ADMINISTRATIVE PROCEEDING
FILE NO. 3-6495

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:
NEW CAPITAL PROPERTIES FLORIDA, INC., d/b/a NEW CAPITAL PROPERTIES	:
	:

INITIAL DECISION

March 10, 1986
Washington, D.C.

Jerome K. Soffer
Administrative Law Judge

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APPEARANCES: Joseph L. Grant and D. Dawn Lankford, of the Atlanta Regional Office, Counsel for the Division of Enforcement.

Ira Sands, on behalf of Applicant pro se.

BEFORE: Jerome K. Soffer, Administrative Law Judge.

On March 28, 1985, the Commission issued an Order for Public Proceedings ("Order") pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") resulting from the filing under that Section on September 28, 1984 by New Capital Properties Florida, Inc., d/b/a New Capital Properties ("Applicant") of an application to become registered with the Commission as a broker-dealer.

The Order recites allegations by the Division of Enforcement ("Division") that prior to the filing of the application, one Ira J. Sands ("Sands") the president, secretary and director of Applicant and the beneficial owner of all of its outstanding common stock, had been convicted for violating Sections 1341 and 1343 of Title 18, United States Code, and that in its application for registration, applicant made or caused to be made statements which, at the time and in the light of the circumstances under which they were made, were false or misleading with respect to material facts, and had omitted to report material facts which are required to be stated therein. In view of these allegations by the Division, the Commission deemed it necessary and appropriate in the public interest and for the protection of investors that a hearing be held to determine whether the allegations are true and whether, pursuant to the provisions of said Section 15, the registration should

be denied. [1/]

Hearings were held in Miami, Florida on August 6, 7, and 8, 1985 at which Applicant was represented pro se by Sands. Following the close of the hearing, successive proposed findings of fact, conclusions of law and supporting briefs were filed by the Division and by Applicant. The Division served a reply brief.

The findings and conclusions herein are based upon the evidence as determined from the record and upon observation of the demeanor of the witnesses. The preponderance of evidence standard of proof has been applied. [2/]

THE APPLICANT

Applicant is a Florida corporation organized on January 23, 1978. Sands, who signed the application on behalf of the applicant as "Ira Sands" (but is also referred to in these proceedings and in various documents

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1/ Section 15 (b)(1)(B) requires that proceedings instituted thereunder should be concluded within 120 days of the filing of the application. However, Applicant has consented to an indefinite extension of time within which the Commission is to conclude these proceedings.

2/ See Steadman v. S.E.C., 450 U.S. 91 (1981).

submitted as "Ira Jay Sands" and "Ira J. Sands"), is its only named officer and director and the beneficial owner of all of its outstanding capital stock. The registration statement, Form BD, states that Applicant will be engaged as a broker or dealer selling tax shelters of limited partnerships, and may also be engaged in real estate acquisition and consulting thereon. 3/

IRA J. SANDS

Sands, who is some 63 years of age, was admitted to the practice of law in New York State on November 1, 1944 under the name of "Ira Schlusselberg." He continued in the practice of law until his disbarment effective November 8, 1982, under the name of "Ira Jay Sands". During this period he had an extensive litigation practice in which he participated in numerous class-action suits representing plaintiffs seeking recovery in securities related transactions, among others. He interrupted his practice of law from time to time to devote himself to "business activities." He became registered with this Commission some time in 1959 as a broker-dealer under the trade name "Sands

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3/ Sands is named as presently being the business manager of Bio Cellular Systems, Inc., a Florida corporation owned by his wife, in which Applicant may become involved as real estate matters may arise therein.

Company", later called "First Republic Company" and then called "First Republic Corporation", under which he engaged in the sale of mutual funds and employed a number of sales representatives. For a time, he was also a life insurance agent. During this period, for some unspecified time in the 1960's, he also engaged in activities as a real estate syndicator.

The basis for this proceeding is twofold. The first is the charge that Sands, a person associated with Applicant, had been convicted on October 23, 1981 for violating Sections 1341 and 1343 of Title 18, United States Code. The second basis is the allegation by the Division that in the broker-dealer application (Form BD) filed September 28, 1984 there were statements which were false or misleading or applicant omitted to report material facts, in the following respects:

a) A statement that Sands' aforesaid conviction was given a "disposition" of a $4,000 fine and 11 months when, in fact, he was sentenced to imprisonment for 30 months, later reduced to 15 months, but only served 11 months.

b) A statement that no person connected with applicant has had a license, permit, certificate, registration, or membership denied, suspended, revoked or

restricted when, in fact, Sands was disbarred from the practice of law, effective November 8, 1982.

c) A statement that no person connected with applicant has been found to be the cause of action cited in "b" above, when, in fact, Sands was the cause of the action in the disbarment proceeding referred to therein.

THE STATUTE

Section 15 of the Exchange Act requires that a broker or dealer be registered by filing with the Commission an application for registration in such form as prescribed by the Commission. Within 45 days of the date of filing the Commission shall either grant the registration or institute proceedings to determine whether the registration should be denied. Section 15(b)(1)(B) provides that at the conclusion of such proceedings:

> The Commission shall grant such registration if the Commission finds that the requirements of this Section are satisfied. The Commission shall deny such registration if it does not make such a finding or if it finds that if the applicant were so registered, its registration would be subject to suspension or revocation under paragraph (4) of this Subsection.

Paragraph 4 provides as follows:

> The Commission, by order, shall . . . suspend for a period not exceeding 12 months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing that such . . . suspension, or

> revocation is in the public interest and that such broker or dealer, . . . or any person associated with such broker or dealer, . . .
>
> (A) has willfully made or caused to be made in any application for registration . . . any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.
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> (B) has been convicted within 10 years preceeding the filing of any application for registration or at any time thereafter of any felony or misdemeanor which the Commission's finds --
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> * * *
>
> (iv) involves the violation of Section 152, 1341, 1342, or 1343 or Chapter 25 or 47 of Title 18, United States Code.

THE CONVICTION

On August 19, 1981, the grand jury for the Southern District of New York filed a 42-count indictment against Sands (under the name of "Ira J. Sands") and two others charging violations of the mail fraud and wire fraud statutes, Section 1341 and 1343 of Title 18, respectively, United States Code.

