ 2.761 Expedited decisional procedure.

(a) The presiding officer may determine a proceeding by an order after the conclusion of a hearing without issuing an initial decision, when:

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

(2) No unresolved substantial issue of fact, law, or discretion remains, and the record clearly warrants granting the relief requested; and

(3) The presiding officer finds that dispensing with the issuance of the initial decision is in the public interest.

(b) An order entered pursuant to paragraph (a) of this section shall be subject to review by the Commission on its own motion within thirty (30) days after its date.

(c) An initial decision may be made effective immediately, subject to review by the Commission on its own motion within thirty (30) days after its date, except as otherwise provided in this chapter, when:

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

(2) No unresolved substantial issue of fact, or discretion remains and the record clearly warrants granting the relief requested; and

(3) The presiding officer finds that it is in the public interest to make the initial decision effective immediately.

(d) The provisions of this section do not apply to an initial decision directing the issuance or amendment of a construction permit or construction authorization, or the issuance of an operating license or provisional operating authorization.

§ 2.761a Separate hearings and decisions.

In a proceeding on an application 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 (3) or 50.22 of this chapter or is a testing facility, the presiding officer shall, unless the parties agree otherwise or the rights of any party would be prejudiced thereby, commence a hearing on issues covered by § 50.10(e)(2)(ii) and Part 51 of this chapter as soon as practicable after issuance by the staff of its final environmental impact statement but no later than thirty (30) days after issuance of such statement and complete such a hearing and issue an initial decision on such matters. Prehearing procedures regarding issues covered by Part 51 and § 50.10(e)(2)(ii) of this chapter, including any discovery and special prehearing conferences and prehearing conferences as provided in §§ 2.740, 2.740a, 2.740b, 2.741, 2.742, 2.751a, and 2.752, shall be scheduled accordingly. The provisions of §§2.754, 2.755, 2.760, 2.762, 2.763, and 2.764(a) shall apply to any proceeding conducted and any initial decision rendered in accordance with this section. Paragraph 2.764(b) shall not apply to any partial initial decision rendered in accordance with this section. This section shall not preclude separate hearings and decisions on other particular issues.

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

(a) An initial decision directing the issuance or amendment of a construction permit, a construction authorization or an operating license shall be effective immediately upon issuance unless the presiding officer finds that good cause has been shown by a party why the initial decision should not become immediately effective, subject to the review thereof and further decision by the Commission upon exceptions filed by any party pursuant to § 2.762 or upon its own motion.

(b) The Director of Nuclear Reactor Regulation or Director of Nuclear Material Safety and Safeguards, as appropriate, 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.[1]

§ 2.785 Functions of Atomic Safety and Licensing Appeal Board.

(a) The Commission has authorized Atomic Safety and Licensing Appeal Board to exercise the authority and perform the review functions which would otherwise have been exercised and performed by the Commission, including, but not limited to, those under §§ 2.760–2.771, 2.912, and 2.913 in (1) proceedings on applications for licenses under Part 50 of this chapter and (2) such other licensing proceedings under the regulations in this chapter as the Commission may specify.

(b)(1) In the proceedings described in paragraph (a) of this section, the Atomic Safety and Licensing Appeal Board will also exercise the authority and perform the functions which would otherwise

[1] The temporary suspension of this rule in certain proceedings and related matters are addressed in Appendix B to this part.

have been exercised and performed by the Commission under §§ 2.711, 2.717(a), 2.718(i), 2.720(f), 2.730, 2.742(b), 2.743(b), 2.752(a) and (c) and Subpart I, except those functions referred to in § 2.905(c), (e)(2), (g), and (h)(2).

(2) In a proceeding on an application for an operating license where the Atomic Safety and Licensing Appeal Board determines that a serious safety, environmental, or common defense and security matter exists that has not been raised by the parties, it may give appropriate consideration to that matter.

