

**NUCLEAR REGULATORY COMMISSION
ISSUANCES**

**OPINIONS AND DECISIONS OF THE
NUCLEAR REGULATORY COMMISSION
WITH SELECTED ORDERS**

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PREFACE

This is the fifty-fourth volume of issuances (1 – 539) of the Nuclear Regulatory Commission and its Atomic Safety and Licensing Boards, Administrative Law Judges, and Office Directors. It covers the period from July 1, 2001, to December 31, 2001.

Atomic Safety and Licensing Boards are authorized by Section 191 of the Atomic Energy Act of 1954. These Boards, comprised of three members conduct adjudicatory hearings on applications to construct and operate nuclear power plants and related facilities and issue initial decisions which, subject to internal review and appellate procedures, become the final Commission action with respect to those applications. Boards are drawn from the Atomic Safety and Licensing Board Panel, comprised of lawyers, nuclear physicists and engineers, environmentalists, chemists, and economists. The Atomic Energy Commission first established Licensing Boards in 1962 and the Panel in 1967.

Beginning in 1969, the Atomic Energy Commission authorized Atomic Safety and Licensing Appeal Boards to exercise the authority and perform the review functions which would otherwise have been exercised and performed by the Commission in facility licensing proceedings. In 1972, that Commission created an Appeal Panel, from which are drawn the Appeal Boards assigned to each licensing proceeding. The functions performed by both Appeal Boards and Licensing Boards were transferred to the Nuclear Regulatory Commission by the Energy Reorganization Act of 1974. Appeal Boards represent the final level in the administrative adjudicatory process to which parties may appeal. Parties, however, are permitted to seek discretionary Commission review of certain board rulings. The Commission also may decide to review, on its own motion, various decisions or actions of Appeal Boards.

On June 29, 1990, however, the Commission voted to abolish the Atomic Safety and Licensing Appeal Panel, and the Panel ceased to exist as of June 30, 1991. In the future, the Commission itself will review Licensing Board and other adjudicatory decisions, as a matter of discretion. *See* 56 Fed. 29 & 403 (1991).

The Commission also has Administrative Law Judges appointed pursuant to the Administrative Procedure Act, who preside over proceedings as directed by the Commission.

The hardbound edition of the Nuclear Regulatory Commission Issuances is a final compilation of the monthly issuances. It includes all of the legal precedents for the agency within a six-month period. Any opinions, decisions, denials, memoranda and orders of the Commission inadvertently omitted from the monthly softbounds and any corrections submitted by the NRC legal staff to the printed softbound issuances are contained in the hardbound edition. Cross references in the text and indexes are to the NRCI page numbers which are the same as the page numbers in this publication.

Issuances are referred to as follows: Commission—CLI, Atomic Safety and Licensing Boards—LBP, Administrative Law Judges—ALJ, Directors' Decisions—DD, and Decisions on Petitions for Rulemaking—DPRM.

The summaries and headnotes preceding the opinions reported herein are not to be deemed a part of those opinions or to have any independent legal significance.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

**Docket Nos. 50-333-LT
50-286-LT
(consolidated)**

**POWER AUTHORITY OF THE
STATE OF NEW YORK and
ENERGY NUCLEAR FITZPATRICK LLC,
ENERGY NUCLEAR INDIAN
POINT 3 LLC, and
ENERGY NUCLEAR OPERATIONS, INC.
(James A. FitzPatrick Nuclear Power Plant;
Indian Point, Unit 3)**

July 19, 2001

MEMORANDUM AND ORDER

On June 21, 2001, the Commission issued CLI-01-14, 53 NRC 488, approving the transfer of both ownership and operation of the FitzPatrick and Indian Point 3 nuclear power plants from the Power Authority of the State of New York to various subsidiaries of Entergy Corporation. In CLI-01-14, we rejected all arguments of Intervenor Citizens Awareness Network concerning the adequacy of Entergy's financial qualifications and decommissioning plan. We were concerned, however, that we might have inadvertently included in CLI-01-14 proprietary information the public release of which might be harmful to Entergy or PASNY. We therefore withheld the order from public release so that they could review CLI-01-14 and advise us of any information they considered confidential. *See* CLI-01-14, 53 NRC at 561.

Today, we release that order with appropriate redactions on pages 17, 25, 26, and 31 of the slip opinion (53 NRC at 518, 523, and 527). Each redaction addresses a proprietary concern raised by Entergy. We further direct those parties who received the proprietary version of CLI-01-14 not to publicly disclose, discuss, or otherwise make use of the redacted material.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 19th day of July 2001.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket Nos. 50-250-LR
50-251-LR

FLORIDA POWER & LIGHT
COMPANY
(Turkey Point Nuclear Generating
Plant, Units 3 and 4)

July 19, 2001

The Commission reviews and affirms an Atomic Safety and Licensing Board decision that denied a request for hearing and leave to intervene in a license renewal proceeding.

LICENSE RENEWAL PROCEEDINGS: SCOPE (NRC SAFETY REVIEW)

Part 54 centers license renewal reviews on the most significant overall safety concern posed by extended reactor operation — the detrimental effects of aging. The NRC’s license renewal review focuses upon those potential detrimental effects of aging that are not routinely addressed by ongoing regulatory oversight programs. License renewal reviews are not intended to duplicate the Commission’s ongoing review of operating reactors.

LICENSE RENEWAL PROCEEDINGS: SCOPE (NRC SAFETY REVIEW)

Each nuclear power plant has a “current licensing basis,” a term of art comprehending the various Commission requirements applicable to a specific

plant that are in effect at the time of the license renewal application. The current licensing basis represents an evolving set of requirements and commitments for a specific plant that are modified as necessary over the life of a plant to ensure continuation of an adequate level of safety. It is effectively addressed and maintained by ongoing agency oversight, review, and enforcement. In establishing its license renewal process, the Commission did not believe it necessary or appropriate to throw open the full gamut of provisions in a plant's current licensing basis to re-analysis during the license renewal review.

LICENSE RENEWAL PROCEEDINGS: SCOPE (NEPA REVIEW)

Under 10 C.F.R. Part 51, the NRC completes an environmental review for license renewal, focusing upon the potential impacts of an additional 20 years of nuclear power plant operation. Part 51 divides the environmental requirements for license renewal into generic and plant-specific components.

LICENSE RENEWAL PROCEEDINGS: SCOPE (NEPA REVIEW)

Part 51 refers to generic issues, applicable to all existing nuclear power plants, as Category 1 issues. Because Category 1 issues involve environmental effects that are essentially similar for all plants, they need not be assessed repeatedly on a site-specific basis, plant-by-plant. However, there must be a plant-specific review of all environmental issues for which the Commission was not able to make environmental findings on a generic basis. Our rules refer to such issues as Category 2 issues.

LICENSE RENEWAL PROCEEDINGS: SCOPE (NEPA REVIEW)

Part 51's use of generic findings that address impacts common to all nuclear power plants, supplemented by a narrower review of plant-specific issues, reflects a commonplace NEPA approach.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

The Commission should not be expected to sift unaided through earlier briefs filed before the Licensing Board in order to piece together and discern the Intervenor's particular concerns or the grounds for their claims.

MEMORANDUM AND ORDER

I. INTRODUCTION

This case arises out of an application by the Florida Power & Light Company (“FPL” or “the Applicant”) to renew for an additional 20-year period the operating licenses for its two Turkey Point nuclear plant units. Today we review an Atomic Safety and Licensing Board Memorandum and Order, LBP-01-6, 53 NRC 138 (2001), that denied two petitions for leave to intervene and requests for hearing in the Turkey Point license renewal proceeding. The Licensing Board found that both Petitioners had standing to intervene but that neither had submitted an admissible contention. The Board therefore denied their requests for hearing. Pursuant to 10 C.F.R. § 2.714a, one of the Petitioners, Mr. Mark P. Oncavage, has appealed the Board’s decision. FPL and the NRC Staff support the Board’s decision. We affirm.

II. BACKGROUND

On September 11, 2000, FPL filed a license renewal application for the Turkey Point Nuclear Plant, Units 3 and 4, located in Miami-Dade County, Florida. The current operating licenses for these units expire on July 19, 2012, and April 10, 2013, respectively. License renewal would authorize an additional 20 years of operation.

The NRC Staff published a notice of an opportunity for hearing in the *Federal Register* on October 12, 2000. 65 Fed. Reg. 60,693 (2000). In a letter dated October 24, 2000, Mr. Oncavage stated that he resides approximately 15 miles from the Turkey Point facility and wished to intervene in the renewal proceeding. Along with his letter, Mr. Oncavage submitted seven contentions challenging the license renewal. The Commission referred Mr. Oncavage’s petition to the Licensing Board, and expressly outlined the scope of license renewal proceedings. *See* CLI-00-23, 52 NRC 327 (2000); *see also* 10 C.F.R. § 54.4 (outlining scope of safety review); 10 C.F.R. § 51.95(c) (outlining scope of environmental review).

The Licensing Board subsequently issued its own order, directing the Petitioners to “take care to ensure” that each of their proffered contentions was adequately supported and fell “within the limited scope of this [license renewal] proceeding.” *See* Memorandum and Order at 3 (Dec. 1, 2000) (unpublished). The Board advised Mr. Oncavage that he still had the opportunity to amend his contentions, and that directly following each separately numbered contention, he needed to “set forth the basis or bases for that contention.” *Id.*

Mr. Oncavage filed a revised set of contentions on December 22, 2000. His new submission contained only two contentions. The first alleged that aquatic

resources of Biscayne National Park will become contaminated with radioactive material, chemical wastes, and herbicides during the license renewal term, and consequently will endanger those who consume aquatic food from the area. The second alleged that at the Turkey Point plant there are “severe and unusual challenges to the safe storage of high level radioactive spent fuel whether in spent fuel pools or in dry cask storage.” *See* Amended Contentions of Mark P. Oncavage (Dec. 22, 2000) (“Amended Petition”) at 2. Mr. Oncavage pointed to the possibility of a catastrophic radiological accident involving spent fuel. His contention referred in particular to risks posed by aircraft crashes, hurricanes, and a possible terrorist attack by the Cuban Air Force. *Id.* at 3.¹

In LBP-01-6, the Licensing Board rejected Mr. Oncavage’s request for intervention, and found both of his contentions inadmissible. Both contentions, the Board ruled, raised issues that fall beyond the scope of license renewal reviews and renewal proceedings. *See generally* 53 NRC at 163-66. The Board viewed Mr. Oncavage’s contentions as impermissible challenges to established NRC regulations on license renewal. *Id.*

In a short brief filed on March 19, 2001, Mr. Oncavage appealed the Board’s decision. He claims the Board erroneously found his contentions inadmissible. *See generally* Petitioner Mark P. Oncavage’s Notice of Appeal (“Appeal Brief”) (Mar. 21, 2001). He also claims that the decision violates the National Environmental Policy Act (“NEPA”). *See id.* at 2. Both the NRC Staff and FPL support the Board’s decision. We affirm the Board’s decision, for the reasons given by the Board itself and the reasons we give below.

III. OVERVIEW OF NRC LICENSE RENEWAL RULES

Before we address Mr. Oncavage’s specific arguments on appeal, we begin with a general overview of the NRC’s license renewal rules. At the heart of the Licensing Board’s decision is its reasoning that Mr. Oncavage’s contentions fall beyond the scope of license renewal proceedings. We take this opportunity to outline, in some detail, what safety and environmental issues fall inside (and outside) our license renewal rules, and why. Our goal is not only to provide useful background for today’s decision, but also to give helpful guidance for future license renewal adjudications.

Two sets of regulatory requirements govern the agency’s review of license renewal applications. Pursuant to 10 C.F.R. Part 54, the NRC conducts a technical review of the license renewal application to ensure that public health and safety requirements are satisfied. Pursuant to 10 C.F.R. Part 51, the NRC completes an

¹ Later in the proceeding, Mr. Oncavage dropped the Cuban Air Force attack claim. *See* Transcript of Proceedings (Jan.18, 2001) (“Transcript”) at 43.

environmental review for license renewal, focusing upon the potential impacts of an additional 20 years of nuclear power plant operation. Both sets of agency regulations derive from years of extensive technical study, review, interagency input, and public comment. Below, we discuss Parts 54 and 51 separately.

A. Public Health and Safety Review Under Part 54

Initial NRC reactor operating licenses last 40 years, and may be renewed for terms of up to 20 years. *See* 42 U.S.C. § 2133; 10 C.F.R. §§ 50.51, 54.31. In anticipation of potential license renewal applications, the NRC began in the 1980s a program to develop license renewal regulations and associated guidance. We sought to develop a process that would be both efficient, avoiding duplicative assessments where possible, and effective, allowing the NRC Staff to focus its resources on the most significant safety concerns at issue during the renewal term. The issues and concerns involved in an extended 20 years of operation are not identical to the issues reviewed when a reactor facility is first built and licensed. For example, many safety questions related to plant aging will become important only during the extended renewal term.

In contrast, other safety issues were thoroughly reviewed when the facility was first licensed, and now are routinely monitored and assessed by ongoing agency oversight and agency-mandated licensee programs. To require a full reassessment of these issues at the license renewal stage, the Commission found, would be both unnecessary and wasteful. Accordingly, the NRC's license renewal review focuses upon those potential detrimental effects of aging that are not routinely addressed by ongoing regulatory oversight programs. License renewal reviews are not intended to "duplicate the Commission's ongoing review of operating reactors." *See* Final Rule, "Nuclear Power Plant License Renewal," 56 Fed. Reg. 64,943, 64,946 (Dec. 13, 1991).

1. The Detrimental Effects of Aging and Related Time-Limited Issues

Part 54 centers the license renewal reviews on the most significant overall safety concern posed by extended reactor operation — the detrimental effects of aging. By its very nature, the aging of materials "becomes important principally during the period of extended operation beyond the initial 40-year license term," particularly since the design of some components may have been based explicitly upon an assumed service life of 40 years. *See id.*; *see also* Final Rule, "Nuclear Power Plant License Renewal; Revisions," 60 Fed. Reg. 22,461, 22,479 (May 8, 1995). Adverse aging effects can result from metal fatigue, erosion, corrosion, thermal and radiation embrittlement, microbiologically induced effects, creep, and shrinkage. Such age-related degradation can affect a number of reactor and

auxiliary systems, including the reactor vessel, the reactor coolant system pressure boundary, steam generators, electrical cables, the pressurizer, heat exchangers, and the spent fuel pool. Indeed, a host of individual components and structures are at issue. *See* 10 C.F.R. § 54.21(a)(1)(i). Left unmitigated, the effects of aging can overstress equipment, unacceptably reduce safety margins, and lead to the loss of required plant functions, including the capability to shut down the reactor and maintain it in a shutdown condition, and to otherwise prevent or mitigate the consequences of accidents with a potential for offsite exposures.

Accordingly, Part 54 requires renewal applicants to demonstrate how their programs will be effective in managing the effects of aging during the proposed period of extended operation. *See generally* 10 C.F.R. § 54.21(a). This is a detailed assessment, conducted at “a component and structure level,” rather than at a more generalized “system level.” 60 Fed. Reg. at 22,462. License renewal applicants must demonstrate that all “important systems, structures, and components will continue to perform their intended function in the period of extended operation.” *Id.* at 22,463. Applicants must identify any additional actions, i.e., maintenance, replacement of parts, etc., that will need to be taken to manage adequately the detrimental effects of aging. *Id.* Adverse aging effects generally are gradual and thus can be detected by programs that ensure sufficient inspections and testing. *Id.* at 22,475.

In addition, some safety reviews or analyses made during the original term of the license may have been based upon a particular time period, such as, perhaps, an assumed service life of a specific number of years or some period of operation defined by the original license term, i.e., 40 years. Before the NRC will grant any license renewal application, an applicant must reassess these “time-limited aging analyses,” and (1) show that the earlier analysis will remain valid for the extended operation period; or (2) modify and extend the analysis to apply to a longer term, such as 60 years; or (3) otherwise demonstrate that the effects of aging will be adequately managed in the renewal term. *See* 60 Fed. Reg. at 22,480; 10 C.F.R. §§ 54.21(c), 54.29(a)(2).

2. The NRC Regulatory Process and the Current Licensing Basis

The Commission has the ongoing responsibility to oversee the safety and security of operating nuclear reactors. Thus, the NRC maintains an aggressive and ongoing program to oversee plant operation. For license renewal, the Commission found that it would be unnecessary to include in our review all those issues already monitored, reviewed, and commonly resolved as needed by ongoing regulatory oversight.

When the Commission issues an initial license, it makes a “comprehensive determination that the design, construction, and proposed operation of the facility satisfied the Commission’s requirements and provided reasonable assurance of

adequate protection to the public health and safety and common defense and security.’’ 56 Fed. Reg. at 64,947. Each nuclear power plant also has a ‘‘current licensing basis,’’ a term of art comprehending the various Commission requirements applicable to a specific plant that are in effect at the time of the license renewal application. The current licensing basis consists of the license requirements, including license conditions and technical specifications. It also includes the plant-specific design basis information documented in the plant’s most recent Final Safety Analysis Report, and any orders, exemptions, and licensee commitments that are part of the docket for the plant’s license, i.e., responses to NRC bulletins, generic letters, and enforcement actions, and other licensee commitments documented in NRC safety evaluations or licensee event reports. *See* 10 C.F.R. § 54.3. The current licensing basis additionally includes all of the regulatory requirements found in Parts 2, 19, 20, 21, 30, 40, 50, 55, 72, 73, and 100 with which the particular applicant must comply. *Id.*

In establishing its license renewal process, the Commission did not believe it necessary or appropriate to throw open the full gamut of provisions in a plant’s current licensing basis to re-analysis during the license renewal review. The current licensing basis represents an ‘‘evolving set of requirements and commitments for a specific plant that are modified as necessary over the life of a plant to ensure continuation of an adequate level of safety.’’ 60 Fed. Reg. at 22,473. It is effectively addressed and maintained by ongoing agency oversight, review, and enforcement.

Just as these oversight programs help ensure compliance with the current licensing basis during the original license term, they likewise can reasonably be expected to fulfill this function during the renewal term. In short, the regulatory process commonly is ‘‘the means by which the Commission continually assesses the adequacy of and compliance with’’ the current licensing basis. 60 Fed. Reg. at 22,473.

For an example of how the ongoing regulatory process works to maintain safety, we can look at the issue of emergency planning. The Commission has various regulations establishing standards for emergency plans. *See* 10 C.F.R. §§ 50.47, 50.54(s)-(u); Appendix E to Part 50. These requirements are independent of license renewal and will continue to apply during the renewal term. They include provisions to ensure that the licensee’s emergency plan remains adequate and continues to meet sixteen performance objectives. Through mandated periodic reviews and emergency drills, ‘‘the Commission ensures that existing plans are adequate throughout the life of any plant even in the face of changing demographics, and other site-related factors. . . . [D]rills, performance criteria, and independent evaluations provide a process to ensure continued adequacy of emergency preparedness.’’ 56 Fed. Reg. at 64,966. Emergency planning, therefore, is one of the safety issues that need not be re-examined within the context of license renewal.