Based upon a plea of guilty by Sands to four counts of the indictment, Judge Vincent L. Broderick, of the District Court, on December 9, 1981, sentenced him to a concurrent term of imprisonment for a period of 30 months on each of the four counts, and fined him a total of $4,000. The remaining counts were dismissed.

Thereafter, Sands moved, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, for a reduction of his sentence on various grounds. Although finding its original sentence to have been proper, the Court, on April 6, 1983, reduced the term of confinement to 15 months because of the adverse impact of the original term upon Sands' family.

Sands was discharged from prison after serving approximately 11 months of the sentence, having earned a reduction in time through good behavior.

The conviction of Sands, a person associated with Applicant herein, of the above crimes within 10 years preceding the filing of the within application provides the Commission, without anything else, with statutory grounds for denying the application. [Section 15(b)(4)(B)(iv).[4/]

THE CLAIMED MISREPRESENTATIONS

I.

The applicant gave an affirmative answer to Item 7(a)(iii) in the Form BD as to "whether the applicant or

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4/ See Matter of Bruce Paul, Sec. Exch. Act Release No. 2179 (2/26/85), 32 SEC Docket 936, [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH), ¶83,748 (Feb. 26, 1985); aff'd. sub nom. Bruce Paul v. S.E.C., No. 85-4050 (2d Cir. 1985).

any person directly or indirectly controlling, or controlled by, or under common control with applicant, including any employee has . . . been, within the past ten years, convicted, or pleaded guilty or nolo contendere to any felony or misdemeanor . . ." In giving the details to explain this answer, as required by the Form BD in Schedule D, the applicant stated:

> 18 USC 1341 and 1343 in USA v. Sands, USDC, NYC, Broderick, J.; disposition $4000 and 11 months. In or about March 15, 1984, Governor Bob Graham and the Council on Clemency of The State of Florida issued its Certificate number 174660, removing all disabilities and restoring all civil rights. The applicant corporation has had no involvement.

This statement is misleading in many significant respects. It fails to state:

1. The nature of the crime committed (unless one happened to know the contents of the statutes mentioned).

2. Whether there was a conviction, guilty plea or plea of nolo contendere.

3. The name of the individual so convicted (except to state it was not the Applicant-corporation). Thus, the use of a title "USA v. Sands" does not necessarily mean it was Ira Sands who was convicted or some other individual named Sands or even another defendant in that titled proceeding (there were two others named in the same indictment).

4. The date of conviction, since relative recency is important to interested parties.

5. The court in which the case was heard. The designation "USDC, NYC" fails to designate whether the conviction was in the Southern District of New York, or the Eastern District of New York, both of which are in the confines of New York City. Only an aware individual might know that "Broderick, J." refers to a judge serving in the Southern District (although he might have been on assignment to the Eastern District).

6. That a sentence was imposed and, if so, the correct terms thereof. The bare statement "disposition $4,000 and 11 months" does not tell that this relates to a sentence of the court embracing a fine to be paid and a prison term of 15 months (originally 30 months) to be served. Not only was the length of th term inaccurately stated as "11 months", but one cannot tell from the response given whether this was a term of confinement (as it was), or perhaps a term of probation, either supervised or unsupervised, or something else. 5/ Compare this

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5/ Following the giving of notice to Sands that the Commission's staff was going to recommend denial of the

(CONTINUED ON NEXT PAGE)

ambiguous language with that used in the next gratuitously-added statement concerning the restoration of civil rights in the State of Florida in which the application number, the exact date, and the issuing authority is given. 6/

The details of the conviction and the length of the sentence are material matters for consideration by the public. Failure to disclose them accurately and clearly is greatly misleading, and prevents an interested person from learning the details of the crime.

II.

Items 7(a)(vi) and (viii) of Form DB asks whether

5/ (Continued from previous page)
application for the misrepresentations and omissions noted, Applicant filed an amended Form BD on November 7, 1984 in which the Court is more specifically designated as being "SDNY", and Sands is named as the one found guilty of violating 18 U.S.C. 1341 and 1343. It gives the date of the action simply as "1981", and recites a "disposition" of "30 months reduced to approximately 11 months". This amendment does not warrant a change in the conclusions made. Moreover, the repeated use of the term "disposition" in referring to a sentence of the Court is highly disturbing.

6/ Even here, the information given by Applicant relating to the restoration is stated as all disabilities having been removed and all civil rights having been restored. By its terms, the Florida Certificate restoring civil rights excludes the authority to possess or own a firearm, and does not exempt the person from the requirements of Section 775.13, Florida Statutes, that convicted felons must register with the sheriff of any county he enters or with the State Department of Law Enforcement.

any person (inter alia) directly or indirectly controlling Applicant "had a license, permit, certificate, registration or membership denied, suspended, revoked or restricted", or "been found to be the cause of" such action. These questions were answered in the negative. However, by Order dated October 7, 1982, of the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department, Sands was disbarred from practice as an attorney and counselor at law in the State of New York effective November 8, 1982. Thus, the negative answers given were untrue and constitute a withholding of material information, i.e., that the sole principal of Applicant was a disbarred attorney.[7/]

It is concluded, therefore, that if the applicant had been registered, its registration would be subject to suspension or revocation for having wilfully[8/] made a

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7/ In the amended BD application filed after staff notification, Applicant answered both of these questions in the affirmative, and explained: "Subsequent to the event described in 7(a)(iii) above and in 1982, the Appellate Division of New York State ordered disbarment against Ira Sands." This explanation is inaccurate and incomplete. Thus, his conviction for a serious crime becomes merely an "event". The name of the Court is inaccurate (it does not even name a court--see the correct title in the paragraph above). The statement omits dates, index number, and expecially the reason for the "disbarment", or even that Sands was disbarred from the practice of law -- just merely the ordering of a "disbarment".