(c) In the proceedings described in paragraph (a) of this section, the Atomic Safety and Licensing Appeal Board shall exercise the authority and perform the functions delegated to it subject to the provisions and limitations of the referenced sections and subpart. Except as provided in § 2.786, any action taken by the Atomic Safety and Licensing Appeal Board pursuant to its delegated authority shall have the same force and effect and shall be made, evidenced, and enforced in the same manner as actions of the Commission.

(d) In the proceedings described in paragraph (a) of this section, an Atomic Safety and Licensing Appeal Board may, either in its discretion or on direction of the Commission, certify to the Commission for its determination major or novel questions of policy, law or procedure.

§ 2.788 Stays of decisions of presiding officers and 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 decision on an appeal or petition for review. Except as provided in paragraph (f) of this section, such an application 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) A concise summary of the decision or action which is requested to be stayed;

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

(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

(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.

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

(e) In determining whether to grant or deny an application for a stay, the Commission, Atomic Safety and Licensing Appeal Board, or presiding officer will consider:

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

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

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

(4) Where the public interest lies.

(f) 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 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. As to a decision or action of the Atomic Safety and Licensing Appeal Board the application shall be filed with the Commission. In each case the procedures and criteria of §§ 2.788(a)–(e) shall be followed.

Authority for options A through E: See 161, Pub. L. 83–703, 68 Stat. 948 (42 U.S.C. 2201); Sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); Sec. 201, as amended, Pub. L. 94–79, 89 Stat. 413 (42 U.S.C. 5841).

Dated at Washington, D.C., this 16th day of May 1980.

For the Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 80–15780 Filed 5–21–80; 8:45 am]

BILLING CODE 7590–01–M

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration

14 CFR Parts 47 and 49

[Docket No. 17311; Notice No. 80–9]

Recordation of Conveyances Affecting Title to, or an Interest in, Aircraft

AGENCY: Federal Aviation Administration (FAA).

ACTION: Notice of proposed rule making (NPRM).

SUMMARY: This notice proposes rules which would amend certain provisions currently contained in the Federal Aviation Regulations dealing with aircraft registration and recordation of conveyances affecting title to aircraft. These proposed revisions are needed to eliminate the distinction between conditional sales contracts and other security instruments for purposes of those regulations. The proposed revisions are intended to provide more uniform treatment of all secured creditors in keeping with the intent of the Uniform Commercial Code.

DATES: Comments on the proposed regulation must be received before July 21, 1980.

ADDRESSES: Comments on this proposal may be mailed in duplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC–204), Docket No. 17311, 800 Independence Avenue, SW., Washington, D.C. 20591; or may be delivered in duplicate to: Room 916, 800 Independence Avenue, SW., Washington, D.C. 20591. Comments delivered must be marked: Docket No.

17311. Comments may be inspected at Room 916 between 8:30 a.m. and 5:00 p.m.

FOR FURTHER INFORMATION CONTACT:
Ms. Virginia Swimmer, Aircraft Registration Branch, (AAC–250), Airmen and Aircraft Registry, Aeronautical Center, P.O. Box 25082, Oklahoma City, Oklahoma 73125; Telephone (405) 686–2284.

SUPPLEMENTARY INFORMATION:

I. Comments Invited

Interested persons are invited to participate in the making of the propsed rule by submitting such written data, views, or arguments as they may desire. All communications received on or before July 21, 1980, will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this notice may be changed in light of comments received. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each substantive public contact with FAA personnel concerned with this rule making will be filed in the docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments on Docket No. 17311." The postcard will be date and time stamped and returned to the commenter.

II. Availability of NPRM

Any person may obtain a copy of this notice of proposed rule making (NPRM) by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attn: Public Information Center, APA–430, 800 Independence Avenue, SW., Washington, D.C. 20591, or by calling (202) 426–8058. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs should also request a copy of Advisory Circular No. 11–2 which describes the application procedure.

