

8. The U.S. Nuclear Regulatory Commission: Rules for Commission Appointments (Part II)

Gail H. Marcus, Consultant, USA



Profile (January 2008)

Dr. Gail H. Marcus is presently an independent consultant on nuclear power technology and policy. She recently completed a three-year term as Deputy Director-General of the OECD Nuclear Energy Agency (NEA) in Paris. In this position, she was responsible for the program of work and budget for the agency. From 1999 through 2004, Dr. Marcus served as Principal Deputy Director of the Office of Nuclear Energy, Science and Technology. There she provided technical leadership for DOE's nuclear energy programs and facilities, including the development of next-generation nuclear power systems. Other responsibilities included production and distribution of isotopes for medical treatment, diagnosis and research, and oversight of DOE test and research reactors and related facilities and activities. From 1998-1999, Dr. Marcus spent a year in Japan as Visiting Professor in the Research Laboratory for Nuclear Reactors, Tokyo Institute of Technology. She conducted research on comparative nuclear regulatory policy in Japan and the United States.

Previously, Dr. Marcus had been in the US Nuclear Regulatory Commission (NRC). She served in a variety of positions including Deputy Executive Director of the Advisory Committee on Reactor Safeguards/Advisory Committee on Nuclear Waste; Director of Project Directorate III-3, providing regulatory oversight of seven nuclear power plants in the Midwest; and Director of the Advanced Reactors Project Directorate, where she was responsible for technical reviews of advanced reactor designs.

She also served as technical assistant to Commissioner Kenneth Rogers at the NRC for over four years, providing advice and recommendations on a broad range of technical and policy issues of interest to the Commission. From this position she was detailed for five months to Japan's Ministry of International Trade and Industry, where she was NRC's first assignee to Japan, studying Japan's licensing of the Advanced Boiling Water Reactor.

Prior to her service at NRC, Dr. Marcus was Assistant Chief of the Science Policy Research Division at the Congressional Research Service (1980-1985). In this position, she was responsible for policy analysis in support of Congress covering all fields of science and technology, and played a lead role in policy analysis and development for energy, nuclear power, and risk assessment and management.

Organization:

From 2001-2002, Dr. Marcus served as President of the American Nuclear Society (ANS), an 11,000 member professional society. She is a Fellow of the ANS and of the American Association for the Advancement of Science (AAAS). She is a former member of the National Research Council Committee on the Future Needs of Nuclear Engineering Education, and served three terms on the MIT Corporation Visiting Committee for the Nuclear Engineering Department. She is just completing a term as the elected Chair of the Engineering Section of AAAS.

Publication:

Dr. Marcus has authored numerous technical papers and publications. Her research interests include nuclear regulatory policy, energy technology and policy, risk assessment and management, international nuclear policy, and advanced nuclear technologies.

Education:

Dr. Marcus has an S.B. and S.M. in Physics, and an Sc.D. in Nuclear Engineering from MIT. She is the first woman to earn a doctorate in nuclear engineering in the United States.

This essay is a continuation of my previous essay and details further questions and incorrect assumptions I have heard over the years on the NRC Commissioner appointments. I hope that readers will review the two essays together to get a more complete explanation to some of the rules and regulations the NRC follows with regard to its Commissioners. The previous essay covered six questions and comments I have heard. This essay covers six more.

7. A two-member Commission is not permissible.

Wrong! A two-member is clearly not intended. The language states: “a quorum for the transaction of business shall consist of at least three members present.” It is certainly not desirable. There are nagging questions about whether decisions made by a two-member Commission would stand up in Court. In fact, a recent Supreme Court decision ruled that more than 500 decisions of the National Labor Relations Board (NLRB) will have to be reopened because they were decided by only two members. While Boards and Commissions operate under many of the same rules, the applicability of this ruling to the NRC would depend on the detailed wording of the laws for each agency. Nevertheless, the ruling does highlight the fact that two-member boards and commissions can happen, and that the legality of their decisions may be uncertain.

