



SECRETARY

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

February 3, 2016

COMMISSION VOTING RECORD

DECISION ITEM: SECY-15-0129

TITLE: COMMISSION INVOLVEMENT IN EARLY STAGES OF
RULEMAKING

The Commission acted on the subject paper as recorded in the Staff Requirements Memorandum (SRM) of February 3, 2016.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

A handwritten signature in black ink, appearing to read "Annette L. Vietti-Cook", written over a horizontal line.

Annette L. Vietti-Cook
Secretary of the Commission

Enclosures:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Burns
Commissioner Svinicki
Commissioner Ostendorff
Commissioner Baran
OGC
EDO
PDR

VOTING SUMMARY - SECY-15-0129

RECORDED VOTES

	<u>APPROVED</u>	<u>DISAPPROVED</u>	<u>ABSTAINING</u>	<u>N/P*</u>	<u>COMMENTS</u>	<u>DATE</u>
Chrm. Burns	X				X	11/23/15
Comr. Svinicki	X				X	12/16/15
Comr. Ostendorff	X	X			X	10/30/15
Comr. Baran	X				X	12/02/15

*Not Participating

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: Chairman Burns
SUBJECT: SECY-15-0129: COMMISSION INVOLVEMENT IN
EARLY STAGES OF RULEMAKING

Approved Disapproved Abstain Not Participating

COMMENTS: Below Attached None

Entered in STARS

Yes

No



Signature

23 November 2015

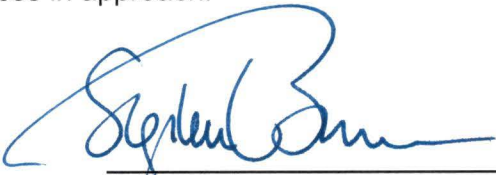
Date

Chairman Burns Comments on SECY-15-0129
“Commission Involvement in Early Stages of Rulemaking”

I commend the staff for providing a timely and thorough response to the Commission’s direction. I approve the staff’s recommendations in full. I support Commissioner Ostendorff’s revisions to the staff’s proposed streamlined rulemaking plan template, which would provide a more thorough discussion to inform the Commission’s consideration of rulemaking plans.

Some stakeholders have expressed concerns about a perceived lack of involvement of the Committee to Review Generic Requirements (CRGR) in rulemaking activities and the level of rigor of the CRGR’s review. I am sensitive to these concerns; however, I am not wholly convinced that expanding the CRGR’s role will effectively address them. I do believe, however, that the staff’s commitment to develop criteria and guidance for CRGR involvement in rulemaking packages will be a positive step. The staff should provide the Commission the CRGR criteria and guidance for information once they are developed. The staff has also committed to examining the need for further process enhancements regarding CRGR after it has been able to assess lessons-learned and feedback from the use of the new guidance and criteria. If the staff determines that further process enhancements would be beneficial, it should inform the Commission. While I am not convinced that expanding the CRGR charter is the most effective approach at this time, I am open to future enhancement of CRGR’s role if warranted.

Finally, I support Commissioner Ostendorff’s recommendation that the rulemaking process should include explicit guidance for the staff to raise potential policy issues to the Commission as early as practicable in the rulemaking process, especially in those instances where leadership is not able to resolve significant differences in approach.



Stephen G. Burns
23 November 2015

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER SVINICKI
SUBJECT: SECY-15-0129: COMMISSION INVOLVEMENT IN
EARLY STAGES OF RULEMAKING

Approved XX Disapproved _____ Abstain _____ Not Participating _____

COMMENTS: Below _____ Attached XX None _____

Entered in STARS

Yes XX

No _____



Signature

12/16 /15

Date

**Commissioner Svinicki's Comments on SECY-15-0129
Commission Involvement in Early Stages of Rulemaking**

I approve the broad elements of the staff's recommendation contained in the paper, subject to the amendments and exceptions noted in this vote. The staff's proposal is a solid foundation, but if we begin by thinking about what problems or gaps we are trying to address, it is apparent that some aspects of the staff's proposal fall a bit short. I also do not prioritize conducting rulemakings quickly over conducting them well. As Mahatma Gandhi said: "There is more to life than increasing its speed." Time added up front in the process that enhances informed decision making and results in the pursuit of only those rulemakings that are necessary and justified is time well spent.