III. Supplementary Information

A. Statutory and Regulatory Background

In 1938, Congress first enacted legislation concerning instruments for the transfer of interests in aircraft when it established a federal system for recordation of those instruments. Currently embodied in Section 503 of the Federal Aviation Act of 1958, as amended (Act), the federal recording system is designed to provide notice of interests in aircraft. Section 503(a) of the Act requires that the FAA establish and maintain a system for recording conveyances which affect title to, or interest in, civil aircraft of the United States. A transfer of an interest in an aircraft must be recorded with the FAA in order to be "valid" as against a third person without actual notice. Section 503(d) provides that each instrument recorded pursuant to the Act shall, from the time of its filing, be valid as to all persons without further or other recordation.

As the result of the O'Connor decision by the Civil Aeronautics Authority (1 C.A.A. 5 (1939)), the buyer of an aircraft under a contract of conditional sale is recognized as the owner of the aircraft for registration purposes. This is true, even though the conditional seller retains legal title until the buyer meets the conditions of the contract. The Federal Aviation Regulations currently provide that the assignment of the interest of a buyer in an aircraft sold under a contract of conditional sale cannot be recorded, and the aircraft cannot be registered in the name of the buyer's assignee, without the consent of the conditional seller. On the other hand, if a person has a security interest in the aircraft as the result of any other arrangement, such as a chattel mortgage or a security agreement, that person's consent is not required under the regulations for recordation of the transfer and registration of the aircraft to the purchaser.

B. Cessna Finance Corp. Petition

In 1975, the Cessna Finance Corporation (CFC) petitioned the FAA to amend the regulations to remove the regulatory distinction between conditional sales contracts and other security instruments. CFC asked the FAA to require the written consent of the holder of every outstanding recorded security interest prior to recording a bill of sale or other conveyance from the debtor to a third party and as a prerequisite to issuing a certificate of aircraft registration to the debtor's transferee.

The CFC petition pointed out that pertinent sections of the Uniform Commercial Code (U.C.C.) make no distinction between such instruments as conditional sales contracts, chattel mortgages and trust deeds. The U.C.C. considers all of these instruments agreements under which a creditor holds an interest in property, and treats them alike.

C. ANPRM

The CFC Petition prompted the FAA to issue an advance notice of proposed rule making (ANPRM) on October 20, 1977 (Notice No. 77–24; 42 FR 55897) which, in keeping with the spirit of the U.C.C., proposed to abolish the distinction between contracts of conditional sale and other security interests recorded with the FAA. The FAA proposed to accomplish this, not in the manner requested by CFC, but by eliminating the current requirement of written consent of the conditional vendor to the assignment of the original buyer's interest before the assignment can be recorded and the aircraft registered to the assignee. The FAA explained in the ANPRM that an amendment similar to the one proposed by CFC would discourage transfer of the buyer's interest in the aircraft and thus be contrary to the spirit of the U.C.C. In addition, the amendment would involve a substantial increase in the administrative costs and workload of the FAA Aircraft Registry. The ANPRM further solicited suggestions of alternate courses of action which would be consistent with the U.C.C., administratively reasonable, and which would also afford protection to persons who hold security interests in aircraft.

D. Comments Recieved

The FAA received a total of 20 comments in response to the ANPRM. All of the comments favored the proposal contained in the CFC Petition and opposed the FAA proposal set out in the ANPRM. Six of the twenty comments suggested alternative courses of action. Due consideration was given to all comments recieved. The comments submitted are discussed below.

One commenter suggested that the FAA refuse to record a transfer of ownership without the written consent of the secured party or the release of the secured party's security interest. That commenter believes that a requirement of written consent or release prior to FAA recordation of a bill of sale would place the burden on the seller of the aircraft to notify the secured party of the sale and to obtain the secured party's consent.

A rulemaking petition by the Aircraft Finance Association (AFC), dated March 16, 1979, proposed the same requirement without specifying whether the burden would fall upon the buyer or the seller of the aircraft to obtain the consent or release of the security interest by the creditor.