Two-member Commissions are certainly not a common occurrence. However, the way the laws regarding the NRC are written, it can happen, and it has happened. Since commissioners at the NRC can't stay on after their terms end, if there are delays for any reason in making new appointments, perhaps coupled by an unexpected resignation by, or death of, a commissioner before his or her term expires, the Commission can find itself with only two sitting Commissioners. It happened when Shirley Jackson was Chairman. At one point, Kenneth Rogers was the only other Commissioner remaining on the Commission. (The rules for commissions are not completely uniform. As noted in the previous essay, the Federal Communications Commission permits members to stay on after their appointments end if a replacement hasn't been confirmed. This arrangement further reduces, but does not completely eliminate, the possibility of a two-member commission.)

I would further observe that it is conceptually possible for the two members to be of the same party. Clearly, if one party has only two members, it is not difficult to envision that one vacancy and one unexpected departure of a sitting Commission

could deplete the minority ranks. So there could be three members left, all from the same party, and should one of those also leave, two from one party would remain.

To date, the only two-member Commission was the period mentioned above, and with Jackson a Democrat and Rogers, a Republican, the Commission did not face that situation. If a situation did occur where the two Commissioners were from the same party, it would be even more likely that the decisions of the NRC would be challenged, and even more problematical whether its decisions would stand up in Court.

I should note that a Commission consisting of three members of the same party, while it meets the test of having a three-member quorum, would also be problematical. Since one of the fundamental reasons for commissions is to have representation of both parties, there would be considerable pressure on the President and the Congress to correct such a situation quickly. The NRC has never had a three-member Commission in which all the members were of the same party. I haven't studied all other commissions, but I'm not aware of any other commission having gotten into that situation. It would take an unusual combination of events, but it is theoretically possible.

Finally, Presidents sometimes fill vacant positions by means of a “recess appointment,” which is an appointment made without Senate confirmation when the Senate is in recess. However, such appointments are temporary, lasting only until the end of that Senate session. In some cases, the Senate later confirms such appointments; in other cases, the President's use of this mechanism has strained relationships between the White House and the Senate. In any event, this mechanism is not often used, and was not used to prevent the two-member Commission in 1995.

8. Oh, but the two-member NRC Commission didn't last long.

Wrong! It has surprised me to get that comment even from people who I thought would know better. I guess such details don't stay in people's minds. However, since I had worked for Commissioner Rogers (although I was no longer working for him at that time), I perhaps was more aware of what was happening than most.

The NRC operated with only two Commissioners for about an 8-month period. Since the law requires a quorum of three Commissioners, the Commission could not function in accordance with the law if it had only two members. Thus, in anticipation of the

potential for this situation to develop, the NRC Commissioners preemptively approved a procedure to delegate authority to the Chairman in the event that a quorum could not be convened, with the proviso that the Chairman consult with the other Commissioner before exercising the delegated authority.

At the time, I understood from legal experts that this was an unusual enough arrangement that decisions of the NRC made during this period could potentially be challenged in court (as were the NLRB decisions mentioned above). There was therefore an effort made to assure that highly contentious issues were delayed as long as possible. Obviously, that could not have gone on forever. Fortunately, the decisions that were made during this period were not challenged.

However, everyone continues to recognize the undesirability of this situation, and that was probably a large part of Dale Klein's reason for staying on the Commission after Gregory Jaczko took over as Chairman.

9. All Commissioners are appointed for five-year terms.

Wrong! Commission **terms** are for five years, so if a nomination is made in advance and the Senate confirms the nomination in advance of the beginning of a term (one Commissioner's term begins on July 1 of each year), then the appointee can indeed serve a full five years. However, either the President or the Senate sometimes does not act in time, or there is occasionally an unexpected vacancy due to an early resignation (or death) of a Commissioner. In those cases, the new Commissioner begins his or her service in the middle of an existing term. A Commissioner can end up serving a term that is anywhere from a few months short to several years short. That is why the terms of the three new Commissioners, who were all confirmed at the same time, will end at different times.