Issues like emergency planning — which already are the focus of ongoing regulatory processes — do not come within the NRC’s safety review at the license renewal stage:

The Commission cannot conclude that its regulation of operating reactors is ‘perfect’ and cannot be improved, that all safety issues applicable to all plants have been resolved, or that all plants have been and at all times in the future will operate in perfect compliance with all NRC requirements. However, based upon its review of the regulatory programs in this rulemaking, the Commission does conclude that (a) its program of oversight is sufficiently broad and rigorous to establish that the added discipline of a formal license renewal review against the full range of current safety requirements would not add significantly to safety, and (b) such a review is not needed to ensure that continued operation during the period of extended operation is not inimical to the public health and safety.

Id. at 64,945.

In sum, our license renewal safety review seeks to mitigate the “detrimental effects of aging resulting from operation beyond the initial license term.” 60 Fed. Reg. at 22,463. To that effect, our rules “focus[] the renewal review on plant systems, structures, and components for which current [regulatory] activities and requirements *may not* be sufficient to manage the effects of aging in the period of extended operation.” *Id.* at 22,469 (emphasis added).² Adjudicatory hearings in individual license renewal proceedings will share the same scope of issues as our NRC Staff review, for our hearing process (like our Staff’s review) necessarily examines only the questions our safety rules make pertinent.

Our rules nonetheless recognize and provide for the possibility of exceptional situations. On a case-by-case basis, if warranted by “special circumstances,” the Commission may waive application of one or more of our license renewal rules or otherwise make an exception for the proceeding at issue. *See* 10 C.F.R. § 2.758;³ 56 Fed. Reg. at 64,961. Absent such a Commission ruling under section 2.758, however, “the scope of Commission review determines the scope of admissible contentions in a renewal hearing.” 60 Fed. Reg. at 22,482 n.2. It bears noting, additionally, that any change to a plant’s licensing basis that requires a license amendment — i.e., a change in the technical specifications — will itself offer an opportunity for hearing in accordance with section 189 of the Atomic Energy Act.

² Some aging-related issues are adequately dealt with by regulatory processes and need not be subject to further review during the license renewal proceeding. An example might be those structures and components that already must be replaced at mandated, specified time periods.

³ The key passage in section 2.758 provides: “The sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted.” 10 C.F.R. § 2.758(b).

B. Environmental Review Under Part 51

The Commission in 1996 amended its environmental protection requirements in Part 51 to establish environmental review requirements for license renewal applicants. As with our Part 54 health and safety review, the Commission sought to develop license renewal requirements in Part 51 that were both efficient and more effectively focused. Part 51 divides the environmental requirements for license renewal into generic and plant-specific components. Underlying Part 51 is an extensive, systematic study of the potential environmental consequences of operating a nuclear power plant for an additional 20 years. *See* NUREG-1437, “Generic Environmental Impact Statement for License Renewal of Nuclear Plants,” Final Report, Vol. 1 (“GEIS”) (May 1996).

As part of its study, the Commission evaluated environmental and safety data on the operating experience of all the light-water nuclear power reactors licensed to operate in 1991. *See* GEIS at 1-4; *see also* Final Rule, “Environmental Review for Renewal of Nuclear Power Plant Operating Licenses,” 61 Fed. Reg. 28,467, 28,468 (June 5, 1996). Numerous interest groups participated in the Commission’s study through public workshops and by written public comments. *See* GEIS at 1-4. The resulting GEIS identified a number of possible environmental impacts, generic and plant-specific, that could result from an additional 20 years of nuclear power plant operation.

On many issues, the NRC found that it could draw generic conclusions applicable to all existing nuclear power plants, or to a specific subgroup of plants. Part 51 refers to these generic issues as “Category 1” issues. *See* 10 C.F.R. Part 51, Subpart A, Appendix B. Because Category 1 issues involve environmental effects that are essentially similar for all plants, they need not be assessed repeatedly on a site-specific basis, plant-by-plant. Accordingly, under Part 51, license renewal applicants need not submit in their site-specific Environmental Reports an analysis of Category 1 issues. *See* 10 C.F.R. § 51.53(c)(3)(i). For those issues, the applicant instead may reference and adopt the generic environmental impact findings codified in Table B-1, Appendix B to Part 51.

Applicants must, however, provide a plant-specific review of all environmental issues for which the Commission was not able to make environmental findings on a generic basis. Our rules refer to these as “Category 2” issues. *See* 10 C.F.R. Part 51, Subpart A, Appendix B. In other words, if the severity of an environmental impact might differ significantly from one plant to another, or, if additional plant-specific measures to mitigate the impact should be considered, then the applicant must provide a plant-specific analysis of the environmental impact. In addition, even where the GEIS has found that a particular impact applies generically (Category 1), the applicant must still provide additional analysis in its Environmental Report if new and significant information may bear on the applicability of the Category 1 finding at its particular plant.

An example of an issue Part 51 declares “generic” (Category 1), and not subject to plant-specific analysis, is the noise impact from operation expected during the license renewal term. The principal noise sources (cooling towers and transformers) will not change appreciably during extended operation. Noise impacts generally have been small at *all* plants, and thus no site-specific analyses are necessary for license renewal. Part 51 declares various other environmental issues “plant specific” (Category 2). For example, the impact of extended operation on endangered or threatened species varies from one location to another and this fits within Category 2. It requires a plant-specific analysis.

There are several aspects to the NRC Staff’s environmental review. Initially, the Staff will independently assess the adequacy of the applicant’s Environmental Report. The Staff sets out its conclusions in a draft Supplemental Environmental Impact Statement (“SEIS”), which is a site-specific supplement to the GEIS; the Staff then seeks public comment. *See* 10 C.F.R. §§ 51.70, 51.73-.74. The final SEIS will adopt any applicable Category 1 environmental impact findings from the GEIS. *See* 10 C.F.R. §§ 51.71(d), 51.95(c). The final SEIS also takes account of public comments, including plant-specific claims and new information on generic findings. *See* 61 Fed. Reg. at 28,470. Part 51 requires the final SEIS to weigh *all* of the expected environmental impacts of license renewal, both those for which there are generic findings and those described in plant-specific analyses.⁴

The Commission recognizes that even generic findings sometimes need revisiting in particular contexts. Our rules thus provide a number of opportunities for individuals to alert the Commission to new and significant information that might render a generic finding invalid, either with respect to all nuclear power plants or for one plant in particular. In the hearing process, for example, petitioners with new information showing that a generic rule would not serve its purpose at a particular plant may seek a waiver of the rule. *See* 10 C.F.R. § 2.758; *see also* note 3, *supra*, and accompanying text. Petitioners with evidence that a generic finding is incorrect for all plants may petition the Commission to initiate a fresh rulemaking. *See* 10 C.F.R. § 2.802. Such petitioners may also use the SEIS notice-and-comment process to ask the NRC to forgo use of the suspect generic finding and to suspend license renewal proceedings, pending a rulemaking or updating of the GEIS. *See* 61 Fed. Reg. at 28,470; GEIS at 1-10 to 1-11.

Finally, quite apart from individual license renewal proceedings, the Commission itself will review (and revise as needed) the license renewal rules and GEIS environmental analyses every 10 years, beginning approximately 7 years after completion of the last review. *See* 61 Fed. Reg. at 28,468. The Commission again will provide opportunity for public comment. If Part 51 or any of its underlying generic findings need modification, the Commission will institute a

⁴ *See* 10 C.F.R. § 51.95; GEIS at 1-9 to 1-10; 61 Fed. Reg. at 28,485; 61 Fed. Reg. at 66,541.

new rulemaking. There are, in short, a number of avenues through which generic environmental findings may be waived or changed.

IV. ANALYSIS

A. Mr. Oncavage's Attack on the License Renewal Rules

We begin with Mr. Oncavage's arguments on appeal. Mr. Oncavage devotes most of his appeal brief to challenging the Commission's license renewal rules. He suggests that our renewal rules violate NEPA by centering the agency's Part 54 safety inquiry on aging issues and by allowing the incorporation of generic findings under our Part 51 environmental inquiry:

Are 10 C.F.R. Part 51, 10 C.F.R. Part 54 and the National Environmental Policy Act mutually exclusive? If Petitioner Mark P. Oncavage were to precisely follow all the rules set forth in Part 51 and 54, would he find his rights under NEPA unduly abridged? If he were to request that all provisions of NEPA be utilized in license renewal procedures, would he incur a violation of Commission rules?

See Petitioner Mark P. Oncavage's Notice of Appeal (Mar. 19, 2001) ("Appeal Brief") at 2. Mr. Oncavage apparently believes that both our Part 54 safety review and our Part 51 environmental review are incompatible with NEPA. We do not find his arguments persuasive.

The Commission's AEA review under Part 54 does not compromise or limit NEPA. The AEA and NEPA contemplate *separate* NRC reviews of proposed licensing actions. See *Limerick Ecology Action v. NRC*, 869 F.2d 719, 729-31 (3d Cir. 1989). The AEA "endows the NRC with significant discretion to determine the information that is necessary to support the factual findings of the agency during the licensing process." *Kelley v. Selin*, 42 F.3d 1501, 1516 (6th Cir.), *cert. denied*, 515 U.S. 1159 (1995). The Commission reasonably chose to focus its AEA-based Part 54 safety review on the potential detrimental effects of aging, instead of treating license renewal as the occasion for a broad-based reassessment of all operational safety issues. While the aging issues the NRC considers in its Part 54 safety review may overlap some environmental issues it considers in its Part 51 review, the two inquiries are analytically separate: one (Part 54) examines radiological health and safety, while the other (Part 51) examines environmental effects of all kinds. Our aging-based safety review does not in any sense "restrict NEPA" or "drastically narrow[] the scope of NEPA," as Mr. Oncavage maintains. See Appeal Brief at 2-3.

Our reliance on generic environmental findings in Part 51 also comports with NEPA. NEPA requires federal agencies to (1) "consider every significant aspect of the environmental impact of [the] proposed action" and (2) "inform the public that

it has indeed considered environmental concerns in its decisionmaking process.’’ *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983) (citations and internal quotations omitted). Agencies need not “elevate environmental concerns” over other considerations, but they must show that they have taken a “hard look” at environmental consequences. *Id.* Our Part 51 establishes a mechanism for taking the required “hard look.” Its use of generic findings that address impacts common to all nuclear power plants, supplemented by a narrower review of plant-specific issues, reflects a commonplace NEPA approach. *See, e.g.*, 40 C.F.R. § 1508.28 (Council on Environmental Quality Regulations addressing “tiering” of NEPA documents). By longstanding practice, repeatedly upheld on judicial review, the Commission has considered and addressed generically through rulemaking specific environmental (or safety) issues that otherwise would have been addressed in an individual licensing proceeding. *See generally Baltimore Gas & Electric*, 462 U.S. 87; *Kelley v. Selin*, 42 F.3d at 1512; *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979).

In *Baltimore Gas & Electric*, the Supreme Court expressly upheld the Commission’s adoption of a series of generic NEPA rules evaluating the environmental effects of a nuclear power plant’s fuel cycle. 462 U.S. at 91. The Court stressed the NRC’s broad discretion to structure its NEPA inquiries:

NEPA does not require agencies to adopt any particular internal decisionmaking structure. Here, the agency has chosen to evaluate generically the environmental impact of the fuel cycle and inform individual licensing boards, through the Table S-3 rule, of its evaluation. The generic method chosen by the agency is clearly an appropriate method of conducting the hard look required by NEPA. . . . [T]he Commission has discretion to evaluate generically the environmental effects of the fuel cycle and require that these values be “plugged into” individual licensing decisions.

Id. at 100-01. When there are environmental effects that would be essentially similar for all or a commonly identifiable subcategory of nuclear plants, “[a]dministrative efficiency and consistency of decision are both furthered by a generic determination of these effects without needless repetition of the litigation in individual proceedings, which are subject to review by the Commission in any event.” *Id.* at 101 (citations omitted).

Similarly, in *Kelley v. Selin*, the court of appeals endorsed the NRC’s generic resolution of NEPA questions. “Although NEPA requires the NRC to undertake ‘careful consideration’ of environmental consequences,” the court said, “the NRC may issue a rulemaking to address and evaluate environmental impacts that are ‘generic,’ namely, neither plant-specific nor site-specific.” 42 F.3d at 1512 (citations and brackets omitted). “[E]ven where an agency’s enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration A contrary holding would require the agency continually to relitigate issues that

may be established fairly and efficiently in a single rulemaking proceeding.” *Id.* at 1511 (internal quotations and brackets omitted).

Resolving an environmental issue generically does not reduce its importance. In making a final decision on license renewal, the NRC will still weigh *all* of the different environmental impacts from extended operation, whether those impacts occur generically at all plants or on a plant-specific basis.⁵ The NRC ultimately determines whether all adverse environmental impacts, taken together, “are so great” that the renewal option would be unreasonable. *See* 10 C.F.R. § 51.103(a)(5). And while it is true that “Category 1” generic issues normally are beyond the scope of a license renewal hearing, the Commission provides mechanisms for a petitioner to alert the Commission to generic findings that are incorrect or do not pertain to a particular site. *See supra* pp. 12-13.

The thrust of Mr. Oncavage’s appeal, in short, is ill-conceived. Neither the NRC’s aging-driven safety inquiry nor its use of generic environmental findings violates NEPA.

B. Mr. Oncavage’s Contentions

We turn now to Mr. Oncavage’s two specific contentions. Interwoven among his various claims challenging our license renewal rules, Mr. Oncavage’s appellate brief makes just a few statements directly bearing on his actual contentions in this case. As we have said before, “[t]he Commission should not be expected to sift unaided through . . . earlier briefs filed before the Presiding Officer in order to piece together and discern the Intervenor’s particular concerns or the grounds for their claims.” *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 46 (2001). Mr. Oncavage, therefore, “bear[s] responsibility for any misunderstanding of [his] claims.” *Id.* Given that Mr. Oncavage is a *pro se* intervenor, however, the Commission has made a special effort to review the contentions he made in his Amended Petition before the Board. We find them inadequate to justify a hearing.

I. Contention 1

Mr. Oncavage’s first contention alleges that “[t]he aquatic resources of Biscayne National Park will become contaminated with radioactive material, chemical wastes, and herbicides during the license renewal term which will endanger the health and safety of the members of the public who consume aquatic food products that originate in the waters of Biscayne National Park.” Amended

⁵ *See* 10 C.F.R. § 51.95; GEIS at 1-9 to 1-10; 61 Fed. Reg. at 28,485; 61 Fed. Reg. at 66,541.

Petition at 1. Essentially, this is a water contamination claim, focused on public health.

The Licensing Board found that Contention 1 fell beyond the scope of license renewal hearings, and impermissibly challenged the Commission's license renewal regulations. *See* 53 NRC at 164. We agree with this conclusion. “[A] petitioner in an individual adjudication cannot challenge generic decisions made by the Commission in rulemakings.” *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 217 n.8 (1999) (collecting cases). But our review of Mr. Oncavage's arguments leads us also to find his contention inadmissible for lack of sufficient foundation. *See* 10 C.F.R. § 2.714(b)(2). Below, we discuss both of Contention 1's defects.

a. Contention 1 Falls Beyond Scope of Parts 54 and 51

The Licensing Board correctly concluded that Contention 1 falls outside of the scope of license renewal reviews and proceedings. As the Board found, the contention “does not raise any aspect of the Applicant's aging management review or evaluation of the plant's systems, structures, and components subject to time-aging analysis.” *See* LBP-01-6, 53 NRC at 164. It does not, then, identify any issue encompassed by the NRC safety review for license renewal, conducted under 10 C.F.R. Part 54, that focuses on aging.

Insofar as Contention 1 raises NEPA, or Part 51, claims, it fails as (in effect) a collateral attack on Part 51 and its underlying GEIS. Contention 1 only involves topics discussed in the GEIS and codified in Part 51 as generic “Category 1” issues. As we indicated earlier, these issues are not subject to site-specific review and thus fall beyond the scope of individual license renewal proceedings.

Contention 1 maintains that renewing Turkey Point's license will result in aquatic contamination affecting public health. But the GEIS provides an extensive analysis of radiological impacts, including a discussion of radiation exposures from aquatic pathways, i.e., eating fish caught near the point of discharge of liquid effluent. Its evaluation extends to all nuclear power reactors in operation in 1996 when the GEIS was issued, including Turkey Point. *See* GEIS at 4-84. Indeed, the GEIS's conclusions rest on site-specific data on effluents obtained from all the reactor facilities. *See generally id.* Appendix E; *see also id.* at 4-84 to 4-95.

As part of its discussion, the GEIS assesses how well nuclear power plants have met applicable NRC radiological dose limits, design objectives, or guidelines (found under Appendix I to 10 C.F.R. Part 50, 10 C.F.R. Part 20, and 10 C.F.R. § 50.36a). As the GEIS describes, data collected on all nuclear power plants “demonstrate[d] that the ALARA [“As Low As Reasonably Achievable”] process has been effective at controlling and reducing radiation doses to the

public.’’⁶ *See id.* at 4-95 (citations omitted); *see also id.* at 4-92 to 4-95 and Appendix E. The GEIS study found that renewing reactor operating licenses would not increase radioactive effluents in nearby waters:

Radiation doses to the members of the public from current operation of nuclear power plants have been examined from a variety of perspectives and the impacts were found to be well within design objectives and regulations in each instance. No effect of aging that would significantly affect the radioactive effluents has been identified. Both maximum individual and average doses are expected to remain well within design objectives and regulations. In about 5 percent of the plants, maximum individual doses are approximately 20 percent of the Appendix I design objective. All other plants [including Turkey Point] are operating far below this level. Because no reason was identified to expect effluents to increase in the period after license renewal, continued operation well within regulatory limits is anticipated. . . . No mitigation measures beyond those implemented during the current term license would be warranted because current mitigation practices have resulted in declining public radiation doses and are expected to continue to do so.

Id. at 4-95.

The GEIS thus declared radiological exposure from power reactor operation a “Category 1 issue.” *Id.* This classification covers all public exposure pathways — gaseous and liquid effluents, including the buildup and concentration of radioactive materials in soils and sediment, which could in turn impact radionuclide levels in bottom-feeder fish. *See* GEIS at 4-85 to 4-86. The GEIS contains detailed support for its conclusions on the radiological impacts of license renewal. *See, e.g., id.* at 4-84 to 4-95, 4-126, 3-26 to 3-42, Appendix E.

Contention 1 also vaguely refers to “chemical wastes” and “herbicides.” Again, these topics fall within the GEIS study. For instance, the GEIS discusses the discharge of chlorine and other biocides, the discharge of metals in wastewater, and the discharge of sanitary wastes and minor chemical spills; the GEIS finds these discharges of small significance for all plants. *See id.* at 4-53 to 4-56, 4-58. The GEIS specifically considered additional mitigation measures to curtail these discharges, but found mitigation unwarranted. *See id.* at 4-55 to 4-56. Part 51, therefore, characterizes these as Category 1 issues. *See* 10 C.F.R. Part 51, Appendix B (Table B-1). They are not subject to litigation in a license renewal hearing.

Mr. Oncavage seeks to salvage Contention 1 by characterizing it as a nongeneric “groundwater conflict” issue. *See, e.g.,* Appeal Brief at 3. A “groundwater conflict” concerns competing uses of the same water — for example, a reactor’s use of water needed for irrigation. Our rules discuss several types of “groundwater

⁶ ALARA criteria appear in Appendix I to 10 C.F.R. Part 50. In addition, 10 C.F.R. § 50.36a imposes license conditions in the form of technical specifications on effluents from nuclear power reactors. These specifications are intended to maintain all releases of radioactive materials to unrestricted areas during operations to ALARA levels.

conflicts,” some of which are Category 2 issues that must be addressed on a site-specific basis. *See* Table B-1, 10 C.F.R. Part 51, Appendix B.