The Act does not specifically authorize the administrator to refuse to record a conveyance affecting title to, or

an interest in, aircraft in the absence of a secured creditor's assent to that conveyance. For several years, the FARs have required evidence of the conditional vendor's assent to the transfer of an aircraft by the conditional vendee to a third party to be submitted with an application for aircraft registration and in order for the instrument evidencing such a transfer to be recorded. The special character of the contract of conditional sale, that is, the retention of legal title by the vendor, was thought to have warranted the special protection of consent to transfer.

However, Section 503(c) of the Act leaves the determination of the substantive validity of any conveyance to state law, specifically, the law of the state where the instrument is delivered. To the extent that the Act does not regulate the rights of parties to, and third parties affected by, these transactions, security interests in aircraft are controlled by Article 9 of the U.C.C., which has been adopted in forty-nine of the fifty states.

As the CFC, the commenters, and the AFC have pointed out, the U.C.C. Has eliminated the distinction between conditional vendors and other secured creditors. In view of this virtually uniform policy of state law, the FAA continues to believe that the distinction should be abolished for purposes of aircraft registration and recordation.

Furthermore, it is the policy of the U.C.C. that debtor's rights in collateral be freely transferable notwithstanding a provision in the security agreement making such a transfer a default. It would be contrary to the policy of the U.C.C. to restrain such transfers by requiring, as a condition of aircraft registration and recordation, the assent of the secured creditor to a conveyance of the aircraft. The FAA believes that it is improper to override these state laws, in the absence of specific Federal statutory authority, unless it is necessary to carry out the provisions of a Federal statute or treaty.

Four commenters suggested that the FAA notify each holder of an outstanding recorded security interest when there is a change in the registered owner of the aircraft. One of these commenters also suggested that the FAA should advise the prospective purchaser of the existence of a recorded lien against the aircraft.

Such an undertaking would require a complete examination of each aircraft record to obtain a compilation of the outstanding liens, the lien holders, debtors, dates, and recorded document number for the liens on each U.S. registered civil aircraft. This compilation would require continual updating by the FAA to reflect the attachment and removal of liens as releases and repossessions are received. The FAA could accomplish this task by computerizing the records of all U.S. registered aircraft. However, FAA studies indicate that the minimum cost of implementing an automatic data processing (ADP) system would be in excess of $80,000 and a continuing annual personnel cost in excess of $236,000 would be incurred in examining and updating the appropriate aircraft records.

As already stated, the aircraft recordation system was established as a centralized system which interested persons could access to locate documents relating to the title of a particular aircraft. As such, the system was designed to provide construction notice upon filing of any document affecting aircraft title. None of the submitted comments put forth legal arguments which persuade the FAA to go beyond the intent of Congress and undertake such an expenditure of public funds.

Finally, one commenter suggested that the FAA notify and seek the consent of each creditor of an aircraft before recording an aircraft bill of sale. Not only would such an undertaking by the FAA require an even larger expenditure of funds than the proposal already discussed, but it would embroil the FAA in aircraft financing transactions—a role clearly not contemplated by Titles III and V of the Act.

The CFC petition and comments received in support of it argue not only that the FAA should refuse to record a bill of sale in the absence of a secured creditor's consent, but that the FAA should refuse to register any aircraft where that consent has not been given. Again, there is no specific statutory authority for such a refusal.

Section 501(c) provides that, upon the request of the owner of any aircraft eligible for aircraft registration under Section 501(b), the FAA must issue an aircraft registration certificate. The application for aircraft registration must be in such a form, filed in such a manner, and contain such information as the Administrator may require. Evidence as to ownership, such as a bill of sale, is only relevant to the FAA insofar as it identifies the owner of the aircraft for purposes of determining eligibility for registration under Section 501(b). The limited interest of the FAA in the ramifications of aircraft financing transactions upon aircraft title is evidenced in Section 501(f). That section provides that the Certificate of Aircraft Registration is only evidence of nationality for international purposes. Registration is not to be used as evidence of aircraft ownership in any proceeding in which ownership by a particular person is in issue.