8/ A finding of wilfulness does not require a showing of an intention to violate the law; it is enough that the person charged intentionally commits the act constituting the violations. Hughes v. S.E.C., 174 F.2d 969, 977 (2nd Cir. 1958); Tager v. S.E.C., 344 F.2d 5, 8 (2nd Cir. 1965); and Gearhart & Otis v. S.E.C., 348 F.2d 975 (D.C. Cir. 1965).

statement therein which was, at the time and in light of the circumstances under which it was made, false or misleading with respect to any material fact, (i.e., that Sands was convicted of the crime of mail fraud and wire fraud, and was sentenced to serve a term of imprisonment for 30 months later reduced to 15 months) and omitted to state in the application a material fact which was required to be stated therein (i.e., that Sands was disbarred from the practice of law).

Moreover, these misstatements evidence a serious lack of candor, a subject which will be discussed again later.

PUBLIC INTEREST

Sands conviction and the misrepresentations found to exist in the broker-dealer application having been established, there remains for consideration the question of whether denial of the application is in the public interest.

Applicant, in urging that with respect to the conviction, the public interest requires a grant of the application, argues that Sands was not fundamentally guilty of the criminal charges contained in the indictment, that he at all times attempted to comply with the law as he interpreted it and to get his associates to do likewise,

and that he only plead guilty because of circumstances other than his guilt. Applicant further contends that in any event the extent of Sands' criminal activity is limited only to those facts admitted in the statement he gave the District Court in compliance with Rule 11(f) of the Federal Rules of Criminal Procedure. 9/

The latter contention raises the question of what factors may be considered by the Commission in determining wherein the public interest lies. It is clear that the Commission in making such a determination following findings that there has been a violation of the securities laws is in the same position as that of a criminal court in seeking to impose an appropriate sentence upon the accused after a finding of guilt. See Billiteri v. United States Board of Parole, 541 F.2d 938 (CA-2, 1976), wherein the Court upheld the administrative actions of a parole board, in this respect and stated, at p. 944:

> . . . a sentencing judge has wide latitude in taking into consideration all matters bearing upon the personal history and behavior of the convicted accused, and this is by no means

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9/ This Rule, captioned "Determining Accuracy of Plea", states: " Notwithstanding the acceptance of a plea of guilty, the Court should not enter a judgment on such a plea without making inquiry as shall satisfy it that there is a factual basis for the plea".

> confined to the defendant's conduct in connection with the offense for which he was convicted. It has been held that in connection with a narcotics conviction, an unadjudicated charge of perjury could be considered. United States v. Hendrix, 505 F.2d 1233 (2d Cir. 1974). Offenses charged in dismissed counts of an indictment . . . may likewise be weighed in fixing sentence. United States v. Needles, 472 F.2d 652 (2d Cir. 1973). Similarly, the sentencing judge may properly take into account evidence of crimes of which the accused was acquitted. United States v. Sweig, 452 F.2d 181 (2d Cir. 1972). In United States v. Doyle, 348 F.2d 715 (2d Cir. 1965), the sentencing judge obviously had taken into consideration the overall circumstances of the offenses charged in a multi-count indictment although the accused had pleaded guilty to only one of those counts. 10/

The Commission similarly recognizes the breadth of its consideration in determining where the public interest lies. Thus, in Kimball Securities, Inc., 39 S.E.C. 921 (1960), involving reliance upon a prior civil injunction action as a basis for imposing administrative disciplinary sanctions against a respondent broker-dealer, the Commission held admissible into evidence the entire record of the

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10/ In the Doyle case cited by the Court, in reply to the argument by defendant that the sentencing is strictly limited to the framework of a count upon which he is found guilty, it was stated at p. 721:

> The narrowing of the indictment to a single count limits the maximum punishment the court can impose, but not the scope of the court's consideration within the maximum. (underlining added)

underlying injunctive action including the complaint, the defendant's answer, the motion for preliminary injunction, affidavits in support and in opposition to such motion, and the transcript of the court hearing thereon, the Commission stating, at page 924,

> ' . . . the documents on which the Court has based its action serve to place the injunction and its terms in perspective and should, we think, be included in the record for the purpose of assessing the public interest . . .'

Nevertheless, Applicant has been insisting - in its "Wells submission" to the Commission, at the evidentiary hearing, and in its post-hearing brief -- that the narrow Rule 11(f) statement by Sands (the contents of which will be discussed later) limits the Commission, when dealing with the effect of his conviction on the public interest to a consideration of only those facts admitted in that statement, and not to the allegations in the counts of the indictment to which he had pleaded guilty nor the contents of other papers before the sentencing court, such as the prosecutor's pre-sentence memorandum and the pre-sentence probation report.

This contention is wholly without merit, and was so recognized by Judge Broderick as indicated in the following colloquy with Sands' counsel (Exhibit 7, page 7):

> THE COURT: Let me say one thing that I think is the problem because you determined against it, and that is that it does seem to me, after reading very carefully the pre-sentence report, that Mr. Sands has really taken the position that his allocution (i.e., his Rule 11(f) admissions) is the extent of what is going to be considered in sentencing, and that is just not so. (Underlining added).

Moreover, even when considering whether there has been compliance with Rule 11(f) as to the existence of a factual basis for the plea of guilty, the District Court is free to rely on any facts at its disposal, not just admissions of the defendant. Irizarry v. U.S., 508 F.2d 960 (2 Cir. 1974). A factual basis for the plea may come from several sources, such as for example, the indictment, U.S. v. Montoys-Comacho, 644 F.2d 480, 485-6 (5 Cir. 1981), and a pre-sentence report, Christopher v. U.S., 541 F.2d 507 (5 Cir. 1976). 11/

11/ It would appear that the District Court did consider under Rule 11(f) the indictment in addition to Sands' statement. At the hearing where the Court accepted the guilty plea (transcript included in Exhibit 19), immediately following the proffer of Sands' Rule 11(f) statements, this colloquy ensued (pages 2 and 3):

> THE COURT: . . . May I assume, Mr. Arkin (i.e., Sands' counsel), that in the extended period of time that we have been dealing with this case, that both you and Mr. Sands are thoroughly familiar with the indictment?
> MR. ARKIN: That is a fact, your Honor. It goes beyond assumption. Yes.
> THE COURT: Do you agree with that, Mr. Sands?
> THE DEFENDANT: Yes, your Honor.
> THE COURT: I think, then, that it will not be necessary for us to read the counts to which you propose to plead guilty, since I will assume that your familiarity with those counts and with the portions of Count 1 that are incorporated in them by reference.