I approve the institution of a streamlined rulemaking plan requirement in the form of a SECY paper that would request Commission approval to initiate any rulemaking not already explicitly delegated to the staff as a delegated rulemaking activity, but the modifier of "nonroutine" before "nondelegated" in the staff's proposal is not appropriate. This term is both undefined and scopes the requirement too narrowly. Under this rubric, the Commission would not have received a rulemaking plan SECY paper for the "routine" proposed incorporation by reference of IEEE Standard 603-2009, a matter members of the Commission have found so replete with policy issues that the Commission is conducting a public Commission meeting to explore them. The new rulemaking plan requirement should apply to all rulemaking that is not already explicitly delegated to the staff as a staff delegated rulemaking.

I approve the template for the rulemaking plan (Enclosure 2) subject to the addition of the following elements to the template. The template should include a section for a summary OGC analysis of legal matters. The template should include a section containing a preliminary backfit analysis, including a quantitative estimate of safety benefits. The template should include a section on Agreement State considerations. The template should also require, in the discussion or as separate sections, content explicitly addressing the NRC staff's definition of the regulatory issue, identifying why NRC rulemaking action is necessary, outlining alternatives to rulemaking, presenting any differing views that are currently dividing the staff on the issue, and providing the results of early stakeholder engagement. As the staff acknowledges in SECY-15-0129, these elements were historically contained in the rulemaking plans presented to the Commission and will serve to make the Commission's early involvement in the initiation of rulemaking a meaningfully informed deliberative process – not a ministerial ratification or "rubber stamping" of staff's proposed path forward. In this regard, the staff's definition of the regulatory issue (again, defining what problem we are fixing) and the presentation of possible alternatives to rulemaking (e.g., other regulatory instruments such as updating guidance) are essential to the Commission's decision making process. I further approve rescinding the existing delegations described on page 10 of SECY-15-0129, Items 1.b and 1.c of "Recommendations."

I approve the requirements that staff submit a SECY paper to request Commission approval to discontinue any rulemaking and for approval of any petition for rulemaking determination that recommends rulemaking. These elements flow naturally from, and are consistent with, the new requirement for Commission approval of rulemaking, described above.

I do not propose to disturb the list of currently approved agency rulemaking activities (Enclosure 1), which is unnecessary in light of the Commission's vote early next year on a staff proposal rebaselining the agency's entire scope of work, including ongoing rulemakings. However, I will comment on the repeated representation that the Commission has approved all current rulemaking activities "through the budgeting process." As I noted in my vote on COMSGB-15-

0003, "I would be surprised if any of my colleagues could attest that the scant information we receive on proposed and ongoing rulemaking activities provided to us in the budget proposal provides anywhere near sufficient information to opine meaningfully on this question." I continue to hold to this view. I am encouraged, however, by the commitment of the NRC Chief Financial Officer to improving the quality of the agency's budget development process. I look forward to supporting her in this endeavor.

The Commission should not reaffirm the Commission's 2006 direction regarding CRGR and ACRS. With respect to review of rulemaking activities by the Advisory Committee on Reactor Safeguards (ACRS) and the Committee to Review Generic Requirements (CRGR), I agree that not all rulemaking activities should be subject to review by these bodies. It is my observation that the ACRS process with respect to rulemaking review is working reasonably well; at least, any modifications to the process beyond what the staff is already working on would not be a priority over addressing the deficiencies in the CRGR.