For these reasons and those already stated with regard to consent as a prerequisite for aircraft recordation, it would be improper to refuse to register an aircraft on the grounds that a secured creditor's consent to the transfer of that aircraft is absent.

Section 47.47(a), which requires the secured creditor's consent to deregistration of an aircraft for export purposes, is not affected by this proposal. The consent requirement in that regulation is based upon different grounds than the regulations prescribing requirements for registration of aircraft and recordation of conveyances affecting title to, or an interest in, aircraft. Section 47.47(a) relates to international transactions and gives effect to the requirement of the Convention on International Recognition of Rights in Aircraft (4 U.S.T. 1830) that the holder of a recorded right in an aircraft be satisfied or consent to the transfer of an aircraft to the register of another country.

Therefore, it is appropriate to delete regulations affording special consideration to conditional sales contracts in view of modern state statutes which treat alike all instruments executed for security purposes as they concern the rights, duties and remedies of the parties. Specifically, the proposed amendment to § 47.11(a) would eliminate the current requirement that the assignee under a contract of conditional sale submit, with an Application for Aircraft Registration, written assent of the seller, bailor, lessor, or assignee thereof, under the original contract, to the assignment. The proposed amendment to § 49.17 would consolidate the recordation requirements for instruments executed for security purposes.

IV. Economic Impact of Proposed Regulation

The FAA has determined that the expected impact of the proposed regulation is so minimal that it does not require an evaluation. Approximately 15 per cent of the total security interest conveyances filed for recordation with the FAA are contracts of conditional sale under which legal title is retained by the conditional vendor. In the majority of cases, a release of the contract of conditional sale is filed for recordation prior to transfer of ownership. Consequently, the elimination of the current regulatory provision that the assignment of the interest of the buyer in an aircraft sold

under a contract of conditional sale cannot be recorded, and the aircraft cannot be registered in the name of the buyer's assignee, without the consent of the conditional seller, will have little effect upon the majority of aircraft financing transactions. However, interested persons are invited to comment on the economic impact of the proposed rule by submitting such written statistical data or other factual information as they may desire.

V. Proposed Amendments

Accordingly, the Federal Aviation Administration proposes to amend Parts 47 and 49 of the Federal Aviation Regulations (14 CFR Parts 47 and 49) as follows:

PART 47—AIRCRAFT REGISTRATION

1. By revising § 47.11(a) to read as follows:

§ 47.11 Evidence of ownership.

* * * * *

(a) The buyer in possession, the bailee, or the lessee of an aircraft under a contract of conditional sale must submit the contract. The assignee under a contract of conditional sale must submit both the contract (unless it is already recorded at the FAA Aircraft Registry) and the assignment from the original buyer, bailee, lessee or a prior assignee.

* * * * *

PART 49—RECORDATION OF AIRCRAFT TITLE AND SECURITY DOCUMENTS

2. By deleting paragraph (e) of § 49.17 and revising paragraph (d) of § 49.17 to read as follows:

§ 49.17 Conveyances recorded.

* * * * *

(d) The following rules apply to instruments executed for security purposes and assignments thereof:

(1) A chattel mortgage must be signed by the mortgagor. If the mortgagor is not the registered owner of the aircraft, the chattel mortgage must be accompanied by the mortgagor's Application for Aircraft Registration and evidence of ownership, as prescribed in Part 47 of this chapter, unless the mortgagor:

(i) Holds a Dealer's Aircraft Registration Certificate and submits evidence of ownership as provided in § 47.67 of this chapter (if applicable);

(ii) Was the owner of the aircraft on the date the mortgage was signed, as shown by documents recorded at the FAA Aircraft Registry; or

(iii) Is the vendor, bailor, or lessor under a contract of conditional sale.