For the purpose of acertaining where the public interests lies, the following allegations of the counts in the indictment to which Sands pleaded guilty are found to comprise the facts embraced within his conviction, and to have been admitted by him by such plea. 12/

From in or about August, 1979, Sands and two co-defendants named in the indictments, Michel Gharbi and Sam Mizrahi, engaged in a conspirary to defraud numerous investors who purchased commodity contracts from National City Trading Corporation (NCTC), a New York corporation organized on July 31, 1979 by Sands in which his wife, Kiti Sands, and Gharbi's wife each owned 50 percent of the stock. 13/ At all relevant times Sands was "counsel" to NCTC. Its offices were located in a suite of rooms in which Sands also kept his law offices. Sands and his family also controlled S.F. Management Coporation, which was the principal lessee of the premises and, in turn, sublet space to Sands, NCTC and others.

12/ It is fundamental that a plea of guilty admits all material allegations contained in the indictment to which it is directed. U.S. v. Ruttenberg, 625 F.2d 173 (7 Cir. 1980); U.S. v. Davis, 452 F.2d 577 (9th Cir. 1971); Johnston v. U.S., 254 F.2d 239 (8 Cir. 1958, and Tom v. Twomey, 430 F. Supp. 160 (D.C., ND Ill. 1977).

13/ The evidence shows that Mizrahi first owned the 50 percent Gharbi interest, but he assigned them to Mrs. Gharbi when he left NCTC in September 1979.

From August 1979 until January 1980, NCTC sold various commodity contracts including those for silver, gold, platinum and foreign currencies, which purportedly gave the purchaser in return for the payment of a fee or "premium" the right to acquire a particular commodity at a set price at the end of a specified period of time and which were referred to as "deferred delivery" or "fixed maturity" contracts. During this period, NCTC conducted a nation-wide telephone sales operation which sold approximately 140 commodity contracts and received over $600,000 from members of the public who invested in these contracts.[14/] Apart from two of them who realized a profit of some $12,000, the remaining $600,000 in fees became losses to the investors, in addition to the failure of NCTC to pay customers over $2,500,000 in profits due to them under the terms of the contracts.

Sands and Gharbi, individually, and through their agents, utilized a nation-wide campaign of high-pressure telephone calls, most of which were made from a "boiler

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14/ Sands disputes this figure of $600,000. He insists that the gross fees received by NCTC did not exceed $100,000. Since this record shows individual fees ranging from $2,541 (Lillian Wotton account) to $4,816 (Donald Fair account), in order to accept Sands' estimate, we would have to believe that as many as 10 salespersons making telephone calls all day over a period of 5 months could produce only about 30 customers. This testimony borders on the incredible.

room" consisting of a bank of 10 telephones located in the aforesaid premises occupied by NCTC. NCTC utilized canvassers and closers in making sales of the contracts which Sands and Gharbi described to the salesmen as a "deferred delivery" or "fixed maturity" contract for the purchase of commodities. Several of the sales persons, including Gharbi and Mizrahi, had, on August 17, 1979. been enjoined from selling almost identical contracts at another company. 15/

The defendants and their agents utilized various deceptive and misleading representations as to the terms of the NCTC commodity contracts, such as that the total investment and risk would not exceed the initial fee paid, that the customer would not be required to take actual delivery of the commodity, and that at maturity date NCTC would sell the commodity for the customer at no additional cost and send the customer a check for the profit. They failed to disclose additional terms to customers until after they had paid their sales premiums, these terms including that the customers were required to pay NCTC the total purchase price of the contract plus 8% sales tax, that they were required to take actual delivery of the commodity in New York, and that even upon payment of the total purchase price, they would have to wait 5 or more days before the commodity would be delivered to them, although their funds would not be segregated or placed in escrow.

15/ See CFTC v. Morgan, Harris & Scott, Ltd., 484 F. Supp. 669 (S.D. N.Y.).

Moreover, Sands and his co-defendants, directly or through their agents failed to disclose that NCTC did not possess any of the commodities it was purportedly selling, but was looking to another company, Euro-Swiss International Corporation ("Euro-Swiss") which was supposedly "backing" the NCTC contracts. This misrepresentation continued even after Sands had reason to believe that Euro-Swiss would be unable to deliver any gold, silver or other commodities. NCTC continued to sell these contracts even after the assets of Euro-Swiss had been attached and frozen by a U.S. District Court. Additionally, they attempted to force customers to default on the commodity contracts by various maneuvers and misrepresentations, such as demanding the total purchase price plus sales tax, arbitrarily advancing the "maturity date" and then demanding acceptance of the commodity and payment therefor, and requiring the customer to pay an additional service charge.

There were a series of similar false and fraudulent representations concerning the sale of commodity contracts for the purchase of Mexican pesos.

Additional overt acts in furtherance of the conspiracy include the payment during the relevant period by NCTC to Sands, his wife and to companies they controlled, or for their benefit, a sum of over $100,000; that Sands and Gharbi caused most of the NCTC books and records

to be removed from the offices; that on November 14, 1979 Sands and Gharbi met with and made misleading representations to representatives of the Commodity Future Trading Commission (CFTC).

A study of the background relating to the sale of commodity futures options contracts lends understanding to the origin of the conspiracy involving Sands, Gharbi and Mizrahi. Congress created the CFTC in 1974 (Pub. L. 93-463, 88 Stat. 1389) granting it authority to regulate the commodities options market with the view of curtailing the many fraudulent practices which had grown up in that market. The Commission issued Rule 32.11 which outlawed trading in commodity options after June 1, 1978 and Congress affirmed this action in an amendment to the Commodity Futures Trading Act, 7 U.S.C. §6c(d).