The Licensing Board rejected Mr. Oncavage’s depiction of his first contention as a “groundwater conflict” claim, noting that “all the Category 2 groundwater conflict issues deal with the issue of withdrawal of groundwater by an Applicant when there are competing groundwater uses — a situation far different from Mr. Oncavage’s allegation.” LBP-01-6, 53 NRC at 164. We agree with the Board. The expression “groundwater use conflicts” refers to “conflicts” or “competing water uses” arising among “neighboring groundwater users” because of reduced quantities of available water. *See* GEIS at 4-115 to 4-116; *see also id.* at 4-53 (discussing “water use conflicts”). For instance, if a facility is located by a small river and withdraws large amounts of water from the river for its cooling towers, this “could impact an alluvial aquifer during periods of low flow.” *Id.* at 4-117; *see also id.* at 4-52 to 4-53. Similarly, “[n]uclear power plants that withdraw makeup water for cooling ponds from small bodies of water may need to curtail operations during drought periods or may experience future conflicts with other water users.” *Id.* at 4-53.

In addition, the GEIS and our rules refer to three different types of Category 2 groundwater use conflicts that could arise, but each applies only to certain types of facilities: (a) those using cooling towers that withdraw makeup water from small rivers, (b) those using more than an annual average of 100 gallons of groundwater per minute, or (c) those using so-called “Ranney Wells” for cooling tower makeup water.⁷ *See id.* at 4-115 to 4-118. If a particular environmental issue does not apply to a facility, the applicant need only describe why it does not.⁸

Here, FPL’s Environmental Report addresses each potential groundwater use conflict, and states why each is inapplicable to the Turkey Point facility. FPL notes that the Turkey Point plant does not withdraw makeup water from a river or offsite surface waterbodies, use cooling towers or Ranney wells, or pump more than 100 gallons of groundwater per minute. *See* Applicant’s Environmental Report at 4.1-1, 4.5-1, 4.6-1, 4.7-1. Turkey Point instead obtains potable and service water from municipal suppliers. Mr. Oncavage does not rebut any of these statements. We therefore find the “groundwater use conflict” issue inapplicable

⁷ A Ranney Well collects water from sedimentary aquifers. It is constructed of a central caisson sunk to a depth below the water table. Several “screens,” i.e., slotted collection pipes, extend radially from the bottom of the caisson. The bottom of the caisson serves as a collection point for groundwater. A pump located at the top of the caisson structure above the surface draws water from the bottom and forces it through overland pipe runs to the point of service.

⁸ *See* Supplement 1 to Regulatory Guide 4.2, “Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Licenses” (Sept. 2000), Chap. 4, “General Guidance.”

to Turkey Point, and reject Mr. Oncavage's attempt to characterize Contention 1 as a "groundwater use conflict" claim.⁹

In sum, Contention 1 lies in its entirety outside Part 54, and raises only topics that are codified in Part 51 as generic Category 1 issues. The contention therefore advances no dispute material to the NRC's license renewal decision at Turkey Point. Hence, Contention 1 is not litigable.

b. Contention 1's Lack of Foundation

To trigger a full adjudicatory hearing, petitioners must be able to "proffer at least some minimal factual and legal foundation in support of their contentions." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999); *see also* 10 C.F.R. § 2.714(b)(2)(ii). As the Commission described at length in *Oconee*, the NRC toughened its contention-pleading rule in 1989, to avoid the admission of contentions based on "little more than speculation." *Id.* Prior to the amended rule, it was possible for intervenors to be admitted to hearing after merely "copying contentions from another proceeding involving another reactor." *Id.* (citation omitted). Hearings should serve the purpose for which they are intended: "to adjudicate genuine, substantive safety and environmental issues placed in contention by qualified intervenors." *Id.* (citing H.R. Rep. No. 97-177, at 151 (1981)). While intervenors need not be technical experts, they must knowledgeably provide some threshold-level factual basis for their contention.

A contention must show a "genuine dispute . . . with the applicant on a material issue of law or fact." *See* 10 C.F.R. § 2.714(b)(2)(iii). To do so, the contention should refer to those portions of the license application (including the environmental report and safety report) that the petitioner disputes and indicate supporting reasons for each dispute. *Id.* If a petitioner believes that the license application simply fails to consider some information required by law, he or she then may indicate that failure and supporting grounds. *Id.* Contentions arising under NEPA should be based upon the Applicant's Environmental Report.

Even if Mr. Oncavage's environmental claims were not barred as a collateral attack on Part 51, his Contention 1 does not come close to meeting the specificity requirements of our contention-pleading rule. While he raises several environmental issues, Mr. Oncavage makes only broad-brushed references to the Applicant's Environmental Report, which was publicly available. He provides not a single reference to any particular portion of the Environmental Report. Indeed,

⁹There is a Category 2 "groundwater quality degradation" issue involving cooling ponds that must be addressed on a site-specific basis. It does not apply, however, to plants located adjacent to or in salt marshes. *See* GEIS at 4-121 to 4-122; Table B-1 to Appendix B to 10 C.F.R. Part 51. Turkey Point's cooling canals are located in a salt marsh. *See* GEIS at 4-122. The GEIS explicitly finds that for Turkey Point "this is a Category 1 issue." *Id.*

the Environmental Report often explicitly contradicts Mr. Oncavage's arguments, such as, for example, his "groundwater use conflicts" claim. *See supra* pp. 18-19.

Mr. Oncavage does mention the GEIS and the original 1972 Final Environmental Statement (FES) for Turkey Point. But he does nothing more than quote select passages which in themselves indicate no deficiency in FPL's license renewal application or Environmental Report. Mr. Oncavage's "alleged facts" in support of his contention amount to no more than his own predictions and speculation. In claiming unhealthful water contamination, for instance, Mr. Oncavage raises what he calls "massive seepage, up to 89,000 gallons per minute, into Biscayne Bay and Card Sound." Amended Petition at 1. This claim does not come from Turkey Point's license renewal documents, but from a page in the 1972 FES discussing estimated groundwater "seepage losses" to the east, ranging from "50 to as high as 200 cfs [cubic feet per second]." *See* 1972 FES at V-3. The 1972 discussion, however, refers to controlling the impacts of groundwater flow on water salinity and temperature, not to the radiological and chemical contamination concerns that Mr. Oncavage raises in Contention 1.

As another basis for Contention 1, Mr. Oncavage cites a passage from the GEIS on the subject of "radionuclide deposition." *See* Amended Petition at 1. "Radionuclide deposition" refers to the potential for marine organisms to receive relatively higher radiation doses than terrestrial organisms. Fish that are bottom feeders might "ingest worms and other biota that may remobilize radioactive materials accumulated in the sediment." GEIS at 4-86. Mr. Oncavage views this discussion in the GEIS as a "warning of a health problem that may require reexamination." *See* Amended Contentions at 1. But he raises no specific indication that the Turkey Point facility has had any significant problems with radionuclide deposition. Nor does he allege that radiological doses to the public — through aquatic food pathways or any other — have exceeded NRC requirements. Mr. Oncavage's Amended Petition does nothing more than cite to a general passage in the GEIS outlining how radionuclide deposition is monitored. He offers no evidence that a problem may exist at Turkey Point.

The short of the matter is that Contention 1, even if we were somehow to find it within the scope of our license renewal inquiry (which it is not, *see* pp. 16-19, *supra*), is so thinly supported and rationalized that it could not possibly justify a full hearing under our contention-pleading rule.

2. Contention 2

Mr. Oncavage's second contention concerns the storage of radioactive spent fuel. He claims that at Turkey Point there are "severe and unusual challenges to the safe storage of high level radioactive spent fuel whether in spent fuel pools or in dry cask storage." Amended Petition at 2. Mr. Oncavage's apparent concern is the risk of a catastrophic accident — due to hurricanes or an aircraft crash

— involving the additional spent fuel stored in the pool (from more years of reactor operation). See Amended Petition at 2-3. The Licensing Board found the contention inadmissible, noting that Part 51 characterizes onsite spent fuel storage impacts as a generic Category 1 issue, not subject to litigation in a license renewal proceeding. See 53 NRC at 165. The Licensing Board also found that Mr. Oncavage’s spent fuel contention raises none of the aging-related issues that are the focus of NRC’s safety review. We agree with both conclusions.

a. Onsite Storage of Spent Fuel Is a Category 1 Issue

Our rules explicitly conclude that “[t]he expected increase in the volume of spent fuel from an additional 20 years of operation can be safely accommodated on site with small environmental effects through dry or pool storage at all plants if a permanent repository or monitored retrievable storage is not available.” Table B-1, Subpart A, Appendix B to Part 51. See *Oconee*, CLI-99-11, 49 NRC at 343-44. The GEIS provides the background analyses and justification for this generically applicable finding. See GEIS at 6-70 to 6-86. It finds “ample basis to conclude that continued storage of existing spent fuel and storage of spent fuel generated during the license renewal period can be accomplished safely and without significant environmental impacts.” *Id.* at 6-85. The GEIS takes full account of “the total accumulated volumes of spent fuel after an additional 20 years of operation.” *Id.* at 6-79; see also *id.* at 6-80 to 6-81.

The GEIS’s finding encompasses spent fuel accident risks and their mitigation. See GEIS, at xlviii, 6-72 to 6-76, 6-86, 6-92. The NRC has spent years studying in great detail the risks and consequences of potential spent fuel pool accidents, and the GEIS analysis is rooted in these earlier studies. NRC studies and the agency’s operational experience support the conclusion that onsite reactor spent fuel storage, which has continued for decades, presents no undue risk to public health and safety. Because the GEIS analysis of onsite spent fuel storage encompasses the risk of accidents, Contention 2 falls beyond the scope of individual license renewal proceedings.

Mr. Oncavage argues, however, that a “catastrophic radiological accident at a spent fuel facility would be a severe accident which is a category 2 issue.” Amended Petition at 2. Part 51 does provide that “alternatives to mitigate severe accidents must be considered for all plants that have not considered such alternatives.” See Appendix B to Subpart A of Part 51; see also GEIS at 5-106 to 5-116. But Mr. Oncavage’s Contention 2 says nothing about mitigation alternatives. And, in any event, Part 51’s reference to “severe accident mitigation alternatives” applies to nuclear *reactor* accidents, not spent fuel storage accidents. Not only Mr. Oncavage, but also the NRC Staff and FPL, apparently was confused on this point, for no one raised the important distinction between reactor accidents and spent fuel accidents. As we have seen, the GEIS deals with spent fuel

storage risks (including accidents) generically, and concludes that “regulatory requirements already in place provide adequate mitigation.” GEIS at 6-86, 6-92, xlviii; *see also id.* at 6-72 to 6-76.

On the issue of onsite fuel storage, then, the GEIS rejects the need for further consideration of mitigation alternatives at the license renewal stage. *Id.* Indeed, for all issues designated as Category 1, the Commission has concluded that additional site-specific mitigation alternatives are unlikely to be beneficial and need not be considered for license renewal. *See* 61 Fed. Reg. at 28,484; GEIS at 1-5, 1-9.

The NRC customarily has studied reactor accidents and spent fuel accidents separately. For instance, our “Policy Statement on Severe Reactor Accidents Regarding Future Designs and Existing Plants” discusses only reactor accidents and defines “[s]evere nuclear accidents [as] those in which substantial damage is done to the *reactor core* whether or not there are serious offsite consequences.” 50 Fed. Reg. 32,138 (Aug. 1985) (emphasis added). Similarly, the various NRC studies on severe accidents typically focus upon potential damage to the reactor core of nuclear power plants.¹⁰ A different set of studies altogether is devoted to spent fuel pool accidents, and has concluded that the risk of accidents is acceptably small.¹¹ Hence, Part 51 and the GEIS treat the matter generically. Indeed, the events that could lead to a severe reactor accident vary significantly from plant to plant, thereby requiring plant-specific consideration, whereas accidents involving spent fuel pools or dry casks are more amenable to generic consideration.

Part 51 notwithstanding, Mr. Oncavage maintained before the Licensing Board that the possibility of catastrophic hurricanes at Turkey Point justified his plant-specific contention on spent fuel accidents. *See* 53 NRC at 165. Again, however, as the Board held, Part 51 treats all spent fuel pool accidents, whatever their cause, as generic, Category 1 events not suitable for case-by-case adjudication. *Id.* In the past, the NRC has considered the effect of hurricanes on reactors generally.¹² And the Staff quite recently examined their effect on spent fuel pools in particular; it found the risks “very low” or “negligible.”¹³ Mr. Oncavage did not seek a

¹⁰ *See, e.g.*, NUREG-1150, “Severe Accident Risks: An Assessment for Five U.S. Nuclear Power Plants (Dec. 1990) (examining core meltdown risks); NUREG/CR-5042, “Evaluation of External Hazards to Nuclear Power Plants in United States” (Dec. 1987) (examining the risk of core damage from external events).

¹¹ *See, e.g.*, NUREG-1353, “Regulatory Analysis for the Resolution of Generic Issue 82, ‘Beyond Design Basis Accidents in Spent Fuel Pools’ (April 1989); NUREG/CR-4982, “Severe Accidents in Spent Fuel Pools in Support of Generic Safety Issue 82” (July 1987); NUREG/CR-5281, “Value/Impact Analyses of Accident Preventive and Mitigative Options for Spent Fuel Pools” (Mar. 1989); NUREG/CR-5176, “Seismic Failure and Cask Drop Analysis of the Spent Fuel Pools at Two Representative Nuclear Power Plants (Jan. 1989). A recent study of spent fuel storage risks at decommissioning reactors finds the risk of accident somewhat greater than originally believed, but still very low. *See* NUREG-1738, “Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants (Feb. 2001).

¹² *See, e.g.*, NUREG/CR-5042, “Evaluation of External Hazards to Nuclear Power Plants in the United States (Dec. 1987) (hurricane risk assessed in section on “high winds/tornadoes”).

¹³ *See* NUREG-1738, at 3-25 (cited in note 10, *supra*).

waiver of the Category 1 determination for spent fuel issues, nor did his hurricane discussions raise any information that might render the GEIS's Category 1 finding inapplicable to the Turkey Point facility. Nothing in Mr. Oncavage's "hurricane" claim renders it litigable under our license renewal rules.

In short, Part 51's license renewal provisions cover environmental issues relating to onsite spent fuel storage generically.¹⁴ All such issues, including accident risk, fall outside the scope of license renewal proceedings.

b. Onsite Storage of Spent Fuel Raises No Safety Question for License Renewal

Mr. Oncavage's spent fuel storage concerns (Contention 2) do not raise any admissible safety issues under the NRC's Part 54 safety review.¹⁵ His concerns do not relate to managing the aging of systems, structures, and components or to any time-limited aging analyses, the safety inquiries contemplated by Part 54. There are in fact a number of spent fuel pool structural components and related systems subject to the Part 54 aging management review for license renewal. FPL's license renewal application provides extensive information on these spent fuel storage materials and components, and on the spent fuel cooling system. At no point does Mr. Oncavage identify any deficiency in the renewal application's discussion of spent fuel storage and handling. He never even refers to any part of the license renewal application.

Mr. Oncavage does refer to "inadequate construction practices" and lack of "defense in depth" at the Turkey Point facility,¹⁶ but these claims go to the adequacy of the plant's current licensing basis, which is not within the scope of the license renewal review. Hurricane and tornado winds as well as hurricane-induced flooding are among the design-basis events for the Turkey Point facility. If Mr. Oncavage genuinely knows of a serious current safety problem resulting from the design of the Turkey Point facility, he should petition under 10 C.F.R. § 2.206 for NRC action on the Turkey Point license.

¹⁴The Board, as well as the NRC Staff and FPL, apparently views our "Waste Confidence Rule," 10 C.F.R. § 51.23(a), as an additional generic environmental finding precluding Mr. Oncavage's spent fuel pool contention. See 53 NRC at 165. But that rule, by its own terms, applies only to the storage of spent fuel *after* a reactor ceases operation. It does not speak to the NEPA question at issue here: whether Mr. Oncavage may obtain a hearing on spent fuel pool risks arising *during* a reactor's operating life. As we hold in the text, it is Part 51, with its underlying GEIS, that precludes litigation of that issue.

¹⁵It should be noted that during the licensing of the spent fuel pools under the current Turkey Point license, the operation of the pools was previously evaluated and found safe for operation up to the approved capacity. If, in the future, Turkey Point were to seek to expand the capacity of the pools or to construct dry cask storage, its action would be subject to separate environmental and safety evaluation by the NRC, with associated license amendments and hearing opportunities. If additional capacity is not required, it is possible that the spent fuel pools will never operate differently as a result of license renewal. This highlights that the concerns raised by Mr. Oncavage with respect to the spent fuel pools are not inherent in license renewal itself and are not within the scope of this renewal proceeding.

¹⁶See Amended Petition at 3.

Mr. Oncavage raises an additional point. He claims that the Safety Evaluation Report for the renewal of the Turkey Point license is “fatally flawed” because it relies upon an incorrect NRC Staff safety assessment of a planned international, commercial airport to be located 4.9 miles away from the Turkey Point site. Amended Petition at 2; *see also* Oncavage Appeal Brief at 4. But, as the Board stated, Mr. Oncavage’s claim is “obviously flaw[ed]” because the Safety Evaluation Report has yet even to be issued.¹⁷ *See* LBP-01-6, 53 NRC at 166. Moreover, the Commission notes that this international airport appears no longer planned for the area. The Air Force has issued a Record of Decision in which it states that, given environmental considerations, a commercial airport will not be allowed at the site. *See* 66 Fed. Reg. 12,930 (Mar. 2001). This Record of Decision was discussed at the prehearing conference, and a copy of the decision was made available to the Licensing Board and the parties. *See* Transcript at 35-36, 57-58. Thus, the latest information about the airport in the record before us pertains to this final Air Force decision explicitly disallowing the use of its surplus property as an airport. The Commission therefore believes that any assumption that a commercial airport will be built on the planned site is speculative.¹⁸

In any event, none of Mr. Oncavage’s claims in Contention 2 — not his airport claim, not his hurricane claim, not his spent fuel accident claim — raises any aging issue under our Part 54 safety review. Thus, the Board correctly refused to admit Contention 2 for a safety hearing.

C. Final Observations

We conclude by addressing a few additional comments made by Mr. Oncavage in his appeal brief. He claims unwarranted “difficulty” because the NRC Staff has not yet issued its SER and SEIS. Appeal Brief at 4. He believes his rights “have been unduly abridged” because the Licensing Board dismissed his contentions “many months before the SEIS and SER” were due for publication. *Id.* He asks, “[i]f the SER contains information that goes beyond the scope of Parts 51 and 54, how can a petitioner question or litigate those issues?” *Id.* at 5. Mr. Oncavage seems to believe that the Licensing Board dismissed his contentions simply because the SEIS and SER were unavailable to him. *See id.* at 4.