As a practical matter, when only a very small portion of a term is left, the appointment is usually made for the remainder of the term, and—in advance—for the following term, so in a few instances, an appointment can be made with the understanding it will last for more than five years. However, that is technically a merging of two terms, a partial term and a full term.

10. Appointments of new Commissioners have to be paired, Democrat–Republican.

Wrong! This is a rather recent development, and in my mind, not necessarily a good one.

The rules do not state this and do not require this. For most of history, most Commission appointments—NRC and other commissions—have been done one at a time. This allows a full review of each commissioner's qualifications for the job. It should allow vacancies to be filled sooner and the transitions of Commission membership to be more gradual. And it should minimize the duration of four-member commissions (that can lead to tie votes). The recent trend reflects the increasing politicalization of the appointment process. Appointments were being held up for reasons unrelated to the qualifications of the individuals, so Presidents began pairing their appointments so that the opposing party would have something at stake as well. What began as an exceptional event seems to have become standard practice. But it is not a requirement.

11. The Senate Minority or Majority Leader designates who the President should nominate from the opposing party.

Wrong! That is another misperception based on a practice that has evolved in relatively recent years. The President actually has the sole responsibility and authority to identify and nominate appropriate candidates from both parties. However, in recent years, the President has sometimes turned to the Senate leader from the opposing party (the Majority leader when the majority of the Senate is from the opposite party as the President, and the Minority leader when the majority of the Senate is from the same party as the President). Once again, this has been seen as an effort to assure that the President's candidates are acceptable to the Senate and that the nominations will be acted upon favorably by the Senate.

This trend has also led, in recent years, to an increase in the number of Congressional staffers filling seats in commissions, including the NRC. There have almost always been one, or perhaps two, former Congressional staffers on the Commission. However, at one point recently, three of four members of the Commission were former Congressional staffers. While I cannot speak for other commissions, I want to say that the Congressional staffers who have become NRC Commissioners have been highly qualified, both in terms of having an appropriate technical or legal background, and in the knowledge and understanding of the issues that their work in Congress has given them.

Nevertheless, one strength of a commission is in the diversity of background and experience that five members can bring to the activities of the organization. In this regard, it is noteworthy that

none of the three most recent appointments are former Congressional staffers. This has “re-balanced” the Commission to a more diverse mix of two former Congressional staffers, an academic, a former industry official, and an individual with a mix of Executive branch and industry experience.

12. A Commissioner is limited to two terms.

Wrong! There is actually no specified limit on the number of terms a Commissioner can serve. However, for a very long time, no Commissioner had been appointed to more than two terms. In fact, when Commissioner Rogers finished his second term on June 30, 1997, he was the longest serving Commissioner in the history of the NRC. He retained this title until Ed McGaffigan became the first NRC Commissioner to be reappointed to a third term and had served a portion of that term. To date, Commissioner McGaffigan is the only NRC Commissioner who was appointed to a third term. Unfortunately, he died before he could serve out his full third term.

A good reference to the terms of the previous NRC Commissioners can be found at:

http://www.nrc.gov/about-nrc/organization/commissioner/former-commissioners/former-commissioners.html#N_19

These two essays, taken together, are probably more detail than most people need to know most of the time. However, I have heard every one of these statements made, sometimes by people I would have thought knew better. I therefore thought this might be a useful reference to post, and hope people will return to it the next time the need arises. As always, I welcome comments on these two essays. If there are other questions on the NRC—or the DOE, where I also worked—that I have not addressed, please let me know, and if possible, I will try to address them in a future essay. My e-mail address is:

ghmarcus@alum.mit.edu.

(An image character is used intentionally for @-sign. Please cut the image and put a keystroke @-sign.)

October 2010