Those individuals who had previously dealt in these options, including many who had engaged in the fraudulent practices which gave rise to the ban, tried to circumvent the ban by selling so-called "deferred delivery contracts," claiming them to be cash sales for future delivery and not options. A number of these schemes have been interpreted by the Courts as nothing more than an options contract, thinly disguised as a cash sale. See CFTC v. U.S. Metals Depository, 468 F. Supp. 1149 (D.C. SDNY, 1979) and CFTC v. Harris & Scott, Ltd., supra, for a detailed analysis of

these transactions. In fact, the decision in the latter case enjoining the defendants therein has a direct bearing on events leading up to the conviction of Sands for wire and mail fraud.

A salesman at Morgan, Harris & Scott, (MHS) at the time it was enjoined, one Sami Eisbart, who was also a client of Sands, brought to Sands' attention the financially profitable activities at MHS in the sale of commodities contracts which had to cease following the issuance of the injunction. Sands, based upon his own research and the advice of an attorney in his employ (and aided, no doubt, by the decision in the MHS injunction proceeding) felt that if the transactions could be made to look like an outright sale wherein the customer would appear to be required to purchase and take delivery of the commodity, the transaction would be differentiated from a forbidden option and hence, arguably legal. 16/ Thereupon, NCTC was formed by Sands with Eisbart and Sands' wife as principals in which they were later joined by Gharbi and Mizrahi, the co-defendants in the criminal case, plus other former salesmen of MHS. Thereafter, they commenced the above-described boiler-room type telephone selling of commodities primarily of

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16/ The decision in both U.S. Metals Depository and Morgan, Harris & Scott, Ltd., supra. make a distinction between options contracts and those on margin for later delivery.

silver, eventually employing as many as 10 salesmen.

The sales techniques employed, as described in the indictment and as actually conducted by the sales force, were the same as those utilized at MHS, including the failure to tell prospective customers of a requirement that they had to actually complete the purchase of silver. Sands, however, insists that he had prepared instructions and directives to be issued to the salesmen that they must emphasize this requirement in their sales presentations. He has offered in evidence copies of his drafts of such instructions. However, there is no proof that these directives were ever issued to the salesmen, nor that they were required to disclose to prospects any such requirement as part of their sales pitch. According to the indictment to which respondent admitted guilt, and in his Rule 11(f) statements to the sentencing court, the prospects were not so told. However, when the contracts matured and the customers became entitled to profits between the contract price and the ever-rising market price, profits which were not "covered" under deals with Euro-Swiss (who itself was in financial difficulty), Sands and his cohorts for the first time contacted customers by phone and mailgram insisting upon a prior payment of the full contract price (in some instances over $100,000), advancing the settlement

date, and seeking payment of sales tax and additional fees, in an attempt to force a default upon many of the customers, particularly those without the requisite resources or unwilling to pay the large sums involved for which they had no prior warning. 17/

Sands admitted as much in his Rule 11(f) statement addressed to the four counts to which he was pleading. The substance and totality of the statement was to the effect that for each of these counts he had demanded of a customer via telephone and mailgram that full payment for the silver must be paid, although he had already become aware of the "high probability" that the salesmen who originally made the sales to these customers failed to advise them of this requirement and, hence, that Sands' statements in each instance served to defraud the customer. 18/

17/ In those instances where customers did forward the contract purchase price, they were not delivered their silver. Instead, their money was returned and they were advised to seek redress for their unpaid profit from Euro-Swiss. In any event, their initial premium payment was retained by NCTC.

18/ Throughout this proceeding and in preliminary communications with the Commission, Sands refers to the Rule 11(f) statement as his "allocution" to the District Court. This use of the term is misplaced. The term "allocution" refers to the statement made to the sentencing court in response to the classic question asked of a convicted accused whether he had anything to say as to why sentence should not be pronounced against him. This is embraced within Rule 32(a)(1) of the Federal Rules of Criminal Procedure. See, also, U.S. v. Turner, 741 F.2d 696 (5 Cir. 1984); U.S. v. de la Paz, 698 F.2d 695 (5 Cir. 1983); and U.S. v. Myers, 646 F.2d 1142 (6 Cir. 1981); People v. Foss, 213 Cal. app 2d 678. It is not the rule 11(f) statement.

It would appear that the draft memoranda prepared by Sands concerning the need for full payment were never intended for use by the salesmen, but were intended to be available in the event the transactions were ever challenged as being the sale of forbidden options. Other similar devices designed to cover their tracks, although never disclosed when sales were made, include: notification to customers that NCTC was really not their principal but merely an agent to buy silver from Euro-Swiss on their behalf, including an offer to help them to sue Euro-Swiss for the profits they should have gained from the transaction; an attempt to have the clients seek satisfaction against Euro-Swiss (and not NCTC) by urging that they had become third party beneficiaries under the back-up contracts between NCTC and Euro-Swiss; and finally, by having NCTC purchase 1,000 ounces of silver (an amount hardly sufficient to cover one customer contract, let alone the many entered into), as "proof" of NCTC's intent to deliver.

In all of the above situations, Sands played a principal role (although, he vehemently denies being anything else than NCTC"s lawyer), engaging in these acts which became necessary because there never was a true sale of silver with later delivery. 19/

19/ Given the fungible nature of the commodities involved, there was never an appropriation of specific goods to the contract, never a down payment on account of the purchase price, and never possession by NCTC of the goods to be sold. The only loss to which purchasers were subject was the loss of their premium payment. The allegation that the customers were required to pay the full purchase price before the silver was to be available for

(CONTINUED ON NEXT PAGE)

Mr. Sands has taken the position that he became involved in the silver dealings because he was "taken in" by Gharbi, Mizrahi and Eisbart. This is difficult to believe. Mr. Sands was an experienced trial lawyer who, by his own assertions, had been involved in numerous class-action securities cases, including many in which this Commission was also involved. He had also been a registered broker-dealer of mutual funds, a licensed insurance broker, and involved in business transactions.

The more likely interpretation is that when the proposal was made to him by Eisbart, and convinced that he had found a legal loophole in selling forbidden commodity options, he became a willing participant in the activities that followed.[20/] His involvement was aptly described by

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19/ (CONTINUED FROM PREVIOUS PAGE)
them was meaningless from a practical standpoint since NCTC exhibited no intent to enforce the sale (such as bringing suit against customers who failed to do so) (except for the telephone and other communications to bring about "defaults" in the contracts when the bubble burst). In fact, it is doubtful if any contracts could have been sold if customers were informed they had to pay full purchase price. They expected large profits from only paying a premium thereby profiting from "leverage."