None of this is persuasive. Contentions must be based upon the *applicant’s* (here FPL’s) license application and Environmental Report. Petitioners have

¹⁷ Mr. Oncavage apparently assumed that the Safety Evaluation Report had been issued and that it had relied upon the Staff’s safety assessment of aircraft crash risk, prepared in connection with the proposed airport.

¹⁸ If a tangible plan for a nearby commercial airport again emerges, *see* Reuters English News Service (June 4, 2001) (Defense Department reportedly reviewing Air Force’s decision to ensure the decision is consistent with established policy), the potential safety impacts the airport may have on the Turkey Point facility must be considered, and any needed measures to maintain the safety of the facility will be undertaken. If Mr. Oncavage finds that the airport poses an unaddressed safety concern, he may bring his concerns to the NRC’s attention, or if timely and appropriate, he may submit a late-filed contention. *See* 10 C.F.R. §§ 2.206, 2.714(a).

an “ironclad obligation” to examine the application and publicly available documents to uncover any information that could serve as a foundation for a contention. *Oconee*, 49 NRC at 338 (citing Final Rule, “Rules of Practice for Domestic Licensing Procedures — Procedural Changes in the Hearing Process,” 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989). “[I]t is the license application, not the NRC Staff review, that is at issue in our adjudications.”¹⁹

Intervenors may amend contentions later if data or conclusions in the SER or SEIS differ significantly from the license application or Environmental Report. See 10 C.F.R. § 2.714(a). “[M]uch of what those reports will bring to light [however] will . . . not be new *issues*, but [merely] new *evidence* on issues that were apparent at the time of application.” *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 55 (D.C. Cir. 1990) (emphasis in original). In the event that either the SER or SEIS indeed does contain new and significant information, NRC rules permit a petitioner to submit a late-filed contention. See 10 C.F.R. § 2.714(b)(2)(iii).

The Licensing Board dismissed Mr. Oncavage’s contentions because they raised issues beyond the scope of a license renewal proceeding, not because the Board “viewed the absence of [the SEIS and SER] as a flaw in the Petitioner’s contentions,” as Mr. Oncavage claims. See Appeal Brief at 4. His contentions also lacked foundation, as we explained earlier in this opinion. Mr. Oncavage states that he is “challenging the environmental documents” and “challenging the safety documents.” See Transcript at 21. Although he had available to him the Turkey Point license application and Environmental Report, he provides not a single reference to any specific portion of either, and indeed indicates no familiarity with either.

Our contention-pleading rule bars “anticipatory” contentions, where a petitioner seeks to have NRC “Staff studies as a sort of pre-complaint discovery tool.” *Oconee*, 49 NRC at 338 (citing *Union of Concerned Scientists*, 920 F.2d at 56). The courts repeatedly have upheld NRC contention procedures on judicial review. See, e.g., *Union of Concerned Scientists v. NRC*, 920 F.2d 50 (D.C. Cir. 1990); see also *National Whistleblower Center*, 208 F.3d 256. Mr. Oncavage, however, appears unwilling to “commit to this type of procedure.” See Transcript at 20. He seems not to understand that it was his obligation to formulate contentions based upon FPL’s license renewal application and Environmental Report, and that, if he submitted admissible contentions, he then could amend them if necessary once the NRC Staff issued its SER and SEIS. Having failed to submit a single admissible issue, Mr. Oncavage complains that the dismissal of his petition “abrogates any legitimate opportunity for [him]

¹⁹ *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 350 (1998), *aff’d sub nom National Whistleblower Center v. NRC*, 208 F.3d 256 (D.C. Cir.), *cert. denied*, 121 S. Ct. 758 (2001).

to amend the contentions upon the issuance of the SEIS and SER.” Appeal Brief at 4-5. There is, though, no right to later “amend” arguments that were inadmissible to begin with. If the SEIS and SER bring to light new and significant data or conclusions, which differ materially from what was available in the license renewal application and Environmental Report, Mr. Oncavage will still have an opportunity to submit late-filed contentions. *See* 10 C.F.R. § 2.714(a)(1).

The Commission recognizes that under our rules individuals concerned about a licensing action must work within a limited time frame to examine the license application and related documents, and that this may be especially difficult for *pro se* petitioners. “But it has long been a ‘basic principle that a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation.’” *Oconee*, 49 NRC at 338-39, citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983).

Mr. Oncavage seems to believe that simply because the Licensing Board found he had standing, he automatically should also be allowed to intervene as a party in the proceeding.²⁰ *See* Appeal Brief at 4 (“[t]he Licensing Board has, in effect said, yes you have an interest to defend, but we won’t let you defend your interest”). To gain admission as a party, however, a petitioner must proffer at least one valid contention for litigation. 10 C.F.R. § 2.714(b). This Mr. Oncavage has not done.

V. CONCLUSION

For the reasons given in this decision, the Commission hereby *affirms* LBP-01-6.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 19th day of July 2001.

²⁰FPL and the NRC Staff contest Mr. Oncavage’s standing to intervene. *See* 10 C.F.R. § 2.714(a)(2) (intervenors must demonstrate how their own “interest may be affected by the results of the proceeding”). The Licensing Board determined that Mr. Oncavage had failed to show the “traditional elements of standing,” but nonetheless the Board concluded that Mr. Oncavage’s residence 15 miles from the Turkey Point facility was sufficient to accord him standing. *See* LBP-01-6, 53 NRC at 146-50. The Board applied a “proximity presumption” — a presumption of standing for those residing within 50 miles of the reactor that sometimes has been applied in NRC reactor licensing cases. Because the Commission has found Mr. Oncavage’s contentions inadmissible, we do not decide whether the Board’s application of a proximity presumption was correct. *See Oconee*, CLI-99-11, 49 NRC at 333 n.2.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Edward McGaffigan
Jeffrey S. Merrifield

In the Matter of

Docket No. 40-8681-MLA-8
(Source Material
License Amendment)
(License No. SUA-1358)

INTERNATIONAL URANIUM (USA)
CORPORATION
(White Mesa Uranium Mill)

July 30, 2001

RULES OF PRACTICE: STANDING TO INTERVENE

To demonstrate standing in a Subpart L materials licensing case, a petitioner must allege “(1) an actual or threatened, concrete and particularized injury, that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the Atomic Energy Act . . . and (4) is likely to be redressed by a favorable decision.” *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001).

ATOMIC ENERGY ACT: SECTION 11e(2)

As long as source material is processed to extract either uranium or thorium, the resulting tailings are 11e(2) byproduct material, regardless of whether, prior to processing, the material contained more of a mineral that was not extracted than the thorium or uranium that was extracted. *See International Uranium (USA) Corp.* (Request for Materials License Amendment), CLI-00-1, 51 NRC 9, 15-16 (2000).

RULES OF PRACTICE: STANDING TO INTERVENE (INJURY IN FACT)

A claim that the applicant has violated or will violate the law does not create a presumption of standing, without some showing that the violation could harm the petitioner.

RULES OF PRACTICE: STANDING TO INTERVENE

The Commission generally defers to the Presiding Officer's determinations regarding standing, absent an error of law or an abuse of discretion. *See International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 118 (1998); *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995).

RULES OF PRACTICE: STANDING TO INTERVENE (INJURY IN FACT)

In challenging a license amendment, a petitioner must show that the amendment will cause a "distinct new harm or threat" apart from the activities already licensed. *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 192 (1999).

RULES OF PRACTICE: STANDING TO INTERVENE (INJURY IN FACT)

The mere increase in the traffic of low-level radioactive material on a highway near the petitioner's residence, without more, does not constitute an injury traceable to a license amendment that primarily affects a site hundreds of miles away. *See, e.g., Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40 (1990).

MEMORANDUM AND ORDER

Petitioner Sarah Fields has filed an appeal, *pro se*, of the Presiding Officer's decision denying her request for a hearing in this license amendment proceeding. *See* LBP-01-8, 53 NRC 204 (2001). Finding no error in the Presiding Officer's ruling that Fields has not demonstrated standing, we affirm.

I. BACKGROUND

International Uranium (USA) Corporation (IUSA) seeks to amend NRC Source Material License SUA-1358 to allow IUSA to receive and process up to 2000 cubic yards of alternative feed material at its White Mesa Uranium Mill near Blanding, Utah. The alternative feed material is “monazite sand” which has been processed by Heritage Minerals, Inc., to remove minerals, particularly titanium, and which still contains uranium and thorium. IUSA intends to process the material to extract uranium, and dispose of the remainder onsite.

If the license amendment is approved, the material will be shipped from New Jersey by truck through Moab, Utah, on Utah State Highway 191 on its way to White Mesa. Petitioner Fields lives in Moab, one block from Highway 191, and also works one block away from the highway on the other side. She contends that she will be affected by radioactive emissions from the trucks passing by. In addition, should there be an accident, she contends that high winds could spread the material all over the neighborhood where she lives and works.

After considering Fields’s petition and its addenda, as well as IUSA’s response and supporting expert opinion, and after conducting a telephone conference with all parties, the Presiding Officer concluded that Fields had not shown that the requested amendment could cause her a concrete and particularized injury. IUSA’s undisputed statements indicated that about ten trucks per week for 1-3 months would be carrying Heritage material through Moab. *See* 53 NRC at 210. The Presiding Officer found, based on uncontroverted expert opinion, that the radiological emissions from the material were minute and that any potential exposure, even in the case of an accident, would be negligible. *Id.* at 219-20. In addition, the Presiding Officer found that Fields had not shown that any danger presented by the Heritage material was different from or greater than that presented by the material IUSA is already licensed to receive and process at White Mesa. *Id.* at 220. Concluding that the Heritage materials would not present a new or increased danger to Fields, the Presiding Officer found that Fields had not shown any injury traceable to the license amendment. *Id.* The Presiding Officer therefore concluded that two elements of standing — injury-in-fact and traceability to the requested amendment — were lacking. *Id.*

II. DISCUSSION¹

A. Allegation of a Violation of Law Does Not Create Presumption of Standing

To demonstrate standing in a Subpart L materials licensing case, a petitioner must allege

(1) an actual or threatened, concrete and particularized injury, that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the Atomic Energy Act . . . and (4) is likely to be redressed by a favorable decision.

Sequoyah Fuels Corp. (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001).

Fields's appeal fails almost entirely to address the threshold issue of standing, i.e., how the amendment could injure her personally. For standing, she relies on a merits-based argument that the proposed license amendment would be unlawful, and that this unlawfulness gives rise to a presumption of standing. If we understand her merits argument correctly, Fields claims that because the Heritage material contains more thorium than uranium, it is primarily "thorium source material" rather than "uranium source material." Because the thorium is not to be extracted, Fields claims, the material left after processing at White Mesa will not be "byproduct material," as that term is defined in section 11e(2) of the Atomic Energy Act ("11e(2) material"),² and hence not licensable at White Mesa. She therefore concludes that if IUSA receives and disposes of the monazite sand at White Mesa, it will be in violation of the AEA.

The Commission has never held that a claimed violation of law creates a presumption of standing, without some showing that the violation could harm the petitioner. In support of her standing argument, Fields cites *Energy Fuels Nuclear Inc.* (White Mesa Uranium Mill), LBP-97-10, 45 NRC 429 (1997), which involved a similar license amendment to allow processing additional feed material. The Presiding Officer in that case found that the petitioner, an adjacent

¹As an initial matter, we note that our regulations give Fields the right to appeal from an initial decision denying her hearing request in its entirety. See 10 C.F.R. § 2.1205(o). She was not required, as IUSA has argued, to meet the standards for discretionary Commission review set forth in 10 C.F.R. § 2.786. IUSA points to 10 C.F.R. § 2.1253, which requires a party to meet the section 2.786 standards when petitioning for review of an initial decision following an informal hearing. The Presiding Officer's order here, however, wholly denied Fields's hearing request and therefore section 2.1253 does not apply.

²"The term 'byproduct material' means . . . (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." AEA § 11e(2), 42 U.S.C. § 2014(e)(2).

property owner, had failed to show a “mechanism for injury” for the disputed materials to enter his property. In the passage Fields quotes to support her standing argument, the Presiding Officer noted that “if . . . there is a law preventing [a] particular material from being stored pursuant to the amendment, then there may also be a presumption of . . . standing.” *Energy Fuels Nuclear*, 45 NRC at 431. But taken in context, it is clear that the Presiding Officer was merely suggesting that if the materials were stored improperly, it could be presumed that they might escape onto the Petitioner’s property, causing the injury requisite for standing. In contrast, Fields does not live near the White Mesa Mill, but near the transportation route. There is no reason to presume that any alleged unlawful processing or storage at the mill could injure Fields. The Presiding Officer’s ruling in *Energy Fuels Nuclear* does not endorse a general theory that a violation by a licensee gives standing to any person who is offended in principle, but not injured in fact, by the violation.

Further, without delving deeply into Fields’ argument that the license amendment would be unlawful, we observe that even though the monazite sand may contain more thorium than uranium, as long as it is, in fact, processed to extract either uranium or thorium, the resulting tailings will be 11e(2) byproduct material. See *International Uranium (USA) Corp.* (Request for Materials License Amendment), CLI-00-1, 51 NRC 9, 15-16 (2000).

B. Presiding Officer’s Finding of No Injury Was Not Abuse of Discretion

The Commission generally defers to the Presiding Officer’s determinations regarding standing, absent an error of law or an abuse of discretion. See *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 118 (1998); *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995). Here, the Presiding Officer reasonably found that Fields failed to show how the amendment of this license would affect her. While on appeal Fields voices some complaints about the Presiding Officer’s choice of words in her opinion, none of these complaints addresses standing questions, and therefore none shows an error of law or abuse of discretion in the denial of the hearing request.

In challenging a license amendment, a petitioner must show that the amendment will cause a “distinct new harm or threat” apart from the activities already licensed. *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 192 (1999). The evidence before the Presiding Officer showed that the potential radiological consequences to Fields from the transportation of the Heritage material, even in the case of an accident on the highway, are negligible. See LBP-01-8, 53 NRC at 218-19. Similarly, Presiding Officers in the past have declined to find that the mere increase in the traffic of low-

level radioactive material on a highway near the Petitioner's residence, without more, constitutes an injury traceable to a license amendment that primarily affects a site hundreds of miles away. *See, e.g., Northern States Power Co. (Pathfinder Atomic Plant) LBP-90-3, 31 NRC 40 (1990)*. Fields did not present any evidence that this material differs from material IUSA is already authorized to receive with respect to the type of hazard presented. On the contrary, much of the material IUSA is already authorized to ship to White Mesa through Moab on Highway 191 has equal or higher concentrations of uranium and thorium. *See LBP-01-8, 53 NRC at 222-23*.

For the reasons stated, the Commission *affirms* LBP-01-8.

It is so ORDERED.

For the Commission

ANDREW L. BATES

Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 30th day of July 2001.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ann Marshall Young, Chair
Dr. Peter S. Lam
Thomas D. Murphy

In the Matter of

Docket No. 50-213-OLA
(ASLBP No. 01-787-02-OLA)

CONNECTICUT YANKEE ATOMIC
POWER COMPANY
(Haddam Neck Plant)

July 9, 2001

In this license termination proceeding under 10 C.F.R. § 50.82(a)(9), (10), the Licensing Board finds that Petitioners Citizens Awareness Network and the Connecticut Department of Public Utility Control have both established interests sufficient to confer standing and submitted admissible contentions, and therefore grants in part the hearing requests of both.

**RULES OF PRACTICE: STANDING TO INTERVENE;
INTERVENTION**

**REGULATIONS: INTERPRETATION (10 C.F.R. § 2.714(a)(2),
2.714(d)(1), 2.715(c))**

Judicial concepts of standing provide the following guidance in determining whether a petitioner has established the necessary “interest” under 10 C.F.R. § 2.714(d)(1): To qualify for standing a petitioner must allege (1) a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision, criteria commonly referred to, respectively, as “injury in fact,” causality, and redressability. The

injury may be either actual or threatened, but must lie arguably within the “zone of interests” protected by the statutes governing the proceeding — here, either the Atomic Energy Act (AEA) or the National Environmental Policy Act (NEPA). An organization may satisfy these standing criteria either by showing organizational standing, based upon the licensing action’s effect upon the interest of the petitioning organization itself; or by showing representational standing, based upon the interest of at least one of its members who has authorized the organization to represent him or her. In addition, 10 C.F.R. § 2.715(c) provides that a presiding officer may offer states, counties, municipalities, and/or agencies thereof a reasonable opportunity to participate in a proceeding.

**RULES OF PRACTICE: STANDING TO INTERVENE;
INTERVENTION**

A public interest group petitioner established standing to be admitted as a party by demonstrating that the proposed license amendment could cause the requisite injury to members within the AEA or NEPA zone of interests, redressable by a favorable decision in this proceeding, through three affidavits of members who own property abutting or near the plant site, in which it is alleged that the health and safety of members would be affected by contamination through drinking water taken from a well close to the site and through continuing exposure to radioactive waste both above- and belowground, and that property values would be affected.

**RULES OF PRACTICE: STANDING TO INTERVENE;
INTERVENTION**

A state agency petitioner, responsible for overseeing the health, safety, environmental, and economic interests of local citizens who live, work, and travel near a plant site, established standing to be admitted as a party by showing the requisite redressable injury within the AEA or NEPA zone of interests.

RULES OF PRACTICE: CONTENTIONS

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.714(b)(2), (d)(2))

The failure of a contention to comply with any of the requirements of 10 C.F.R. § 2.714(b)(2) and (d)(2) is grounds for dismissing the contention. A petitioner is not called upon to make its case at the contention stage of the proceeding, but must indicate what facts or expert opinions, be it one or many, of which it is aware at the time, provide the basis for its contention. Nor is a petitioner required to proffer facts sufficient to withstand a summary disposition motion, but must present

sufficient information to show a genuine dispute, and reasonably indicating that further inquiry is appropriate. A contention must directly controvert and actually and specifically challenge the application in order to be admitted; and additional information corroborating the existence of an actual safety problem, in the form of documents, expert opinion, or at least a fact-based argument, is necessary, as is specific reference to specific portion(s) of a licensee's application. It is the petitioner's obligation to formulate a contention and provide the information necessary to satisfy the basis requirement of the rule, and mere reference to a document is not a sufficient basis. Nor is an expert affidavit with no particularized, reasonably specific facts or opinion sufficient to support an admissible contention. Nor are contentions cognizable unless they raise issues germane to the application pending before the licensing board, and are material to matters that fall within the scope of the proceeding for which the board has been delegated jurisdiction.

RULES OF PRACTICE: CONTENTIONS; ALLEGED LACK OF INFORMATION IN APPLICATION

REGULATIONS: INTERPRETATION (10 C.F.R. §§ 50.82(a)(9)(ii)(D), 2.714(b)(2)(ii))

Although petitioners who allege that an application lacks necessary information are not required to fill the "gap" with their own detailed alternative, they must provide a concise statement of the alleged facts or expert opinion that support the contention and on which they rely; mere reference to the document (here a License Termination Plan (LTP)) itself, or to "possible" recontamination and expressions of "concern," without more, is insufficient to support the admission of such a contention.