(2) The name of a co-signor may not appear in the mortgage as a mortgagor (owner). If a person other than the registered owner signs the mortgage, that person must show the capacity in which that person signs, such as "co-signor" or "guarantor."

(3) An assignment of an interest in a contract of conditional sale, chattel mortgage, or other security instrument must be signed by the assignor and, unless it is attached to and is a part of the original agreement, must describe the agreement in sufficient detail to identify it, including its date, the names of the parties, the date of FAA recording, and the recorded document number.

(4) An amendment of or a supplement to an instrument executed for security purposes that has been recorded by the FAA must meet the requirements for recording the original instrument and must describe the original instrument in sufficient detail to identiy it, including its date, the names of the parties, the date of FAA recording, and the recorded document number.

(5) Immediately after a debt secured by an instrument given for security purposes has been satisfied, or any of the encumbered aircraft have been released from the instrument, the holder shall execute a release of AC Form 8050–41, "Conveyance Recordation Notice and Release," provided to him by the FAA when the conveyance was recorded by the FAA, or its equivalent, and shall send it to the FAA Aircraft Registry for recording. If the debt is secured by more than one aircraft and all of the collateral is released, the collateral need not be described in detail in the release document. However, the original instrument must be clearly described in enough detail to identify it, including its date, the names of the parties, the date of FAA recording, the recorded document number.

(6) A contract of conditional sale, as defined in Section 101(19) of the Federal Aviation Act of 1958 (49 U.S.C. 1301(19)), must be signed by all parties to the contract.

(Secs. 313(a), 501, 503, 1102, Federal Aviation Act of 1958, as amended (49 U.S.C. 1354(a), 1401, 1403 and 1502); sec. 6(c), Department of Transportation Act (49 U.S.C. 1655(c)))

Note.—The FAA has determined that this document involves a proposed regulation which is not significant under Executive Order 12044 as implemented by DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). In addition, the FAA has determined that the expected impact of the proposed regulation is so minimal that it does not require an evaluation.

Issued in Oklahoma City, Oklahoma, on May 7, 1980.

Benjamin Demps, Jr.,

Director, Aeronautical Center.

[FR Doc. 80–15347 Filed 5–21–80; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Part 71

[Airspace Docket No. 80–AAL–5]

Proposed Designation of Transition Area Valdez, Alaska

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes to establish a 1,200-foot transition area at Valdez, Alaska, to provide protected controlled airspace for aircraft conducting an instrument approach procedure to the Valdez Airport. This proposed action will also enable ATC to more efficiently control aircraft operations using radar control procedures from an en route radar facility at Middleton Island, Alaska. This action is made necessary by a recently approved instrument approach procedure for the Valdez Airport and the imminent establishment of an en route radar facility on Middleton Island.

DATE: Comments must be received on or before June 23, 1980.

ADDRESSES: Send comments on the proposal in triplicate to: Director, FAA Alaskan Region, Attn: Chief, Air Traffic Division, Docket No. 80–AAL–5, Federal Aviation Administration, Box 14, 701 C Street, Anchorage, Alaska 99513.

The official docket may be examined at the following location: Office of the Regional Counsel, Alaskan Region, Federal Aviation Administration, Box 14, 701 C Street, Anchorage, Alaska 99513.

An informal docket may be examined at the office of the Chief, Operations, Procedures and Airspace Branch, Air Traffic Division, at the above address.

FOR FURTHER INFORMATION CONTACT: John G. Costello, Operations, Procedures and Airspace Branch, Air Traffic Division, Federal Aviation Administration, Box 14, 701 C Street, Anchorage, Alaska 99513, telephone (907) 271–5902.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons may participate in the proposed rulemaking by submitting such written data, views, or arguments as they may desire. Communications should identify the airspace docket number and be submitted in triplicate to