20/ His enthusiasm for the activities by NCTC and its salesmen is shown by his ordering to be made and posted in the sales-room where the salesmen were operating, a series of instructional signs, such as: "no guarantee", "non-refundable service fee", "full disclosure", "not a down payment", etc. Strange conduct from one who professes to have been only an attorney for NCTC merely giving legal advice.

his attorney in his plea to the sentencing Court (Exhibit 7, pages 11-12):

* * *

> . . . I think that when this man was confronted with this proposition, he thought himself to be a clever lawyer and I think he thought he could sort of thread the eye of the needle and end up selling what they were selling in some way, which was threading the eye of the needle on a very narrow, perhaps razor thin line of propriety, . . . which arguably . . . would bring this without the proscriptions of the CFTC -- the CFTA I should say.
>
> Basically he had done research and made inquiries and determined that there may have been a gap in the regulatory mechanism, such that if you insisted on payment and delivery, he wouldn't have a violation. This prophylaxis which went into the business broke down as the thing progressed. It was certainly within his office, and he was there and it came to a point and, as he admitted to your Honor, he had to know what was going on. (underlining added)

This argument that Sands was taken in by others was apparently rejected by the District Court which imposed upon Sands the severest sentence of the three conspirators, and later reduced the prison term only out of consideration for Sands' family. 21/

21/ As Judge Broderick said, in his order reducing the sentence, with respect to the original sentence imposed:

> I measured Mr. Sands' culpability, as an attorney experienced in securities matters, by a standard more exacting than that applicable to defendants without that background, and I am satisfied that the sentence imposed was, at the time, an appropriate one.

A noteworthy aspect of the culpability of Mr. Sands for the crimes for which he stands convicted, is his failure to appreciate and understand the seriousness of his actions and his responsibility for the fraud with which he was involved.

Thus, his position, as stated at the hearing herein (transcript, pp. 184-5), is that the crimes with which he was involved should be viewed as "little more, if any, than gross negligence on my part, and that the scienter, the intention, the moral turpitude, was totally absent", that his plea of guilty was "inadvisable", that what he plead to was "not anything morally or legally wrong", that he was not the perpetrator but the victim, and that everything he did was "according to law."

In his "Wells" submission to the Commission in November of 1984, (Exhibit 19, p. 3), Sands argued that he did not have the intention to damage, but rather to clear up a misunderstanding between his client (NCTC) and the customers, that "beyond peradventure" his guilt was "but slight", and that the necessary ingredients of guilt were "carefully added in by counsel (i.e., in the Rule 11(f) submission) so as to satisfy the law to be just enough to satisfy the requirements of a guilty plea".

In his Form U-4 application for registration (Applicant's Exhibit KKK) filed with the National Association

of Securities Dealers, almost simultaneously with the application herein, Sands explains his conviction as a "matter" which occurred while advising a client as to the case law on the subject, as a result of which he was indicted as a co-conspirator and a co-principal; that his "heart-health and related problems" caused him to change his plea, thereby making "a serious error of judgment"; that his statement to the sentencing court "barely contained sufficient scienter of necessary elements of a guilty plea", and that this "error" ultimately resulted in "events of removal of my right to practice law". 22/

This failure by Sands to recognize the seriousness of the crimes with which he was deeply involved and for which the District Court imposed so severe a sentence is of utmost significance in determining whether he has become sufficiently rehabilitated to warrant a grant of the requested application in the public interest. Even the true meaning of his disbarment escapes him. As he stated at the hearing (transcript, p. 865):

> The onus of being disbarred doesn't bother me one whit, because I, personally, know that it was a totally unfair situation . . .

22/ The primary reason for Sands' change of plea to guilty was when he was informed that Gharbi, his co-conspirator, had agreed to plead guilty and testify for the Government against him. According to the testimony of his wife, Kiti, and concurred in by Sands, there was a resultant fear that, faced with Gharbi's testimony, he could not succeed at a trial and would thus face a more severe sentence than he could get by a guilty plea.

Based upon this Administrative Law Judge's observation of Sands' demeanor, it is concluded that he has exhibited a significant lack of candor in his documentation and the way he testified orally.

His lack of candor in the manner in which he prepared his BD application has already been described. The assertion in his U-4 application that his involvement in the criminal fraud case arose only because he gave a legal opinion to a client resulting in his being charged as a co-conspirator, hardly describes his activities and connection to the violations of the fraud statutes to which he pleaded guilty.

Examples of Sands' lack of testimonial candor are found profusely throughout this record. Thus, it required numerous questions before he would admit to the obvious fact that his BD application as filed did not contain the statement that his original sentence involved a prison term of 30 months, or would even admit that this was the sentence of the court. (Transcript, pages 146-158) He persisted in claiming a lack of recollection as to whether in conversations held with Division counsel on October 30, 1984, he was advised of the specific grounds for which a recommendation of denial of his application would be made (i.e., his failure to disclose his disbarment from the practice of law) despite a letter from him

to Division counsel some two weeks later (Exhibit 19) admitting that he had been so informed (Transcript, pages 132-161). This testimony as to a lack of recollection is deemed unbelievable.

In explaining why he told his customers that they had to make full payment under the contract for the silver when he knew the statement to be fraudulent, Sands testified he did so in order to protect them from being charged with engaging in illegal options. (Transcript, pages 921-5) This role of "protector" of the fraud victims, coming from the perpetrator of the fraud, was assumed for the first time at the hearing herein to serve the exigencies of the moment. In any event, it demonstrates a lack of candor, if nothing else.

Sands testified that when he was a registered broker-dealer in the sale of mutual funds overseas under the firm name of First Republic Company, he required his salesmen to take the NASD examination and to become registered with that body, and that he presented them with an NASD certificate. Under further questioning he admitted that the certificates issued were from his own company, and in fact the salesmen were not registered with the NASD nor could they be, since they were out of the country.