RULES OF PRACTICE: CONTENTIONS; USE OF GUIDANCE DOCUMENTS

LICENSE TERMINATION PLAN: SITE CHARACTERIZATION

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.82(a)(9)(ii)(A))

In considering and ruling on a contention relating to the adequacy of an LTP's site characterization, and interpreting what constitutes an adequate site characterization under 10 C.F.R. § 50.82(a)(9)(ii)(A), it is appropriate, in the absence of any specific definition in the rule, to look first to the meaning of the words, to seek further guidance in the Commission's Statement of Considerations (SOC) for the rule, and also to seek assistance in guidance documents such as NUREGs, provided they do not conflict with the plain meaning of the wording of the regulation. Even though they do not carry the binding effect of regulations

or prescribe requirements, so that nonconformance with them does not equate to noncompliance with regulations, and they do not necessarily prevent a party from arguing that other or alternative considerations should be taken into account in making an ultimate ruling on the merits of a contention, guidance documents may assist in resolving any ambiguity in a regulation's language.

RULES OF PRACTICE: CONTENTIONS; USE OF RAIs

Staff requests for additional information (RAIs) may be relevant in the adjudicatory process, and may be used to support contentions, provided a petitioner does more than just rest on their mere existence.

RULES OF PRACTICE: CONTENTIONS

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.714(b)(2)(ii))

Findings of an Administrative Law Judge from another agency do not constitute the type of facts or expert opinion required to support a contention.

RULES OF PRACTICE: CONTENTIONS (LATE-FILED)

After receipt of Licensee's responses to Staff's RAIs and the Staff's issuance of its Safety Evaluation Report (SER), late-filed contentions may be submitted within appropriate deadlines and will be ruled on under 10 C.F.R. § 2.714(a)(1), (b)(2), and (d)(2).

RULES OF PRACTICE: DISCOVERY (AGAINST NRC STAFF)

Where Staff has not reviewed the LTP and contentions are admitted alleging that the LTP is not sufficiently detailed, discovery against the Staff will be delayed until after Licensee's responses to Staff's extensive RAIs have been received and Staff has issued its SER on the LTP.

RULES OF PRACTICE: SCOPE OF PROCEEDING; LICENSE TERMINATION PLAN

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.82(a)(9), (10))

An LTP proceeding is confined to a review of the matters specified in 10 C.F.R. § 50.82(a)(9), (10), defined by the terms of section 50.82(10) as read in light of the filing requirements of section 50.82(a)(9)(ii)(A)-(G), and is coextensive with the LTP itself. The LTP is necessary because the NRC must make decisions

regarding adequate funds, radiation release criteria, and adequacy of the final survey required to verify that the release criteria have been met. Matters such as plans for site remediation and for the final radiation survey are within the scope of an LTP proceeding, but some other subjects, including spent fuel management, are not.

RULES OF PRACTICE: SCOPE OF PROCEEDING; LICENSE TERMINATION PLAN

The purpose of the LTP process is to ensure that the property will be left in such a condition that nearby residents can frequent the area without endangering their health and safety, and is the one and only chance petitioners have to litigate whether the proposed survey methodology is adequate to demonstrate that the site will ultimately be brought to a condition suitable for license termination.

RULES OF PRACTICE: SCOPE OF PROCEEDING; LICENSE TERMINATION PLAN

NRC intentionally did not adopt the EPA drinking water standard in the LTP rule, and the licensing board has no authority to enforce EPA standards not adopted by NRC.

LICENSE TERMINATION PLAN: SITE CHARACTERIZATION

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.82(a)(9)(ii)(A))

A site characterization in an LTP must contain a description of the essential character or quality of the plant site.

LICENSE TERMINATION PLAN: SITE CHARACTERIZATION

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.82(a)(9), (10))

A showing of a violation of 10 C.F.R. § 50.82(a)(9) — which contains the words, “[t]he LTP must include” — could constitute a significant indication of a possible violation of 10 C.F.R. § 50.82(a)(10); if a site characterization as required under section 50.82(a)(9)(ii)(A) is shown to be inadequate, then areas not covered by the site characterization might be omitted or given inadequate attention in cleanup efforts and in the final status survey, which could in turn be an indication that the LTP has not “demonstrate[d] that the remainder of the decommissioning activities [1] will be performed in accordance with the regulations in this chapter, [2] will not be inimical to the common defense and security or to the health and

safety of the public, and [3] will not have a significant effect on the quality of the environment,” under section 50.82(a)(10).

LICENSE TERMINATION PLAN: TECHNICAL ISSUES; ALLEGED RUBBLIZATION

A licensing board does not have authority under the LTP rule to determine what a licensee may do after unrestricted release, once it is determined that requirements for unrestricted release have been met; however, a petitioner will be permitted to present otherwise admissible evidence on the adequacy of the LTP’s site characterization and plans for final cleanup and survey of buildings and buried foundations, taking into account possible post-release demotion and burial activities.

LICENSE TERMINATION PLAN: TECHNICAL ISSUES DISCUSSED

The following technical issues are discussed: Requirement for Historical Site Assessment in LTP; Requirement for Unplanned Releases List in LTP; Monitoring of Radiological Releases During Operations; Requirement of Multi-Agency Radiation Survey and Site Investigation Manual (MARSSIM), NUREG-1575, Rev. 1 (Aug. 2000), that all plant site areas are initially considered Class 1 unless some basis for reclassification as nonimpacted, Class 3, or Class 2 is provided; LTP Work Scope; Methodology for Determining Background Radiation Levels; Dose Modeling Calculations; Water Contamination Issues.

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MEMORANDUM AND ORDER
(Ruling on Standing and Contentions)

This proceeding concerns a license amendment application of Connecticut Yankee Atomic Power Company (CYAPCO, Connecticut Yankee, Applicant, or Licensee), seeking approval pursuant to 10 C.F.R. § 50.82(a)(9), (10), of a License Termination Plan (LTP) for its Haddam Neck Plant, located approximately 21 miles southeast of Hartford, Connecticut, on the east bank of the Connecticut River. The Citizens Awareness Network (CAN) and the Connecticut Department of Public Utility Control (CDPUC or Connecticut) have requested a hearing and petitioned to intervene with regard to the amendment request and LTP.

For the reasons set forth below, we conclude that both Petitioners have standing and have proffered admissible contentions, and we therefore grant, in part, the hearing requests of both.

I. BACKGROUND

In its July 7, 2000, license amendment request, Connecticut Yankee proposes to add a new license condition that would approve the LTP, also dated July 7, 2000, and allow the Applicant to make changes to the approved LTP without prior NRC approval if certain criteria specified in the license condition are met. After a public meeting held October 17, 2000, the Staff proposed to determine that the amendment request involves no significant hazards consideration under 10 C.F.R. § 50.92(c), and provided notice of this finding and of the opportunity for a hearing with regard to the amendment request in the December 13, 2000, *Federal Register*. 65 Fed. Reg. 77,913 (2000). Thereafter, Petitioners CAN, appearing through nonattorney representatives,¹ and CDPUC filed their requests for hearing on January 11 and 17, 2001, respectively, and this matter was forwarded to the Atomic Safety and Licensing Board Panel on January 23, 2001. In their responses filed January 29 and 30, 2001, respectively, both Connecticut Yankee and the Staff state that they do not oppose finding that both Petitioners have standing to proceed in the matter.

On January 31, 2001, this Licensing Board was established to preside over this proceeding. *See* 66 Fed. Reg. 9,111 (Feb. 6, 2001). In its initial prehearing order of February 2, 2001, the Board set deadlines of February 26 and March 19, 2001, for the filing of amended and supplemented petitions and responses thereto,

¹At one point early in this proceeding there was some indication that CAN might be assisted by counsel, but the attorney in question withdrew from any representation of CAN, and CAN currently appears through three nonattorney representatives, Ms. Rosemary Bassilakis, Director of Connecticut CAN; Ms. Deborah B. Katz, Executive Director of CAN; and CAN member Ms. Katie Flynn-Jambeck.

which deadlines were subsequently extended to March 12 and April 2, 2001, at the unopposed request of Petitioner Connecticut joined by CAN, based upon the Applicant's indication that it might revise significant portions of the LTP. Licensing Board Memorandum and Order (Setting Schedule for Proceedings) (Feb. 2, 2001) at 1-2 (unpublished); Licensing Board Memorandum and Order (Addressing Motions and Amending Schedule for Proceedings) (Feb. 28, 2001) at 1 (unpublished). In accordance with the extended deadlines, the Petitioners filed their amended and supplemented petitions and contentions, and Connecticut Yankee and the Staff responded, opposing some of the proffered contentions. Oral argument on the Petitioners' contentions commenced on April 24, 2001, and was concluded on May 9, 2001, in Cromwell, Connecticut. Tr. 1-349.

During oral argument on April 24, an issue that recurs throughout many of the Petitioners' contentions — the level of detail and specificity required of an LTP — prompted Staff Counsel to point out the "unique procedural status" of ruling on and beginning a hearing on contentions alleging that the LTP is not sufficiently detailed, in advance of the Staff's review of the plan. Asserting that the Staff's review will not be completed until extensive requests for additional information (RAIs) have been answered, which will likely result in significant alterations in the LTP prior to Staff approval of it, Staff Counsel suggested that it might "make more sense to examine [the contentions] after the Staff has completed its review." Tr. 44-46.

The Board determined that its decision on contentions filed to date would not be delayed. Assuming, however, that a hearing would be granted in this matter based upon at least unopposed standing and contentions, and based upon the agreement of all participants during a May 2, 2001, telephone conference, Tr. 363-69, the Board ruled that discovery against the Staff would be delayed until after the Licensee's responses to the RAIs have been received and provided to all participants and the Staff has issued its Safety Evaluation Report (SER) on the LTP. Order (Scheduling Remainder of Oral Argument on Contentions, and Confirming Matters Addressed in May 2, 2001, Telephone Conference) (May 2, 2001) at 2 (unpublished); *see Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 351 n.12 (1998). As a result of the May 2 ruling it is anticipated that, based on the RAI responses, the Staff's SER, and changes to the LTP, the Petitioners may submit some late-filed contentions, which would be ruled on under 10 C.F.R. § 2.714(a)(1), (b)(2), and (d)(2). Appropriate deadline(s) for any such late-filed contentions will be set after the SER has been issued, along with a schedule for discovery from the Staff, other appropriate matters, and a hearing on all admitted contentions that have not otherwise been resolved. *Id.*

After the conclusion of oral argument, during which an objection was sustained to CAN's submission of a document proffered in support of one of its contentions, Tr. 614, CAN filed a Motion to Reconsider Admission of

Draft Report Titled “Evaluation for the Dec-Mar, 2001 Groundwater Tritium Fluctuations” by Allen D. Yates (May 16, 2001) (hereinafter CAN Motion to Reconsider). Thereafter, CYAPCO filed its Opposition of Connecticut Yankee to CAN Motion for Reconsideration (May 24, 2001) (hereinafter CYAPCO Opposition to CAN Motion), and the Staff filed the NRC Staff Response to Motion to Reconsider Admission of Draft Report Titled “Evaluation for the Dec-Mar, 2001 Groundwater Tritium Fluctuations” by Allen D. Yates (June 7, 2001). This motion is ruled on in our discussion of CAN Contention 4.2, below.

II. ANALYSIS

A. Standing

As indicated by the Commission in *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 194 (1998), NRC standing criteria are ultimately grounded in section 189a of the Atomic Energy Act (AEA), 42 U.S.C. § 2239(a), which requires the NRC to provide a hearing upon the request of any person “whose interest may be affected by the proceeding.” Both Petitioners assert such an interest, specifically relying on the implementing provisions of 10 C.F.R. § 2.714.

Under section 2.714(a)(2), an intervention petition must set forth with particularity “the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d)(1),” along with “the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.” 10 C.F.R. § 2.714(a)(2). Subsection (d)(1) provides in relevant part that the Board shall consider the following three factors when deciding whether to grant standing to a petitioner:

- (i) The nature of the petitioner’s right under the [AEA] to be made a party to the proceeding.
- (ii) The nature and extent of the petitioner’s property, financial, or other interest in the proceeding.
- (iii) The possible effect of any order that may be entered in the proceeding on the petitioner’s interest.

10 C.F.R. § 2.714(d)(1)(i)-(iii).

When determining whether a petitioner has established the necessary “interest” under subsection (d)(1), the Commission has long looked for guidance to judicial concepts of standing. *See, e.g., Yankee*, CLI-98-21, 48 NRC at 195; *Quivira Mining Co.* (Ambrosia Lake Facility), CLI-98-11, 48 NRC 1, 5-6 (1998); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta,

Georgia), CLI-95-12, 42 NRC 111, 115 (1995). According to these concepts, to qualify for standing a petitioner must allege (1) a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998); *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995). These three criteria are commonly referred to, respectively, as “injury in fact,” causality, and redressability. And, as indicated by the Commission in *Yankee*, the injury may be either actual or threatened. *Yankee*, CLI-98-21, 48 NRC at 195 (citing, e.g., *Wilderness Society v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987)). In addition, the Commission has required potential intervenors to show that their “injury in fact” lies arguably within the “zone of interests” protected by the statutes governing the proceeding — here, either the AEA or the National Environmental Policy Act (NEPA). *See Yankee*, CLI-98-21, 48 NRC at 195-96; *Ambrosia Lake*, 48 NRC at 6.

An organization may satisfy these standing criteria in either of two ways — to show organizational standing, based upon the licensing action’s effect upon the interest of the petitioning organization itself; or to show representational standing, based upon the interest of at least one of its members who has authorized the organization to represent him or her. *See, e.g., Yankee*, CLI-98-21, 48 NRC at 195; *Georgia Tech*, CLI-95-12, 42 NRC at 115. Finally, regarding governmental participation, 10 C.F.R. § 2.715(c) provides that a presiding officer may offer states, counties, municipalities, and/or agencies thereof a reasonable opportunity to participate in a proceeding.

As indicated above, neither the Staff nor Connecticut Yankee opposes the Petitioners’ standing to proceed in this matter. We likewise find that both Petitioners have established standing under 10 C.F.R. § 2.714. CAN included with its petition three affidavits of members who own property abutting or near the Haddam Neck plant site. In these affidavits it is alleged that the health and safety of CAN members would be affected by, for example, contamination through drinking water taken from a well close to the site and through continuing exposure to radioactive waste both above- and belowground, and that property values would be affected. We conclude that these affidavits demonstrate that the proposed license amendment could cause the requisite injury in fact to CAN members, within the AEA or NEPA zone of interests, that would be redressable by a favorable decision in this proceeding. *See Yankee*, CLI-98-21, 48 NRC at 208. Likewise, we conclude that CDPUC, as a State agency responsible for overseeing the health, safety, environmental, and economic interests of local citizens who live, work, and travel near the site, has shown the requisite redressable injury within the zone of interests sought to be protected by the AEA or NEPA.

B. Contentions

Both Petitioners have submitted a number of contentions. To be admitted as litigable in this proceeding, each must address a subject that falls within the scope of an LTP proceeding as defined by the Commission, and meet the contention requirements of 10 C.F.R. § 2.714.

1. Scope of LTP Proceeding

As the Commission noted in *Yankee*, CLI-98-21, 48 NRC at 196, the provisions of 10 C.F.R. § 50.82(a)(9) and (10), which the Commission promulgated in 1996, oblige a licensee who is decommissioning a power reactor to file an LTP in the form of a license amendment application. The Commission found it “appropriate,” regardless of legal mandates, “to use the amendment process for approval of termination plans, including the associated opportunity for a hearing, to allow public participation on the specific actions required for license termination.” See Final Rule, “Decommissioning of Nuclear Power Reactors,” 61 Fed. Reg. 39,278, 39,289 (July 29, 1996). A licensee may file the LTP either prior to or concurrently with a license termination request. See *Yankee*, CLI-98-21, 48 NRC at 196.

Section 50.82(a)(9) provides in relevant part:

All power reactor licensees must submit an application for termination of license. The application for termination of license must be accompanied or preceded by a license termination plan to be submitted for NRC approval.

-
- (ii) The license termination plan must include—
 - (A) A site characterization;
 - (B) Identification of remaining dismantlement activities;
 - (C) Plans for site remediation;
 - (D) Detailed plans for the final radiation survey;
 - (E) A description of the end use of the site, if restricted;
 - (F) An updated site-specific estimate of remaining decommissioning costs; and
 - (G) A supplement to the environmental report, pursuant to § 51.53, describing any new information or significant environmental change associated with the licensee’s proposed termination activities.

10 C.F.R. § 50.82(a)(9)(ii). Section 50.82(a)(10) establishes the following standard for Commission approval of an LTP:

If the license termination plan demonstrates that the remainder of decommissioning activities [1] will be performed in accordance with the regulations in this chapter, [2] will not be inimical to the common defense and security or to the health and safety of the public, and [3] will not have a significant effect on the quality of the environment and after notice to interested persons, the Commission shall approve the plan, by license amendment, subject to such conditions and

limitations as it deems appropriate and necessary and authorize implementation of the license termination plan.

10 C.F.R. § 50.82(a)(10).

An LTP proceeding such as the instant one is “confined to a review of the matters specified in 10 C.F.R. § 50.82(a)(9) and (10), such as the plans for site remediation and for the final radiation survey.” *See Yankee*, CLI-98-21, 48 NRC at 201. The scope of the proceeding is “coextensive with the . . . LTP itself” and, further, is “defined solely by the terms of 10 C.F.R. § 50.82(a)(10), as read in light of the filing requirements of 10 C.F.R. § 50.82(a)(9)(ii)(A)-(G).” *Id.* at 204-05. In adopting the requirements for the LTP, the Commission stated that the LTP is necessary “because the NRC must make decisions . . . regarding (1) . . . adequate funds, (2) radiation release criteria . . . , and (3) adequacy of the final survey required to verify that these release criteria have been met.” 61 Fed. Reg. 39,279, 39,289 (July 29, 1996). Some subjects, including spent fuel management, are off-limits in such a proceeding. *See Yankee*, CLI-98-21, 48 NRC at 201, 203-05.

An LTP is not, however, just “a kind of hortatory document, without important effects,” for this “would defeat the carefully crafted process” established by the Commission through the above-quoted rules. *See id.* at 205. The LTP approval process has “at least one important future consequence . . . which *must be litigated now or never*. . . . [It] is Petitioners’ one and only chance to litigate *whether the survey methodology is adequate to demonstrate that the site [will ultimately be] brought to a condition suitable for license termination*.” *See id.* at 206-07 (emphasis added). For, as the Commission noted in *Yankee*, 10 C.F.R. § 50.82(a)(11) provides only that:

The Commission shall terminate the license if it determines that—

- (i) The remaining dismantlement has been performed in accordance with the approved license termination plan, and
- (ii) The terminal radiation survey and associated documentation demonstrates that the facility and site are suitable for release in accordance with the criteria for decommissioning in 10 CFR part 20, subpart E.

CLI-98-21, 48 NRC at 206 n.9.

Finally, according to the Commission, the purpose of the LTP process is “to ensure that the property will be left in such a condition that nearby residents . . . can frequent the area without endangering their health and safety.” *Id.* at 208.

2. Contention Requirements

With the Commission’s guidance on the scope and purpose of LTP proceedings in mind, we turn next to the standards we must apply in ruling on the admissibility

of the contentions proffered by the Petitioners, which are defined in 10 C.F.R. § 2.714 and provide in relevant part as follows:

(b)(2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

(i) A brief explanation of the bases of the contention.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

....

(d) ... [A] ruling body or officer shall, in ruling on—

....