In the CRGR, the agency purports to have a process of rigorous internal challenge – a kind of "murder board" if you will – to maintain disciplined defense of, and adherence to, the backfit rule. In my observation, nothing of the kind is happening at the CRGR. We must either quit representing the CRGR this way or reform it to achieve this goal. I suspect that the central problem may be one of composition. Are the members of the CRGR appropriately dispassionate about the staff's backfit analyses or, since the members are, for the most part, Deputy Directors of offices with significant rulemaking activity, is the natural posture more one of "If I let hers go through, she will let mine go through"? We do not know the answer to that question but I do observe that the CRGR has not substantively modified a staff work product presented to them in some years. Based on a quick review, I could not find a single instance of the staff electing to recommend CRGR review of any rulemaking package since the waiver process was approved by the Commission in 2007 – not one, ever. To me, this is telling.

The EDO should task a small group to include representatives from among current CRGR members and also NRC staff from non-program offices, perhaps OCAA or technical staff advisors to the ACRS, to examine this question and propose for the Commission's consideration, changes to the CRGR charter, including, if merited, its purpose and composition.

In its recommendations 4 and 5, the staff elevates form over substance. It is hard to believe that in the Project Aim environment, the staff cries "Uncle" on its own self-imposed administrative burden in processing an Information Paper to the Commission and proposes to demote this work product to a Commissioners' Assistants Note. Rather, the staff should undertake a business process improvement on its processing of Information Papers under Project Aim. This should begin immediately. Rulemaking activities are significant and important. If the staff is in jeopardy of being crushed under the administrative burden of sending an information paper to its own Commission, it should fix that problem systematically rather than providing frivolous recommendations that the Commission vote on demoting this work product to a different one, with a different label on the top of the page. I ponder how former EDO Jim Taylor would have reacted to such a recommendation. I am confident that today's NRC is more than capable of holding to and surpassing the high standards he and other agency leaders historically set and achieved.

I also observe that Commissioners' Assistants Notes are not routinely publicly released. Re-categorizing agency work product as the staff proposes has the potential to diminish agency transparency on these topics.

I approve moving the due date for the annual submission of the Common Prioritization of Rulemaking process to the CFO to May or June, along with the Information Paper to the Commission. I approve inclusion of the ACRS and CRGR on the distribution for the Information Paper conveying the Rulemaking Activity Plan to the Commission and moving the date for the annual submission of the plan to May or June.

We now have nearly ten years of operating experience with the changes to the rulemaking process adopted in 2006. Although well intentioned, those changes were predicated on a forecasted deluge of rulemaking activity arising from a nuclear renaissance that did not materialize in the way predicted. Based on the voting record adopting those 2006 changes, the Commission appeared to worry that its review and approval process could become too much of a bottleneck, gumming up the orderly execution of agency work. In retrospect, however, the Commission's review and approval may have been providing a natural and appropriate restraint on the pacing and prioritization of embarking on new rulemakings and the effect of the removal of that wicket may have been the greater worry. Be that as it may, we have the chance to take corrective action now. The staff's proposal is a good start but the additional items I have proposed here are necessary in building confidence that the changes will result in the Commission's re-establishing itself, meaningfully and centrally, in one of the most significant authorities enshrined to us by the law – rulemaking.



Kristine L. Svinicki 16 December 2015

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER OSTENDORFF
SUBJECT: SECY-15-0129: COMMISSION INVOLVEMENT IN
EARLY STAGES OF RULEMAKING

Approved X Disapproved X Abstain _____ Not Participating _____

COMMENTS: Below _____ Attached X None _____

Entered in STARS

Yes X

No _____

22107 [Signature]
Signature

10/30/15
Date

**Commissioner Ostendorff's Comments on SECY-15-0129,
"Commission Involvement in Early Stages of Rulemaking"**

I want to thank the staff for its thorough assessment of the rulemaking process in response to the SRM for COMSGB-15-0003, also titled "Commission Involvement in Early Stages of Rulemaking." In my vote on COMSGB-15-0003, I applauded the Chairman for initiating this proposal and I believe the staff has proposed a set of reasonable and pragmatic recommendations that, if implemented properly, will better ensure that we are applying our resources judiciously in the rulemaking arena and are only implementing new requirements when appropriately justified. My specific responses to each of the recommendations are provided below.