(Tr. pp. 904-806). Yet, in his proposed findings of fact submitted post-hearing, he went back to asserting:

> 15. In his activities in the Mutual Funds field, Ira Sands was the supervisor for his own company, of a sizeable number of SEC and NASD registered representatives. (underlining added)

In other cases and reported decisions in other jurisdictions, lack of candor and similar observations concerning Sands have been made by other judges. Thus, at the sentencing hearing in his fraud case, Judge Broderick observed (Exh. 7, p. 7) that the pre-sentence report of the probation officer did not reflect "what I would call overwhelming cooperation on the part of the person . . . involved" (i.e., Sands). In the per curiam memorandum opinion accompanying the order of disbarment of Sands issued by the Appeallate Division of the Supreme Court of the State of New York, First Judicial Department, 23/ the Court observed:

> It cannot be gainsaid that this court has treated respondent with patience and indulgence until this point. It now appears that respondent is taking advantage of the court.

In the decision In Re Four Seasons Securities Law Litigation - Opinion No. 3, 59 F.R.D. 657 (D.C., W.D. Oklahoma, 1973), involving the awarding of counsel fees in a class action suit, the presiding judge stated, at p. 663:

23/ In the Matter of Ira Jay Sands, etc., File No. M-1907A, filed October 7, 1982. (Exhibit 8, in evidence).

> The affidavits and exhibits filed by Sands in support of his application for a fee and expenses and in opposition to the claims of others show an utter lack of candor and lack of judgment.

and again, at p. 664:

> The conflicting statements which Sands has made from time to time with respect to other cases he has been handling weakens the credibility of his affidavits and statements on this and other points. 24/

In Kravitz v. Callen (unreported) 67 Civ. 3446 (S.D.N.Y. 1971), the Court, in passing upon the filing in the Clerk's office on March 3, 1970 by Sands as attorney for plaintiffs of an amended complaint containing his affirmation "under the penalties of perjury" that he had served an amended complaint upon counsel for defendants more than two years earlier, dismissed the complaint for lack of prosecution stating:

> The result is that there is grave doubt, to put it midly, that the amended complaint was ever served . . . There is hesitation to make such a

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24/ Sands points out that despite this language, the Court awarded him a substantial counsel fee, and further, that the Court showed confidence in all of the attorneys in the case which must have included him. However, in discussing the relative experience, skill and standing of these attorneys, the Court specifically stated, p. 663: "The inapt and otherwise inept arguments and statements made by Sands throughout the proceeding cast serious doubt on his legal ability".

finding because a false affirmation by a lawyer is so serious. 25/

While it is recognized that some of these cases go back a number of years, it cannot be overlooked that this pattern of absence of candor was quite apparent in the manner in which he conducted this case. Sands argues that the statements made by the judges in the cases cited above should be balanced by the fact that some of them later appointed Sands lead counsel in other class action suits, had given him awards of counsel fees, and expressed confidence in his abilities to represent class action plaintiffs.

25/ In explanation of these findings, Sands asserts that he swore to the service of the complaint in reliance upon a member of his staff placing something in the file of the case. He apparently did not so argue before the Court which dismissed the case with prejudice based upon his failure to serve the amended complaint.

In an affidavit filed in his disbarment proceedings Sands admitted that he could not successfully defend himself against the charge that his failure to file an amended complaint after an initial complaint had been dismissed without prejudice resulted in the ultimate dismissal of her case with prejudice, and further, to the charge that he falsely represented to his client that the lawsuit was still in progress.

Moreover, in the memorandum decision of the Appellate Division, the Court discussed additional charges that the respondent submitted to the hearing panel of the Department Disciplinary Committee copies of letters he assertedly sent to his client purporting to apprise her of the continuing status of the case. The hearing panel determined that these letters were fabricated by Sands after the client had filed her complaint with the Department Disciplinary Committee.

However, the question of legal capabilities is not related to the candor with which one conducts himself. Nor have any of these jurists ever recanted their statements expressed in the opinions cited. 26/

Applicant contends that, despite the mail and wire fraud conviction of Sands, and despite the failure initially to report the fact of his being disbarred from the practice of law, its application should be granted because (1) he really did not intend to defraud the customers of NCTC, (2) that there is no blemish on his past record during many years of the practice of law involving complex cases, (3) that for many years prior to his conviction he had engaged in many acts of charity on behalf of divers religious and civic organizations (as evidenced by a number of letters and statements offered by him in this record), (4) that his conduct since his incarceration has been exemplary, and (5) that any omissions or misstatements in his BD application were caused entirely by his confusion arising from the simultaneous filing for registration with the NASD and his

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26/ In fact, in the later case of Rogosin v. Steadman, 71 F.R.D. 514, (USDC, SDNY, 1976), the Court found Sands' testimony given during a preliminary hearing to be "highly disturbing" (p. 518), and concluded (at p. 519):

> Finally, it should be noted that given Sands' conduct as revealed by all the testimony, including his own, I conclude that in any event he would not fairly and adequately represent the members of the purported class.

misunderstanding of the form BD and, hence, was not intentional.

With respect to his first contention, it is clear from the findings hereinbefore made that Sands became involved in the fraud willingly under the mistaken belief that he found a way to legalize the sale of commodity options in violation of the proscriptions against them through resort to the transparent device designated as "deferred delivery" contracts.

Sands past acts of charity and assistance to worthy individuals and groups, involving expenditures of time, effort and money, as commendable as they were, did not deter him from crossing that "thin line of propriety" and engaging in the fraudulent conduct described above. The same can be said concerning his long years in the practice of law and his holding of a broker-dealer and insurance licenses ostensibly without blemish or complaint. In other words, since his prior background as an attorney, his experience in the security industry and his extensive charitable endeavors did not prevent him from commiting mail and wire fraud, there is no assurance that he would not do so again.

Even assuming Sands was confused and acted inadvertently in filling out the application herein (although an

inability for a man of Sands' background and experience to understand the requirements of the BD form raises itself a question of fitness),[27/] there is no justification for the failure of applicant to recite the facts of Sands'

27/ It is noted that the Commission adopted amendments to the Form BD effective January 1, 1986 (Release No. 34-22468; File S7-30-85; 34 SEC Docket 119, et seq. October 8, 1985) with a view to, inter alia, creating uniformity with the requirements of Form U-4 "by revising the disciplinary question to remove duplicative information required to be disclosed on the schedules." Most of the changes relate to Item 7 concerning past disciplinary actions. The order of amendment further expresses its intent to narrow certain disciplinary questions and that the questions themselves be drafted in "plain English", not legalese.