(2) The admissibility of a contention, refuse to admit a contention if:

(i) The contention and supporting material fail to satisfy the requirements of paragraph (b)(2) of this section; or

(ii) The contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.

The failure of a contention to comply with any one of these requirements is grounds for dismissing the contention. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

The Statement of Considerations (SOC) for the 1989 amendments to the contention requirements, which explains the Commission's basis for, and interpretation of, the regulatory language quoted above, provides useful guidance on the proper application of the requirements — guidance that is entitled to "special weight." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290-91 (1988), *review declined*, CLI-88-11, 28 NRC 603 (1988). In the SOC, the Commission noted that the requirement at subsection (b)(2)(ii) above "does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which

provide the basis for its contention.’’ 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989) (emphasis added). The Commission quoted the following language from *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983):

[A]n intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable [the petitioner] to uncover any information that could serve as the foundation for a specific contention. . . . [N]either Section 189a. of the [Atomic Energy] Act nor Section 2.714 of the Rules of Practice permits the filing of a *vague, unparticularized contention*, followed by an endeavor to flesh it out through discovery against the applicant or staff.

54 Fed. Reg. at 33,170 (emphasis added). The SOC also contains the following statements:

The new rule will require that a petitioner include in its submission *some alleged fact or facts in support of its position sufficient to indicate that a genuine issue of material fact or law exists*. . . .

[T]he presiding officer shall not admit a contention to the proceeding if the intervenor fails to set forth the contention with *reasonable specificity* or establish a basis for the contention. In addition, the contention will be dismissed if the intervenor sets forth *no* facts or expert opinion on which it intends to rely to prove its contention, or if the contention fails to establish that a genuine dispute exists between the intervenor and the applicant [T]he use of this standard for the admission of contentions had been supported by the Federal courts in numerous instances. *Vermont Yankee Nuclear Power Corp. v. NRC*, 435 U.S. 519 (1978); *Independent Bankers Ass’n v. Board of Governors*, 516 F.2d 1206 (D.C. Cir. 1975); *Connecticut Bankers Ass’n v. Board of Governors*, 627 F.2d 245 (D.C. Cir. 1980). The court in the latter case emphasized that “a protestant does not become entitled to an evidentiary hearing merely on request, or on a bald or conclusory allegation that such a dispute exists. *The protestant must make a minimal showing that material facts are in dispute, thereby demonstrating that an ‘inquiry in depth’ is appropriate.*” 627 F.2d at 251. The Commission’s rule is consistent with these decisions.

. . . The Commission expects that at the contention filing stage the factual support necessary to show that a genuine dispute exists *need not be in affidavit or formal evidentiary form and need not be of the quality necessary to withstand a summary disposition motion*. At the summary disposition stage the parties will likely have completed discovery and essentially will have developed the evidentiary support for their positions on a contention. Accordingly, there is much less likelihood that substantial new information will be developed by the parties before the hearing. Therefore, the quality of the evidentiary support provided in affidavits at the summary disposition state is expected to be of a higher level than at the contention filing stage.

Id. at 33,170-71 (emphasis added).

The Commission has also stated that Petitioners

must develop a fact-based argument that actually and specifically challenges the application. . . . [A] contention “that fails directly to controvert the license application . . . is subject to

dismissal.” . . . Moreover, . . . it is not unreasonable to expect a petitioner to provide additional information corroborating the existence of an actual safety problem. Documents, expert opinion, or at least a fact-based argument are necessary.

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 341-42 (1999) (emphasis added) (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998)). The Commission continued:

It is surely legitimate for the Commission to screen out contentions of doubtful worth and to avoid starting down the path toward a hearing at the behest of Petitioners who themselves have no particular expertise — or expert assistance — and no particularized grievance, but are hoping something will turn up later as a result of NRC Staff work.

Oconee, CLI-99-11, 49 NRC at 342.

It is the petitioner’s obligation to formulate a contention and provide the information necessary to satisfy the basis requirement of the rule. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-98-17, 48 NRC 123, 125 (1998); see also *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998). Mere reference to documents does not provide an adequate basis for a contention. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348 (1998). Finally, contentions are necessarily limited to issues that are germane to the application pending before the Board, *Yankee*, CLI-98-21, 48 NRC at 204 n.7, and are not cognizable unless they are material to matters that fall within the scope of the proceeding for which the licensing board has been delegated jurisdiction as set forth in the Commission’s notice of opportunity for hearing. *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); see also *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426-27 (1980); *Commonwealth Edison Co.* (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980).

3. *Rulings on Contentions*

The Petitioners’ contentions fall into several broad categories: General Contentions, and Contentions Relating to Site Characterization, Work Scope, Dose Calculations, Water Contamination, and Rubblization. We address the Petitioners’ contentions according to these categories. We note also the recurring theme, referenced above, of the degree of detail and specificity that is required in an LTP, both generally and in various particulars. The merits of particular challenges to the LTP in this regard are discussed in the context of our rulings on the contentions in which they are made. The general thrust of this argument is crystallized in the first of three “general” contentions, CDPUC Contention IV.

GENERAL CONTENTIONS

a. *CDPUC Contention IV: Degree of Detail and Specificity Required in an LTP, Quality Control, Isolation and Control*

CDPUC Contention IV states as follows:

The LTP lacks the specificity required to be used as a baseline for evaluating Connecticut Yankee's decommissioning performance.

Connecticut Department of Public Utility Control's Amended and Supplemented Petition to Intervene and Request for Hearings (Mar. 12, 2001) at 19 [hereinafter CDPUC Contentions]. Arguing that "[o]ne fundamental purpose of the LTP should be to provide a detailed roadmap for decommissioning that the Commission can use to determine whether Connecticut Yankee's Part 50 license may be terminated," Connecticut asserts that, "[i]f it is to serve any useful function, the LTP must be modified to specify measurable criteria and standards that can be applied to verify the licensee's performance." *Id.*

During oral argument on this contention, CDPUC narrowed this contention to the last two of seven areas originally listed in support of the contention, relying on the requirement at 10 C.F.R. § 50.82(a)(9)(ii)(D) that an LTP must include "[d]etailed plans for the final radiation survey." Tr. 18-21. These two areas involve parts of section 5 of the LTP, on the "Final Status Survey Plan," relating to quality assurance and control, and isolation and control measures.

CDPUC asserts that the quality control section of the LTP is insufficient in its suggestion that document control and inspection procedures will be written or delineated, and its failure to specify the criteria for selecting such procedures (citing LTP § 5.10, at 5-47). CDPUC further asserts that the LTP's description of isolation and control measures is insufficient in its failure to specify what measures will be used in outdoor areas, how the Licensee will prevent excavated contaminated soil from discharging through air or rain runoff, or how activated rebar in concrete will be removed without permitting flakes and parts of the rebar to spread to noncontaminated areas (citing LTP § 5.4.5). CDPUC Contentions at 20.

With regard to its quality assurance and quality control (QA/QC) plan, CYAPCO argues that it already operates under an approved QA/QC program, which is referenced in the LTP and which applies to license termination activities. Although counsel was not certain of the degree to which the plant QA/QC plan might have changed as a result of the plant shutting down, the LTP at page 5-45 does refer to this program and assert that it complies with the requirements set forth in Appendix B of 10 C.F.R. Part 50. Tr. 29, 32-33.

In response, CDPUC points out that, in addition to the document control and inspection subsections of the QA/QC part of the LTP indicating respectively

that “procedures will be written to control the FSS performance” and that “[i]nspections and verification activities will be delineated in implementing procedures,” the “Quality Assurance Program” section states that “[t]o support the FSS, quality assurance project plans as well[] as Data Quality Objectives[] will be developed.” LTP at 5-46, 5-47. CDPUC argues that this indicates that something different from the Appendix B program will be developed, and queries what the basis, criteria, and guidelines for such procedures, activities, plans, and objectives would be. Tr. 67-68.

With regard to isolation and control measures, CYAPCO argues that “[d]uring the final stages of decommissioning [these are] out of scope.” Tr. 34. Asserting that a released area is treated just like any area outside the plant boundary and that the final status survey will be done incrementally, CYAPCO argues that issues of keeping dust and runoff from spreading from one area to another are controlled by existing plant procedures not unique to the LTP. Tr. 35-37. On what the LTP actually states, CYAPCO refers to a “menu of the techniques that can be used.” Tr. 37-38. The techniques listed in section 5.4.5 of the LTP (on “Area Preparation: Isolation and Control”) include:

- a combination of personnel training, physical barriers and postings, as appropriate, to prevent unauthorized access to an isolated area;
- implementation of provisions to prevent the introduction of plant-related radioactive material by persons authorized to enter the area; and
- measures to prevent the introduction of plant-related radioactive material through the air or through other paths, such as systems or piping.

LTP § 5.4.5, at 5-8.

CDPUC challenges the language in the LTP as providing no useful information about how recontamination will be prevented in areas ready for free release before work in surrounding areas has been completed, and notes that the Staff has also indicated concern about the lack of detail in this section of the LTP. Tr. 68-69.

With regard to what balance should be struck between enough detail not to jeopardize safety, but not so much detail that the licensee would be burdened in doing a satisfactory job of license termination activities, CYAPCO argues that “the degree of methodological rigidity that should be demanded in an LTP [should be] limited to those items where the LTP is unique, where we are not doing activities that we’ve been doing for 30 years . . . for which there are both existing requirements, and existing procedures.” Tr. 41. Referring to the final status survey methodology, CYAPCO gives as examples how samples are selected, what the “pass/fail rate” will be, how to “deal with spikes,” and the sorts of statistical tests that are applied. *Id.*

The Staff did not take a position with regard to this contention as limited during oral argument, other than to make the procedural suggestion discussed in the Background section above.

RULING: CDPUC CONTENTION IV

We find that Contention IV as narrowed during oral argument, while raising a significant substantive issue (the level of detail and specificity required in an LTP) that has merit with regard to certain of the contentions discussed below, does not itself provide supporting facts or expert opinion relating to those areas still at issue with regard to *this* contention so as to render the contention admissible under 10 C.F.R. § 2.714(b)(2)(ii). In one sense, we recognize an arguable insufficiency of procedures that “will be written,” activities that “will be delineated,” plans and objectives that “will be developed,” and of the provisions quoted above from section 5.4.5 of the LTP relating to recontamination, as meeting the requirements of section 50.82(a)(9)(ii)(D) for “[d]etailed plans for the final radiation survey.” However, section 2.714(b)(2)(ii) requires that a petitioner provide a “concise statement of the alleged facts or expert opinion which support the contention . . . together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.” *See* 10 C.F.R. § 2.714(b)(2)(ii). We conclude that more is required in this regard than mere reference to the LTP itself. The Petitioners have provided such facts and/or expert opinion, sources, and documents with regard to other contentions, explaining or demonstrating the significance, for example, of omissions asserted to be in violation of the LTP regulations quoted above. CDPUC has not done so with regard to its Contention IV, and we therefore conclude that this contention is inadmissible for failure to comply with 10 C.F.R. § 2.714(b)(2)(ii).²

b. CAN Contention 7.1: Spent Fuel, High-Level Waste Storage and Handling

CAN Contention 7.1 states as follows:

Contrary to the Commission’s decision to exclude discussion of high-level waste storage and handling during an LTP proceeding, CAN contends that there is conflict within NRC regulations concerning this matter. The presence of high-level radioactive waste at decommissioning reactors raises serious health and safety issues that are orphaned unless they can be addressed as an aspect before the Board in this case.

² As suggested by Staff Counsel, the ultimate version of the LTP that is produced in the process of the Staff evaluating the additional information provided by the Licensee in response to the RAIs, and then issuing the SER, may lead to the submission of late-filed contentions on subjects including quality assurance/control and isolation and control, which would be ruled on according to the provisions of 10 C.F.R. § 2.714(a)(1), (b)(2), and (d)(2).

Citizens Awareness Network's Contentions (Mar. 12, 2001), at 66-67 (hereinafter CAN Contentions).

RULING: CAN CONTENTION 7.1

As acknowledged in Contention 7.1, the Commission has stated that the omission of any reference to spent fuel (high-level waste) management in the LTP rules quoted above was "intentional," and this issue is "beyond the scope of [an LTP] proceeding." *Yankee*, CLI-98-21, 48 NRC at 205. Therefore, we rule that CAN Contention 7.1 is not admissible.³

c. CAN Contention 7.2: Recontamination of Released Areas

CAN Contention 7.2 raises an issue very similar to the isolation and control example provided by CDPUC in its Contention IV, namely:

CYAPCO's LTP lacks appropriate methodology to assure that portions of the site released for unrestricted use will not be re-contaminated during ongoing decommissioning and site remediation. Contrary to 10 CFR 50.82, the phased removal of land parcels and/or buildings from CYAPCO's Part 50 license as presented in the LTP can result in doses in excess of 10 CFR Part 20 Subpart E requirements.

CAN Contentions at 70. CAN challenges the LTP's proposed "phased release approach" to decommissioning (*citing* LTP at 1-8) as untested and potentially dangerous in the event of undocumented recontamination of released property, as well as the LTP's lack of a "methodology to establish control mechanisms to ensure 'clean' areas are not recontaminated." CAN Contentions at 70-71. The LTP's "[m]ere allusion" (at 1-8) to the Licensee's plan for the final status survey report to contain "an evaluation of the potential for possible recontamination of the area and a description of controls in place to prevent such recontamination" is, CAN argues, not a "sufficient basis to find that the LTP will assure protection of public health and safety within the requirements of NRC regulations at 10 CFR 50.82 and 10 CFR Part 20 Subpart E." *Id.*

CAN expresses a concern that, in view of CYAPCO's historical record with regard to "losing control of their radiological materials," the issue of recontamination of released parts of the site takes on additional importance. Tr. 80. CAN also refers in the basis for Contention 7.2 to the likelihood of recontamination

³ As noted by the Commission with regard to *Yankee Atomic*, should a licensee such as CYAPCO determine that it wishes to operate an independent spent fuel storage installation (ISFSI) *after* its Part 50 license is terminated, it must "first obtain a site-specific ISFSI license under section 72.40 of [NRC] regulations — a process that requires safety and environmental reviews and provides the public an opportunity to seek a hearing on the underlying license application." *Yankee*, CLI-98-21, 48 NRC at 212. For now, CYAPCO "would be entitled under its current [Part 50] license and under Part 72 of [NRC] regulations to proceed with onsite dry cask storage in Commission-approved dry casks." *Id.*

“through ongoing decommissioning activities, weather conditions (e.g. wind, rain, etc) and groundwater movement,” CAN Contentions at 71, and to EPA expressions of concern about the need for precautions “to assure that the parcel released early does not become recontaminated.” *Id.* at 71 n.181.

CAN notes that there is presently no rule governing partial site releases, although there is a Staff Requirements Memorandum (SRM) for SECY-00-0023, “Rulemaking Plan to Standardize the Process for Allowing a Licensee to Release Part of Its Reactor Facility or Site for Unrestricted Use Before Receiving Approval of Its License Termination Plan” (Feb. 2, 2000), as well as “NRC Regulatory Issue Summary 2000: Partial Release of Reactor Site for Unrestricted Use Before NRC Approval of License Termination Plan” (Oct. 24, 2000). CAN Contentions at 71 n.180.

CYAPCO responds that CAN Contention 7.2 must be excluded, because techniques to prevent the dispersion of contamination as a result of decontamination activities are “neither new nor particularly difficult.” Response of Connecticut Yankee to Supplement to Petition to Intervene: Proposed Contentions of CAN (hereinafter CYAPCO Response to CAN Contentions) (April 2, 2001) at 41. CYAPCO argues that “[a]ssuring [that such techniques] are effectively applied is a matter of post-LTP-approval implementation and Staff inspection.” *Id.* at 42. CYAPCO also argues that the contention fails to meet the specificity requirements of 10 C.F.R. § 2.714(b)— and, in response to questioning, defined its view of what would satisfy such specificity requirements by stating, “[e]nough description of what should be added to the LTP that . . . I can hand it to an engineer and say, go out and give me that.” Tr. 96.

The Staff responds to Contention 7.2 by asserting that CAN “provides no support for the allegation that phased removal of land parcels may result in doses exceeding 10 C.F.R. Part 20, Subpart E limits.” NRC Staff’s Response to Contentions Filed by Citizens Awareness Network and the Connecticut Department of Public Utility Control (April 2, 2001), at 21 (hereinafter Staff Response to Contentions). Asserting that specific areas of the site “may be removed from the license only after approval of the LTP, completion of the final status survey and compilation of the final status survey report to address the area or building in question,” the Staff states that “[i]n all respects, therefore, release of a portion of the site will only occur after compliance with all applicable regulatory requirements,” and that, “[a]s provided in 10 C.F.R. § 50.82(a)(11)(ii), the Commission will only terminate a license if it determines that the terminal radiation survey and associated documentation demonstrate compliance with the site release criteria in . . . Subpart E.” *Id.* In addition, the Staff indicates that a

proposed rulemaking on this matter is currently being developed.⁴ May 4, 2001, Letter from Staff Counsel Clark and Rafky to Administrative Judges. The Staff argues that “CAN’s desire to impose additional regulatory requirements and guidance on this process cannot be redressed in this proceeding.” Staff Response to Contentions at 21.

RULING: CAN CONTENTION 7.2

We find that CAN in Contention 7.2 has, like CDPUC in Contention IV, raised a significant issue. As with CDPUC Contention IV, in one sense we note the arguable insufficiency, as “[d]etailed plans for the final radiation survey,” of the LTP’s plan for the final status survey report to contain “an evaluation of the potential for possible recontamination of the area and a description of controls in place to prevent such recontamination,” LTP § 1.4.2.1 at 1-8 (as well as of the LTP’s section 5.4.5 measures quoted above in the discussion of CDPUC Contention IV). See 10 C.F.R. § 50.82(a)(9)(ii)(D). And we find CYAPCO’s response asserting the lack of anything “new” in the contention, and its argument to the effect that the contention fails to meet the specificity requirements of 10 C.F.R. § 2.714(b) by virtue of its failure to describe what the LTP should contain in sufficient descriptive detail for an engineer to use it as a working plan, to go farther than the rule requires. See, e.g., *Duke, Cogema, and Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-13, 53 NRC 478 (2001). In this recent order, the Commission, in a different context but one in which the same principles with regard to admissibility of contentions would apply, noted that “[c]ontentions must be based on information (or the alleged lack thereof)” contained in the pertinent documents. *Id.* at 483 n.2. Although petitioners must refer to specific parts of an application, the Commission’s reference to an “alleged lack” of information suggests that it is not required that petitioners in addition provide their own detailed alternative of what should fill in the “gap.”