Recommendation 1: *Approve the institution of a streamlined rulemaking plan requirement in the form of a SECY paper that would request Commission approval to initiate any nonroutine, nondelegated rulemaking.*

- a. *Approve the template for the streamlined rulemaking plan.*
- b. *Rescind the delegation of authority in the SRM on COMNJD-06-0004/COMEXM-06-0006, "Streamlining the NRR Rulemaking Process," dated May 31, 2006 (ADAMS Accession No. ML061510316), that gave the Director of NRR the discretion to waive (in consultation with the General Counsel) the development and submission of rulemaking plans.*
- c. *Rescind the delegation of authority in the SRM on SECY-07-0134, "Evaluation of the Overall Effectiveness of the Rulemaking Process Improvement Implementation Plan," dated October 25, 2007 (ADAMS Accession No. ML072980427), that gave the Director of FSME (now merged with NMSS) the discretion to waive (in consultation with the General Counsel) the development and submission of rulemaking plans.*

I approve Recommendation 1 as it provides a well-understood process to obtain Commission approval for non-routine, non-delegated rulemakings with minimal resource expenditure. However, the staff should revise the template to not only list a preliminary priority, but to also provide a brief discussion regarding the basis for the preliminary priority. Additionally, the "Description and Scope" section of the template should also discuss why rulemaking is preferable to other alternatives such as guidance revisions. I have also proposed additions to the template in my response to Recommendation 7. Additionally, the staff should provide draft and final regulatory bases to the Commission via Commissioners Assistants Notes no less than 10 days before publication to ensure the Commission is provided an opportunity to assess whether additional involvement is warranted.

Recommendation 2: *Approve the requirement that staff submit a SECY paper to request Commission approval to discontinue any rulemaking.*

I approve Recommendation 2, however, the staff should explore ways to minimize the resources necessary to discontinue rulemaking, such as not completing a full regulatory analysis once enough information is gained that a cost-benefit test would not be passed.

Recommendation 3: *Approve the requirement that staff submit to the Commission for approval any PRM determination that recommends rulemaking.*

I approve Recommendation 3, however, my approval of this recommendation is separate and distinct from the Commission direction needed for low or medium priority proposed rulemakings to be funded. Separately, as the majority of rulemakings proposed as a result of PRMs are low or medium priority, and are thus likely not to be funded, I do not believe the public is served by "granting" these PRMs. The staff should re-evaluate the process for

PRM review to reconcile the granting of a PRM for which the associated rulemaking would likely never come to fruition.

Recommendation 4: *Approve submittal of the updated RAP as an enclosure to a CA note (W201100275) and move the due date for the annual submission of the RAP to November (W199500048).*

Recommendation 5: *Approve the inclusion of ACRS and CRGR on the distribution for the CA note submitting the RAP to the Commission.*

Recommendation 6: *Move the due date for the annual submission of the CPR process to the CFO in May, along with a CA Note to the Commission.*

I approve Recommendations 4, 5 and 6, as they represent simple changes to improve efficiency and effectiveness through better communication.

Recommendation 7: *Reaffirm the Commission's 2006 Direction that CRGR and ACRS not expand their roles to routinely review proposed rules.*

I approve Recommendation 7 relative to ACRS review and note the staff's statement that the Commission can direct the ACRS to review individual proposed rules at their discretion. The staff should include in its RAP template an explicit question to the Commission, and recommendation if desired, whether ACRS review of the proposed rule is warranted.

I approve Recommendation 7 relative to CRGR review subject to Commission review and approval of criteria for CRGR review of proposed rules as discussed in SECY-15-0129. I believe CRGR review of proposed rules would provide additional assurance that proposed rules are adhering to Commission expectations regarding backfitting and the use of qualitative factors, but am receptive to the use of a set of well-defined criteria that would provide this assurance while also minimizing expending resources unnecessarily.