The revised BD Form now asks directly, as pertinent hereto, in Item 7(B)(2) whether any Court "has ever found that the applicant or a control affiliate was involved in a violation of investment - related statutes or regulations" and, in Item 7(d)(6), whether any other Federal regulatory agency or any state regulatory agency has ever "revoked or suspended the applicant's or a control affiliate's license as an attorney or accountant".

And under the instructions with respect to Item 7, the revised Form requires with respect to every "yes" answer (1) that the individuals be named, (2) that the title and date of the action be given, (3) that it designate the court or body taking the action be named, and (4) that there be given a description of the action.

Despite the intent and effect of these changes to the Form BD, they do not in any way alter the conclusions heretofore reached concerning the misstatements and omissions found in the application filed in this proceeding, and Sands' responsibility therefor.

disbarment, nor for the obfuscatory manner in which it described his conviction and the sentence meted out. Inaccuracies in an application, even when due to error on the part of a third person, such as the attorney who prepared it, are insufficient to negative the existence of wilfullness within the meaning of Section 15(b) of the Exchange Act. See Peoples Securities Company, 39 S.E.C. 641 (1960), at page 645, wherein the Commission went on to say:

> It was incumbent upon (the applicant), through the principal executive officer who executed the application and amendments, to verify the information contained therein . . . under a duty to determine that each filing was accurate and complete and kept current.

Sands urges that his conduct since his conviction has been most exemplary and justifies the grant of this application to his company. He introduced into evidence letters and work reports prepared by prison personnel asserting that while Sands was serving his sentence he performed duties for the residence counselor and as a procurement clerk in highly commendable fashion.

In further support of Sands' claim that he has been rehabilitated, he offered "character" testimony from three witnesses. One of them, a close and personal friend of Sands for the past 12 or 13 years said all the "nice" things one would expect from a family friend of long standing.

The remaining witnesses were both attorneys with a large law firm in Miami, Florida, each of whom had business dealings with Sands from time to time following his release from prison, and who have found him to be forthright, direct and honest in his relations with them. One of these attorneys, who formerly served as special counsel to the State of Florida, had handled Sands' petition to the Florida Council on Clemency for restoration of his civil rights in that State. No objections were filed to the granting of the petition, although notice was given to interested parties including the Judge and prosecutor in Sands' criminal fraud case. 28/

DISCUSSION AND CONCLUSIONS

Upon the basis of the entire record in this proceeding, it must be concluded that the application herein should be denied, both because of the conviction of wire and mail fraud of applicant's principal officer and sole stockholder and for the deficiencies of omission and commission in the filed Form BD.

The brokerage business is one where opportunities for dishonesty recur constantly, and this necessitates specialized legal treatment. (See Archer v. S.E.C., 133 F.2d 795, 803 (8 Cir. 1943), cert. denied, 390 U.S. 947

28/ In some 60 other applications handled by this attorney for such relief, only two have been denied.

(1968).) As the Commission observed in Arthur Lipper Corporation, et al., 46 S.E.C. 78, 101 (1975):

> Congress, in writing Section 15(b) of the Exchange Act, viewed past misconduct as the basis for an inference that the risk of probable future misconduct was sufficient to require exclusion from the securities business. Having been directed by the Act to draw that inference whenever our discretion leads us to consider it appropriate, we must do so if the legislative aim is to be attained. (footnotes omitted)

Nothing in this record suggests that Sands fully comprehends the standards to which professionals in the securities business must adhere. He appears incapable or unwilling to recognize the gravity of the violations underlying his 1981 conviction. He has exhibited a lack of candor which adversely affects his credibility. Since his conviction and incarceration his activities in helping his wife in her beauty products business and giving some business advice to various individuals hardly qualify as demonstrations of rehabilitation. The character testimony and exhibits offered by applicant concerning Sands are of insufficient quality and substance as to justify a grant of his application.

With respect to the deficiencies heretofore noted in the application as filed, it has been pointed out by the Commission in Justin Stone Associates, Inc., 41 S.E.C. 717, 723 (1963) in holding that an applicant for registration cannot shift responsibility for the truth and accuracy of the application to a clerical employee, that:

> The application for registration is a basic and vital part of our administration of the Act, and it is essential in the public interest that the information required by the application form be supplied completely and accurately. The application form obligates the applicant to verify that all statements contained in it are true, correct and complete to the best knowledge and belief of the person executing the form.

Consequently, the excuses advanced by Sands that he was confused with the requirements of the Form BD, and by the fact that he was filing a companion application with the NASD, are not persuasive. If he cannot comprehend the Form BD requirements, how can he be expected to comply with the many record-keeping responsibilities of a registered broker and dealer?

In dealing with these matters, we must weigh the effect of our action or inaction on the welfare of investors as a class and on the standards of conduct in the securities industry generally. Richard C. Spangler, Inc., et al., 46 S.E.C. 238, 254, n. 67 (1976) On the basis of the entire record, it is concluded that to grant this application even for the restricted purpose of selling limited partnership tax shelters, would offer undue risks to the investing public. 29/

29/ In their briefs and arguments, the parties have requested the Administrative Law Judge to make findings of fact and have advanced arguments in support of their respective positions other than those heretofore set forth. All such arguments herein have been fully considered and the Judge concludes that they are without merit, or that further discussion is unnecessary in view of the findings herein.

ORDER

Under all of the circumstances herein,

IT IS ORDERED that the application of New Capital Properties Florida, Inc., d/b/a New Capital Properties for registration as a broker and dealer in securities be denied.

This order shall become effective in accordance with and subject to the provisions of Rule 17(f) of the Commission's Rules of Practice.

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not, within fifteen days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17 (b), unless the Commission pursuant to Rule 17(c), determines on is own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.

Jerome K. Soffer
Administrative Law Judge

March 10, 1986
Washington, D.C.