We find the Staff’s written Response to Contention 7.2, asserting a lack of support for the contention’s allegation of possible doses exceeding Subpart E, apparently in reliance on 10 C.F.R. § 2.714(b)(2)(ii), to be more persuasive, but are less persuaded by its arguments relating to redressibility for what it terms “CAN’s desire to impose additional regulatory requirements and guidance” not encompassed in the LTP rule, and to the effect that assurances that the Subpart E dose requirements are met will be provided by the process that occurs after the LTP is approved, when the Commission determines whether to terminate the license under 10 C.F.R. § 50.82(11). Although adding requirements not part of a

⁴CYAPCO has argued, as it has with CDPUC Contention IV, that parts of sites can be released already, without reference to the license termination process. This would, according to CYAPCO Counsel, require a plant to meet the requirements of NRC Regulatory Guide 1.86. Tr. 88-89. According to Staff Counsel, however, Regulatory Guide 1.86 is no longer in effect, and the new rule on partial releases will govern the subject. Tr. 90.

rule — as reasonably interpreted — is unarguably inappropriate and unjustified, CAN’s assertion that the LTP lacks “appropriate methodology” to assure no recontamination of released parts of the site (that could result in doses in excess of Subpart E requirements) goes to the heart of what the Commission says of the LTP process — namely, that it is the “one and only chance [for petitioners themselves] to litigate whether the survey methodology is adequate to demonstrate that the site [will ultimately be] brought to a condition suitable for license termination,” see *Yankee*, CLI-98-21, 48 NRC at 206-07 (emphasis added), and would seem to be relevant to the health and safety requirements of 10 C.F.R. § 50.82(a)(10).

The difficulty with CAN Contention 7.2 is, however, as with CDPUC Contention IV, in how well it satisfies the requirement of 10 C.F.R. § 2.714(b)(2)(ii) that a petitioner must provide “[a] concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely” The references to possible recontamination through various routes or mechanisms, and to EPA’s expression of concern, provide thin support for the contention. Moreover, even recognizing the sense in which some parts of the LTP appear to be arguably insufficient as section 50.82(a)(9)(ii)(D) “[d]etailed plans for the final radiation survey,” CAN’s assertion that there could or would likely be recontamination of released areas of the plant site is directly tied to its allegation that there would be sufficient recontamination to violate 10 C.F.R. Part 20, Subpart E requirements. For this, CAN has provided no expert opinion, and we conclude that the asserted facts that CAN has provided are inadequate to support the contention as required by 10 C.F.R. § 2.714(b)(2)(ii).

As with our ruling on CDPUC IV, it may be that, after the Staff completes its evaluation of information provided in response to its RAIs and issues the SER, a late-filed contention addressing this issue more specifically might be admitted, provided it met the requirements of 10 C.F.R. § 2.714(a)(1), (b)(2), and (d)(2). Further guidance may also be provided through the rulemaking on partial site releases, depending upon its timing.

Nonetheless, based on the information provided by CAN in support of Contention 7.2, we rule it to be inadmissible.

CONTENTIONS RELATING TO SITE CHARACTERIZATION

d. CDPUC Contention I.A: Adequacy of Site Characterization, Historical Site Assessment

CDPUC I.A is one of a series of contentions from both Petitioners on the issue of the adequacy of the LTP’s site characterization, in various particulars. These include CDPUC Contentions I.A through I.F, CAN Contentions 1.1 through 1.5, and CAN Contentions 3.1 and 3.2. CDPUC Contention I.A states as follows:

The Site Characterization in the LTP Is Inadequate and Must Be Extensively Supplemented and Modified.

- A. The LTP Does Not Include a Satisfactory Historical Site Assessment Report and Must Be Amended to Include a Comprehensive Report of Historical Contamination Events.

CDPUC Contentions at 3. Noting that the LTP refers at page 2-2 to a January 2000 “Historical Site Assessment” (HSA) report, CDPUC asserts that this report is not part of the LTP and has not been made available. *Id.* CDPUC further asserts that a “Characterization Report” referenced at page 2-39 of the LTP does not satisfy the guidance in NUREG-1700 and -1727, despite including some “sketchy” historical information.⁵ *Id.* At oral argument, CDPUC clarified that it was not suggesting that in every case an historical site assessment report is required, but that in this case it should be required. Tr. 104. Arguing that “[t]he public record of contamination at Connecticut Yankee makes it even more important that the licensee include a comprehensive, systematic assessment of the history of spills and other possible contamination events in the LTP,” and that, “[b]ecause of the extensive history of unplanned releases at the Haddam Neck plant, it is impossible to assess Connecticut Yankee’s site characterization without an explicit identification of the information on which it is based,” CDPUC contends that the two reports “must be an integral part of the LTP.” CDPUC Contentions at 4-5; *see also* Tr. 104-06. Also in support of Contention I.A, CDPUC refers to the findings of an Administrative Law Judge of the Federal Energy Regulatory Commission (FERC) on the manner and impacts of CYAPCO’s handling of radiological materials, and has provided various documents that were exhibits in the FERC proceeding. CDPUC Contentions at 3-5, Attachments 3, 4, 6, 13.⁶

Both CYAPCO and the Staff oppose the admission of this contention, arguing that NUREGs are not a proper basis for a contention and that the contention is unsupported. Response of Connecticut Yankee to Supplement to Petition to Intervene: Proposed Contentions of the State of Connecticut (April 2, 2001) at 5-6 (hereinafter CYAPCO Response to CDPUC Contentions); Staff Response to Contentions at 22. CYAPCO asserts as well that NUREG-1727 does not apply

⁵This document refers among other things to “identification of contamination on the hillside east and southeast of the industrial area,” and states that “[t]here are no known radiological characterization efforts for the southern extent of Area 9528 or for Area 9532. However, given the topography of the area east of the industrial area, it is considered unlikely that there would be any radiological impact on these areas from plant operations.” CDPUC Contentions, Attachment 2 at 2.

⁶These documents include: a three-page “Historical Site Assessment Data Table” (Attachment 3); a one-page report entitled, “Discovery of Radioactive Contamination (115 KV yard; Area East of Discharge Canal)” (Attachment 4); a 42-page April 1980 report of CYAPCO entitled “Investigation of the Source of the Radioactive Contamination Found on the Connecticut Yankee Site March 10-30, 1980,” in which, among other things, two instances of contamination at levels “slightly above that allowable by NRC regulations in nonradiological controlled areas” are noted and there are references to material being released out the stack, CDPUC Contentions, Attachment 6 at CY0015488, CY0015513 (Attachment 6); and an 11-page “preliminary CY site characterization” (Attachment 13).

to LTPs submitted under section 50.82(a) but rather to decommissioning plans submitted by nonreactor licensees under section 50.82(b), and that NUREG-1700 contains no mention of an “historical site assessment report.” *Id.* at 6-7. And it argues, in a similar manner as it does with regard to many of the proffered contentions, that “to require the inclusion of all the data and all the analysis underlying characterization results in an LTP would [be] nonsensical,” since “the volume of site characterization data, and evaluations of it, fills many filing cabinets.” *Id.* at 5.

The LTP rule does not define “site characterization.” On its view of what a site characterization involves, CYAPCO provides the following statement:

The site characterization — actually, an *initial* site characterization, since the site characterization process continues throughout the process of implementing the LTP and ultimately merges in the final status survey results — is the process of collecting vast amounts of data specifically for this process as well as reviewing equally ponderous amounts of historical data. The results of the initial site characterization are embodied primarily in the classifications of each area of the site. These results are set forth in the LTP.

The regulation does not require that all of the data collected, reviewed and evaluated for each of the classification efforts also be reproduced in the LTP. . . .

Id. (emphasis in original). CYAPCO continues:

[W]hat is in issue in an LTP approval proceeding is the results of the initial site characterization process. A legitimate contention might be that a particular area of the site has not been properly classified, and given the required specificity and basis, such a contention should be admitted. However, there is no requirement that the LTP contain all of the data on which the initial site characterization is based, and there is no requirement that the named reports have been prepared or be included in an LTP.

Id. at 7. During oral argument, CYAPCO Counsel stated that the “bottom line of site characterization is the classifications,” and that the two are “identical.” Tr. 120, 123. CYAPCO also notes in a footnote that on November 8, 2000, it did in fact provide the NRC and the Connecticut Department of Environmental Protection with copies of a January 6, 2000, site characterization report titled “Connecticut Yankee Haddam Neck Plant, Characterization Report.” *Id.* at 7 n.6.

In response to CYAPCO’s argument with regard to the site characterization results being embodied in the site classifications (of 1, 2, 3, or nonimpacted) of each area of the site, CDPUC asserted during oral argument that the site classifications essentially define how much attention will be given different areas in remediation and cleanup activities, with areas classified as “nonimpacted” receiving no surveying at all. Therefore, CDPUC argues, to omit underlying information on the bases for the classifications will not provide needed “confidence that public health and safety will be protected,” one of the purposes

of the site characterization as stated by the Commission in its 1996 Statement of Considerations for the LTP rule. Tr. 105-07, 115; *see* 61 Fed. Reg. 39,278, 39,289 (July 29, 1996). Agreeing that Subpart E permits a certain level of residual radioactivity on the site after license termination, CDPUC argues that “the question is whether the Licensee has searched for and found all of the radiation that is at the site, and has identified that, so that it can be remediated. And it is our position that if you don’t look for it, you are not likely to find it.” Tr. 108-09.

While agreeing during oral argument that “this historical information is, in fact, very important . . . very significant,” the Staff disagrees with CDPUC that a contention may “ask[] for this historical site assessment,” Tr. 129, at least in the form of a report, which the regulation does not require, Tr. 138. The Staff faults the contention for citing only “generally to past contamination events to request that an extensive HSA be produced, with no showing of how failure to produce an HSA will result in a regulatory violation.” Staff Response to Contentions at 22. CDPUC, however, noted at oral argument that what is being challenged in Contention I.A is not the individual site classifications but the overall site characterization and its lack of an historical site assessment that would be collected from information to which CDPUC is not privy. Tr. 110.⁷

RULING: CDPUC CONTENTION I.A

In ruling on this and all the contentions relating to the adequacy of the LTP’s site characterization, the first question we must address is very simple and straightforward: What is a site characterization? A necessarily related question is: What must be included in a document in order for it to be considered an adequate site characterization? As noted above, the LTP rule does not define the term. The rule does, however, require that the LTP include a site characterization. Thus, in order to determine whether this requirement of the rule is met, and whether a contention relating to a site characterization is admissible, it is necessary to interpret the term, “site characterization,” as it is used in the rule.

In the absence of any specific definition in the rule, we look first to the meaning of the language of the provision in question. *See Shoreham*, ALAB-900, 28 NRC at 288. In this regard, the dictionary defines the word, “characterization,” as “the act, process, or result of characterizing,” while to “characterize” is “to describe the essential character or quality of.” *Webster’s Third New International Dictionary of the English Language* 376 (4th ed. 1976). Given the general nature of this definition, we find it appropriate to seek further guidance in the Commission’s Statement of Considerations that accompanied publication of the

⁷We note CDPUC’s statement at oral argument that CYAPCO has promised to provide an historical site assessment, which may ultimately render moot this contention, or prompt late-filed contentions challenging the classifications of specific areas in addition to those already challenged in Contention I.E. Tr. 111, 142.

final license termination rule. As noted by CDPUC Counsel, the Commission commented on the purpose of a site characterization as follows:

The *site characterization*, description of the remaining dismantlement activities and plans for site remediation are necessary for the NRC to be sure that the licensee will have adequate funds to complete decommissioning and that the appropriate actions will be completed by the licensee to ensure that the public health and safety will be protected.

61 Fed. Reg. 39,278, 39,289 (July 29, 1996) (emphasis added).

Finally, guidance documents of the Commission may also assist in resolving any ambiguities in a regulation's language. Although they do not carry the binding effect of regulations or prescribe requirements, so that nonconformance with them does not equate to noncompliance with regulations, see *International Uranium (USA) Corp.* (Request for Materials License Amendment), CLI-00-1, 51 NRC 9, 19 (2000); see also *Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 98, 100 (1995), such guidance documents may be consulted in interpreting a regulation, provided they do not conflict with the plain meaning of the wording used in the regulation. *Shoreham*, ALAB-900, 28 NRC at 288. As was recognized in the *Shoreham* case,

NUREG[s] and similar documents are akin to "regulatory guides." That is, they provide guidance for the staff's review, but set neither minimum nor maximum regulatory requirements. . . . Where such guidance documents conflict or are inconsistent with a regulation, the latter of course must prevail. On the other hand, guidance consistent with the regulations and at least implicitly endorsed by the Commission is entitled to correspondingly special weight.

Shoreham, ALAB-900, 28 NRC at 290 (citations omitted).

In this instance, NUREG-1700, "Standard Review Plan for Evaluating Nuclear Power Reactor License Termination Plans — Final Report" (April 2000), provides guidance on what a "site characterization" is in the context of an LTP. NUREG-1700 does not appear to be inconsistent with 10 C.F.R. § 50.82(a)(9) and (10). Therefore, although we do not find NUREG-1727 to be relevant in this proceeding, we see no reason not to refer to the guidance NUREG-1700 offers on what a site characterization consists of and what might be included in one in order for it to be considered adequate to meet the requirements of section 50.82(a)(9)(ii)(A).

NUREG-1700 states in its introductory Abstract as follows:

This standard review plan (SRP) guides NRC staff in performing safety reviews of license termination plans (LTPs). Although interested parties can use it for conducting their own licensing reviews or developing an LTP, the principal purpose of the SRP is to ensure the quality and uniformity of NRC staff reviews and to *present a well-defined base from which to evaluate the requirements for terminating the license of a nuclear power plant.* . . .

NUREG-1700 at iii (emphasis added); *see also id.* at 2. The section of NUREG-1700 on Site Characterization provides the following guidance:

2. Site Characterization

Site characterization is provided to determine the extent and range of radioactive contamination on site, including structures, systems, components, residues, soils, and surface and ground water. On the basis of the site characterization, the final surveys are conducted to cover all areas in which contamination previously existed, remains, or has the potential to remain. The license should also use the site characterization information to develop input to the dose modeling. As part of the review, the NRC staff should review the licensee's site characterization plans and site records (required under 10 C.F.R. 50.75(g)) to ensure that the site characterization presented in the LTP is complete and that the data were obtained with sufficiently sensitive instruments and using proper quality assurance procedures to obtain reliable data applicable to determining if the site will meet the decommissioning limits. The regulation applicable to this area of review is 10 CFR 50.82(a)(9)(ii)(A).

Acceptance Criteria

The LTP identifies all locations, inside and outside the facility, where radiological spills, disposals, operational activities, or other radiological accidents/incidents that occurred and could have resulted in contamination of structures, equipment, laydown areas, or soils (subfloor and outside area).

The LTP describes, in a summary form, the original shutdown and current radiological and non-radiological status of the site.

The LTP site characterization is sufficiently detailed to allow NRC to determine the extent and range of radiological contamination of structures, systems (including sewer systems and waste management systems), floor drains, ventilation ducts, piping and embedded piping, rubble, contamination on and beneath paved parking lots, ground water and surface water, components, residues, and environment, including maximum and average contamination levels and ambient exposure rate measurements of all relevant areas (structures, equipment, and soils) of the site.

The LTP should identify the survey instruments and supporting quality assurance practices used in the site characterization program.

The LTP is sufficiently detailed to provide data for planning further decommissioning activities, which includes decontamination techniques, projected schedules, costs, waste volumes, dose assessments (including ground-water assessments), and health and safety considerations.

NUREG-1700 at 6.

CDPUC also quotes the following language from section B.5 of NUREG-1700:

Subsurface residual radioactivity is mainly determined by the historical site assessment, with knowledge of how the residual radioactivity was deposited.

The LTP should contain a summary of the structures and locations at the facility that have not been impacted by licensed operation and the basis for that conclusion.

For areas that have been impacted by licensed operation, the LTP should contain a summary of the structures and locations at the facility, including (1) a list or description of each room or work area within each of these structures; (2) a summary of the background levels used

during scoping or characterization surveys; (3) a summary of the locations of contamination (i.e., walls, floors, wall/floor joints, structural steel surfaces, ceilings, etc.) in each room or work area; (4) a summary of the radionuclides present at each location, the maximum and average radionuclide activities in dpm/100cm², and, if multiple radionuclides are present, the radionuclide ratios; (5) the mode of contamination for each surface (i.e., whether the radioactive material is present only on the surface of the material or if it has penetrated the material); (6) the maximum and average radiation levels in mrem/hr in each room or work area; and (7) a scale drawing or map of the rooms or work areas showing the locations of radionuclide material contamination.

NUREG-1700 at 10; CDPUC Contentions at 3-4.

Although NUREG-1700 is clearly directed toward the Staff's review of an LTP, it also provides the Board with guidance on what should be included within a document or portion thereof in order for it to be considered an adequate "site characterization" under 10 C.F.R. § 50.82(a)(9)(ii)(A), in an adjudicatory context, which was the context in the *Shoreham* case. Because it is not binding and does not set "minimum or maximum regulatory requirements," see *IUSA*, CLI-00-1, 51 NRC at 19; *Curators*, CLI-95-1, 49 NRC at 98, 100; *Shoreham*, ALAB-900, 28 NRC at 290, it does not necessarily prevent any party from arguing that other additional or alternative considerations should be taken into account in making an ultimate ruling on the merits of a contention relating to the adequacy of a site characterization. Nevertheless, under the authority of *Shoreham*, *supra*, NUREG-1700 is relevant in determining whether a petitioner has submitted an admissible contention under 10 C.F.R. § 2.714(b)(2).

CDPUC in Contention I.A relies on and quotes from NUREG-1700, and has asserted as fact an "extensive history of unplanned releases at the Haddam Neck Plant" and provided various documents relating to prior contamination events at the plant.⁸ See CDPUC Contentions at 2-5, Attachments 1-4, 6, and 13. In addition, CDPUC has in its introduction to all of its contentions referred to the Staff's RAIs, including those relating to site characterization.⁹ CDPUC Contentions at 2. Such RAIs may be relevant in the adjudicatory process, and may be used to support contentions, provided a petitioner does more than just "rest on

⁸ Although we do not find the conclusions of the FERC administrative law judge to be relevant in this proceeding, the documents that were exhibits in the FERC proceeding deal directly with the "history of unplanned releases" that CDPUC relies on in support of Contention I.A, and we find these documents to be relevant sources on which CDPUC may permissibly rely to establish the fact of such a history.

⁹ The RAIs that the Staff issued on February 1, 2001, include several requests relating to the site characterization, introduced by language indicating that "[t]he comments identified below are presented for the purpose of assessing whether the information presented in the LTP adequately characterizes the radiological conditions of the facility and site." CDPUC Contentions, Attachment 1 at 2 of Enclosure. The comments that follow this introduction include among others requests that CYAPCO "identify 'all' locations, inside and outside the facility, where radiological spills, disposals, operational activities, and other radiological accidents could have resulted in contamination of structures, equipment, laydown areas, and soils (subfloor and outside area)"; as well as requests that it describe the extent and range of radiological contamination of the site in numerous particulars, and "provide the [Historical Site Assessment] HSA for review and revise the reference to include this document, given that the HSA is the primary basis for classifying areas of the site as non-impacted." *Id.* at 3 of Enclosure.

their mere existence.” See *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 350 (1998), *aff’d*, *National Whistleblower Center v. Nuclear Regulatory Commission*, 208 F.3d 256 (D.C. Cir. 2000), *cert. denied*, 121 S. Ct. 758 (2001); see also *Oconee*, CLI-99-11, 49 NRC at 338. CDPUC’s factual assertions and supporting documents, along with its reliance on NUREG-1700, illustrate that CDPUC has done more than just “rest on the mere existence” of the Staff RAIs, or, for that matter, on NUREG-1700.