Recommendation 8: *Determine that the CRGR not expand its role to become involved in resource allocation and rule prioritization.*

I neither approve nor disapprove Recommendation 8. In the SRM to SECY-15-0050, Cumulative Effects of Regulation Process Enhancements and Risk Prioritization Initiative," the Commission expressed its support for the consideration of risk-insights in existing agency processes. While SECY-15-0129 mentions the use of risk insights in the rulemaking prioritization process, it does not explicitly discuss how such insights are used. The staff should inform the Commission of how risk insights are explicitly used in the rulemaking prioritization process, and evaluate whether CRGR review of their use would be beneficial.

Separate from the recommendations provided in SECY-15-0128, I offer for Commission consideration an additional recommendation that the rulemaking process should include explicit guidance for the staff to raise potential policy issues to the Commission as early as practicable in the rulemaking process, especially in those instances where leadership is not able to resolve significant differences of approach. Two recent examples have raised my concern in this area, SECY-15-0065 (Mitigation of Beyond Design Basis Events) and SECY-15-0106 (Incorporation by reference of IEEE-603), both of which were proposed rules for Commission consideration that proposed different requirements for new reactors and operating reactors. In each case, the proposal for different requirements to apply to new and operating reactors should have been provided to the Commission for direction on how to proceed well before the proposed rule stage and perhaps could be raised as a proposed revision to the simplified rulemaking plan.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: Commissioner Baran
SUBJECT: SECY-15-0129: COMMISSION INVOLVEMENT IN
EARLY STAGES OF RULEMAKING


Approved XX Disapproved _____ Abstain _____ Not Participating _____

COMMENTS: Below _____ Attached XX None _____

Entered in STARS

Yes XX

No _____



Signature

12/2/15

Date

**Commissioner Baran's Comments on SECY-15-0129,
"Commission Involvement in Early Stages of Rulemaking"**

In this paper, the NRC staff provides eight recommendations for enhanced Commission involvement in the early stages of agency rulemaking. I appreciate the staff's thoughtful, thorough, and timely recommendations and approve them all subject to a few clarifications.

Currently, the staff typically submits a brief notation vote paper to the Commission seeking authorization to initiate any non-routine rulemaking. I agree with the staff that standardizing this familiar and effective process makes sense. As the staff emphasizes in the paper, these streamlined rulemaking plans should not become overly time consuming or resource intensive. Lengthy rulemaking plans would delay the rulemaking process and undermine the goal of preventing the significant expenditure of agency resources on rulemakings prior to Commission approval. Therefore, I approve the streamlined rulemaking plan template subject to the following edits: (1) because the Background section will summarize the reason to pursue rulemaking, the Description and Scope section should briefly describe "how the current regulation needs to change" rather than "why", and (2) the template should note that the Costs and Benefits section should not be included if the staff expects that the rule will be necessary for adequate protection.

In addition, the staff paper and draft template do not account for situations in which a notation vote paper presents multiple policy options, including rulemaking and non-rulemaking options. In this common situation, the staff should meet the requirement for a streamlined rulemaking plan by either: (1) including the necessary rulemaking plan information in the body of the options paper or (2) attaching a separate streamlined rulemaking plan to the options paper. Under either approach, the Commission will benefit from the information outlined in the template in its deliberations on the available options without the need for a cumbersome two-step process.

I also agree with the staff that it is unnecessary to expand the role of the Committee to Review Generic Requirements (CRGR) to routinely review proposed rules. As the staff paper explains, CRGR review of draft proposed rules would be duplicative because each of the individual offices represented on the CRGR already concurs on rulemaking packages. Deferring CRGR review until the draft final rule stage also reduces potential delays in the rulemaking process while allowing CRGR to assess any backfit questions with the advantage of public comments received on the proposed rule. I support Chairman Burns' suggestion that the criteria and guidance being developed by the staff for triggering CRGR review of a proposed rule should be provided to the Commission for information.