We conclude that Petitioner CDPUC has provided the necessary explanation of the bases of Contention I.A; sufficient facts, sources, and documents to support the contention; sufficient information to show that a genuine dispute exists with CYAPCO on whether the LTP is adequate in its site characterization under 10 C.F.R. § 50.82(a)(9)(ii)(A) with regard to its historical site assessment and report of historical contamination events; sufficient identification of the asserted failure of the LTP to “contain information on a relevant matter as required by law”; and sufficient “supporting reasons for the petitioner’s belief” in this regard, to render the contention admissible. Although the text of the contention, which asserts an “extensive history of unplanned releases at the Haddam Neck plant,” does not set forth these past events in specific detail, the supporting documents provided by CDPUC certainly do this, including as they do a detailed list of events, an investigation report, and other forms of event reports. And it is clear that Petitioner CDPUC is asserting a failure of the LTP to contain information required by the relevant regulatory section, on which issue there is a genuine dispute with CYAPCO.

We note the assertion of the Staff and CYAPCO that there is no explicit requirement in the rule for a site characterization to contain a comprehensive report of historical contamination events. The Staff’s and Applicant’s view is taken to be that, since there is no specific mention of the words “Historical Site Assessment Report” in the regulation, such a report is not part of what is required by the rule. The term, “site characterization” must, however, be presumed to have some meaning that is reasonable. Taking the dictionary definitions quoted above, a site characterization would at least need to contain a description of the “essential character or quality” of the Haddam Neck plant site. Utilizing this definition, considering the guidance of NUREG-1700 on what sorts of things might be included in at least one way of providing an adequate site characterization, and applying common sense, it is reasonable to conclude that the dispute between CDPUC and the Applicant, over the proper legal interpretation of the term “site characterization” and over what factually must be included to provide an adequate site characterization, constitutes a “genuine dispute . . . on a material issue of law [*and*] fact.” Thus, although section 50.82 is silent on whether or not the HSA report should be part of the LTP, we find that the preceding information, along with the documents and argument provided by CDPUC, and NUREG-1700, provide ample information to suggest that another

reading of section 50.82(a)(9)(ii)(A) than that provided by Staff and the Applicant is sufficiently arguable to support a contention.

Moreover, as also required by 10 C.F.R. § 2.714(b)(2)(iii), CDPUC has clearly identified the asserted failure of the LTP to contain information on the relevant matter of historical contamination events at the site, which under its reading of section 50.82(a)(9)(ii)(a) would be “required by law,” and has provided reasons to support its belief in this regard. In addition, although not necessary to our decision, we note that the Staff’s view of what the Applicant must provide, in order that the Staff can “assess[] whether the information presented in the LTP adequately characterizes the radiological conditions of the facility and site,”¹⁰ supports CDPUC’s arguments in this regard.

Therefore, in light of CDPUC’s showing regarding the central role the HSA results play in the site characterization, final status survey, and ultimate successful restoration of the Haddam Neck plant site to unrestricted use, we are persuaded that the issue of whether an historical site assessment should be provided for public scrutiny is litigable in this case. We thus admit Contention I.A, in a combined form that is spelled out in our ruling on CDPUC Contention I.B, which follows.

e. CDPUC Contention I.B: Adequacy of Site Characterization, Comprehensiveness of List of Unplanned Releases

CDPUC Contention I.B states:

The Site Characterization in the LTP Is Inadequate and Must Be Extensively Supplemented and Modified.

- B. The LTP’s List of Unplanned Release Events Is Incomplete and Inadequate and Must Be Amended and Supplemented to Include a Comprehensive Review of All Such Events.

CDPUC Contentions at 5. CDPUC in this contention challenges the LTP’s listing, in Tables 2-2 and 2-3, of unplanned gaseous and liquid release events, asserting that they are incomplete and misleading as implying comprehensiveness when they are not so. CDPUC also contends that, in terms of cleanup efforts that will be required, the LTP’s characterization of a 1984 unplanned release as the “most significant” event is misleading. *Id.* at 5-6. CDPUC asserts as fact that substantial unplanned liquid releases into unmonitored drains and soil migrated outside the Radiologically Controlled Area (RCA) to previously uncontaminated areas, which would be likely to have a greater impact on the

¹⁰ See note 9 *supra*.

scope of decommissioning¹¹ than the 1984 release, which was confined to already contaminated areas. *Id.* at 6. In support of this contention CDPUC refers to two of the same exhibits from the FERC proceeding that it relies upon with regard to Contention I.A, *see id.* at 6, Attachments 3, 4, and again to NUREG-1700, to the first of the Acceptance Criteria quoted above in the discussion of Contention I.A, which provides that “[t]he LTP identifies all locations, inside and outside the facility, where radiological spills[, etc.,] occurred and could have resulted in contamination” NUREG-1700 at 6.

CYAPCO argues that Contention I.B should be excluded because there is no requirement in the LTP rule for the items at issue in the contention, and because the contention does not assert that CYAPCO failed to take account of any incident that should have been evaluated. CYAPCO states that it has in fact taken into account “*all known events of unplanned release, both liquid and gaseous*” (emphasis in original), and also states in a footnote that the problem with the two tables is that the LTP is “less clear than was intended that the tables are intended to be illustrative, not comprehensive.” CYAPCO Response to CDPUC Contentions at 8 n.9. The solution CYAPCO proposes for this problem is to make the textual language surrounding the tables “more explicit on their limitation” or simply to delete the tables, relief that would be a mere “formalistic redraft of the plan,” citing *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 9 (1996), for the principle that a contention calling for such relief is not admissible. CYAPCO Response to CDPUC Contentions at 8 n.9.

The Staff objects to the admission of this contention “for many of the same reasons given . . . with regard to I.A,” including the nonprescriptive nature of NUREG-1700. Staff Response to Contentions at 23. The Staff also argues that CDPUC fails “to make any showing that the alleged omissions would cause the LTP to be in violation of 10 C.F.R. § 50.82,” and that the relief sought — a “Comprehensive Review” of all unplanned release events — is “inadequately supported by the facts submitted, thus rendering the contention inadmissible pursuant to section 2.714(b)(2)(iii).” *Id.* The Staff argues that under section 50.82, “the LTP will be approved by the Commission if it demonstrates that the remainder of decommissioning activities will be performed in accordance with the regulations in that chapter, will not be inimical to the common defense and security or to the health and safety of the public.” *Id.* The Staff’s reference is taken to be to section 50.82(a)(10); no reference is made to the provisions or substance of section 50.82(a)(9). Staff Counsel also, during oral argument,

¹¹ CDPUC’s reference to decommissioning appears to be intended as a reference to the cleanup part of the termination process, based on the reference to “cleanup efforts that will be required during decommissioning,” CDPUC Contentions at 6. The reference is therefore taken as such, and not as an inappropriate reference to any “decommissioning” activities that would arguably be outside the scope of the LTP proceeding under the present LTP rules governing this proceeding.

questioned CDPUC's failure to tie the alleged omission to a specific consequence. Tr. 153.

RULING: CDPUC CONTENTION I.B

As in our analysis on Contention I.A, we begin with interpretation of the rule and a look at what it reasonably requires. And again, although CYAPCO correctly asserts that no part of the rule explicitly states that an LTP must contain a comprehensive list of unplanned releases, the term "site characterization" must be presumed to have some meaning that is reasonable. The dictionary definitions quoted above indicate that a site characterization would need to contain at least a description of the "essential character or quality" of the Haddam Neck plant site. Applying this reasoning and considering the guidance of NUREG-1700, we find the argument, that a demonstrably incomplete listing of arguably significant events might be an indication not merely of an omission correctable by a "formalistic redrafting" but of a more substantive inadequacy that would not be resolved by either of the methods posited by CYAPCO, to be one that rises at least to the level necessary to support a contention.

Based upon the preceding analysis, as well as that contained in our ruling on Contention I.A, we find that CDPUC's demonstration of the LTP's omission of significant events such as unplanned releases, which CDPUC alleges and supports with relevant documents, could arguably indicate an inadequate site characterization, at least to the extent necessary to show, with regard to Contention I.B, a "genuine dispute on a material issue of law [and] fact," as required by 10 C.F.R. § 2.714(b)(2)(iii). Moreover, CDPUC makes specific reference to Tables 2-2 and 2-3 and gives reasons for its belief that they fail to contain complete information about unplanned releases on site, which would, based upon the same reasoning, arguably be a "fail[ure] to contain information on a relevant matter as required by law," under 10 C.F.R. § 2.714(b)(2)(iii).

We find that the Staff's argument, that the contention fails to tie the alleged omissions to some consequence by showing that the alleged omissions would cause the LTP to be in violation of 10 C.F.R. § 50.82, with apparent reference solely to subsection (a)(10), overlooks and in effect nullifies the provisions of subsection (a)(9), which, again, must be presumed to have some meaning. We find it at least arguable that violation of a provision of 10 C.F.R. § 50.82(a)(9) — which, we note, at subsection (ii) uses the words "[t]he [LTP] *must include*" — would constitute a significant, if not presumptive, indication of a possible violation of a provision of 10 C.F.R. § 50.82(a)(10). If, as CDPUC argues, the site characterization of the LTP is inadequate, then it is likely, as CDPUC also argues, that those areas not covered by the site characterization might be omitted or given inadequate attention in cleanup efforts and the final status survey, which would in turn indicate that the LTP has not

demonstrate[d] that the remainder of decommissioning activities [1] will be performed in accordance with the regulations in this chapter, [2] will not be inimical to the common defense and security or to the health and safety of the public, and [3] will not have a significant effect on the quality of the environment

10 C.F.R. § 50.82(a)(10). The relief, should CDPUC prevail on the merits of this contention, would be to deny the LTP or condition its approval on completion of an adequate site characterization.

As with Contention I.A, we conclude that Petitioner CDPUC has provided the necessary explanation of the bases of Contention I.B; sufficient facts, sources, and documents to support the contention; sufficient information to show, as indicated above, that a genuine dispute exists with CYAPCO on the combined legal/factual issue of whether the LTP is adequate in its site characterization under 10 C.F.R. § 50.82(a)(9)(ii)(A) with regard to its listing of unplanned gaseous and liquid releases; sufficient identification of the asserted failure of the LTP to “contain information on [this] relevant matter” as arguably “required by law”; and sufficient “supporting reasons for the petitioner’s belief” in this regard, to render the contention admissible.

We therefore admit CDPUC Contention I.B. Because, however, the issues raised by CDPUC’s Contentions I.A and I.B are so closely interrelated, we find that litigating them in a combined form will be more efficient, and thus admit them in the following consolidated form, as Contention I.A/B:

The Site Characterization in the LTP Is Inadequate in Its Historical Assessment of Contamination Events on Site, Including Unplanned Release Events.

During further proceedings on this contention, the parties may, in addition to presenting evidence on Contention I.A/B as restated, present evidence and argument on the scope of additional information that should be included in the site characterization.

f. CDPUC Contention I.C: Adequacy of Site Characterization, Reliability of Monitoring of Radiological Releases During Operations

CDPUC Contention I.C states:

The Site Characterization in the LTP Is Inadequate and Must Be Extensively Supplemented and Modified.

- C. The LTP Does Not Analyze the Implications for License Termination of Unreliable Monitoring of Radiological Releases During Operations, and It Must Be Revised to Include a Thorough Evaluation.

CDPUC Contentions at 7. CDPUC asserts that there were three licensee event reports (LERs) submitted in 1997, after the plant had been permanently shut down, which are inconsistent with a statement in the LTP that “[r]eleases were monitored in accordance with the requirements of the plant Technical Specifications.” *Id.* quoting LTP § 2.2.4.1 at 2-7.

It appears to be undisputed that there were in fact three events in 1997 involving a series of radioactivity monitors that were discovered to have failed to record accurately the correct values for releases. It is also undisputed that, “[f]or operational purposes, these defects could have presented major issues . . . and the use of incorrect data could potentially have the effect of skewing site characterization results.” CYAPCO Response to CDPUC Contentions at 9. According to CYAPCO, however, after the problem was detected the data from the monitors were “corrected to the results that should have been produced by properly calibrated devices,” and indeed, “[i]t turned out that during operations all significant release events were monitored, no dose limits were exceeded and no required actions were omitted.” *Id.* at 9-10. A revised LER was issued, which CYAPCO states leads to a conclusion that “the problems associated with the inaccurate monitoring of liquid and gaseous releases had no impact on the characterization of the site.” *Id.* at 9 n.10. CYAPCO has informed CDPUC of this LER, but it has not been made part of the LTP as far as we are aware.

CDPUC questions CYAPCO’s statements that the events were in effect reconstructed and corrected, and contends that in 1979 and 1980 there were releases that most likely came through the vent stacks where the faulty monitors were located and that have not been sufficiently analyzed for purposes of the site characterization of the LTP. Tr. 159. In support of its contention CDPUC has provided a document prepared by CYAPCO in 1980, entitled, “Investigation of the Source of the Radioactive Contamination Found on the Connecticut Yankee Site March 10-30, 1980.” This document contains references to two instances of contamination at levels “slightly above that allowable by NRC regulations in nonradiological controlled areas” and the statement that the “more likely method of transfer from the RCA” of various forms of radioactive contamination found at various locations on the site was “material being ejected from the primary vent stack.” CDPUC Contentions, Attachment 6, at CY0015488, CY0015513. Finally, arguing that under the “Multi-Agency Radiation Survey and Site Investigation Manual (MARSSIM),” NUREG-1575, Rev. 1 (Aug. 2000),¹² the standard for site characterizations is that all areas are initially considered Class 1 areas unless the licensee provides some basis for reclassification as either Class 2, 3, or

¹²It is undisputed that CYAPCO agrees that it will comply with MARSSIM standards. Tr. 119. However, CYAPCO argues that MARSSIM does not define what is to be contained in an LTP, Tr. 177, in effect arguing that although MARSSIM may require a particular action and analysis, a licensee is not required to state the action or analysis in the text of the LTP. We address this argument as necessary insofar as it relates to particular issues, in the context of these issues as they arise in the text.

nonimpacted, *see* MARSSIM § 4.4 at 4-11, CDPUC contends that CYAPCO must specifically address the monitor malfunctions in its site characterization, both specifically with regard to any area CYAPCO has classified as nonimpacted, and generally, to meet its burden under the MARSSIM standard. Tr. 161.

The Staff opposes Contention I.C, arguing that the relief sought is “far out of proportion to, and thus unsupported by, the evidence put before th[e] Board.” Staff Response to Contentions at 24. The Staff asserts that “[t]here is no factually supported showing here of any likelihood that the entire site could be radiologically contaminated, or that it must be assumed that the malfunctions occurred over the entire operating lifetime of the facility,” nor is there evidence “to show that [the East Site Grounds, which have been designated as nonimpacted,] in particular are contaminated.” *Id.* Staff also asserts the importance of considering the context of the subject matter of the contentions, citing the Commission’s SOC for the 1996 LTP rule, and stating that it is important to keep in mind that, because during decommissioning “the potential for consequences that could result from an inadvertent nuclear reaction are highly unlikely” and “the activities performed by the Licensee during decommissioning are not likely to have a significant potential to impact public health and safety,” the oversight of a reactor during decommissioning activities is at a significantly different and in effect less stringent magnitude than that required during operation of a reactor. Tr. 165-66.

RULING: CDPUC CONTENTION I.C

We find that CDPUC Contention I.C is admissible, at least in the sense of presenting “‘sufficient information to show a genuine dispute’ and reasonably ‘indicating that a further inquiry is appropriate.’” *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 249 (1996); 54 Fed. Reg. at 33,171. Although CYAPCO has provided a somewhat detailed explanation of the events that are the subject of the contention in footnote 10 of its Response to CDPUC’s contentions, this constitutes in effect arguing the merits of the subject matter of the contention, which is not at issue at this point, absent a showing that would indicate, pursuant to 10 C.F.R. § 2.714(d)(2)(ii), that “[t]he contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief.”

CDPUC has provided the three 1997 event reports, along with the 1980 investigation report, to support its contention that the LTP site characterization is inadequate in its analysis of the implications for license termination of unreliable monitoring of radiological releases during operations. In response to CYAPCO’s footnote 10, CDPUC Counsel argues that the explanation is inadequate because the plant’s resolution of the events “focused on a resolution with regard to whether off-site doses were below technical specification limits . . . [but] doesn’t necessarily say anything about the on-site releases,” and because the 1980 report

specifically identified the release of radioactive particles from “the very stack that was supposed to be monitored for particles,” which were “distributed over a fairly wide range of the site.” Tr. 169.

Although we agree with all parties including CDPUC and CAN that the outcome of a more in-depth analysis of the events in question may well indicate that no problems remain as a result of the events in question, and although there is no dispute that the magnitude of appropriate oversight of a plant during decommissioning is lower than that during plant operations, we also note again the Commission’s statement in the SOC for the regulation that “[t]he *site characterization*, description of the remaining dismantlement activities and plans for site remediation are *necessary* for the NRC *to be sure* that the licensee will have adequate funds to complete decommissioning and *that the appropriate actions will be completed by the licensee to ensure that the public health and safety will be protected.*” 61 Fed. Reg. at 39,289 (emphasis added). In light of this, and based upon our previous analysis on the interpretation of the regulatory term, “site characterization,” and related matters, we find that CDPUC has raised an admissible contention in Contention I.C, by providing the necessary explanation of the bases of the contention; sufficient facts, sources, and documents to support the contention; sufficient information to show that a genuine dispute exists with CYAPCO on whether the LTP is adequate in its site characterization under 10 C.F.R. § 50.82(a)(9)(ii)(A) with regard to its analysis of the monitoring defects described in the license event reports; sufficient identification of the asserted failure of the LTP to “contain information on a relevant matter as required by law”; and sufficient “supporting reasons for the petitioner’s belief” in this regard, to warrant further inquiry and render the contention admissible.

We therefore admit Contention I.C.

g. CDPUC Contention I.D: Adequacy of Site Characterization, Fuel Failures, and Likelihood of Alpha Contamination

CDPUC in Contention I.D challenges the adequacy of the site characterization in its alleged failure to give sufficient attention to two “significant fuel failure events in 1979 and 1989.” The contention states:

The Site Characterization in the LTP Is Inadequate and Must Be Extensively Supplemented and Modified.

D. The LTP Does Not Adequately Describe and Evaluate the Impact of Fuel Failures and the Likelihood of Alpha Contamination.

CDPUC Contentions at 8. CDPUC asserts that, although the LTP acknowledges two significant fuel failure events in 1979 and 1989, LTP § 2.2.4.2.3, it does not adequately describe or analyze the impact of these fuel failures and the

associated likelihood of alpha particle contamination. CDPUC contends that the “increase in the level of alpha emitting radionuclides in the Reactor Coolant System,” coupled with unplanned release events and “primary-to-secondary leakage events, raise the possibility of alpha particles anywhere on the site.” *Id.*; CDPUC Contentions at 8. CDPUC provides support for this alleged fact through the plant’s investigation report, *id.* Attachment 6; other plant memoranda and reports, *id.* Attachments 8, 9, 10; and the testimony, in a FERC proceeding, of a “long-time [CYAPCO] radiological technician” who has a Bachelor’s Degree in Radiation Protection and certification from the National Registry of Radiation Protection Technologists, that transuranic and alpha particles were to be found “all over” the plant. *Id.* at 8, Attachment 7 at 50-51.

CDPUC asserts that, because of the plant’s history, the LTP should be required to specify (1) the conditions under which CYAPCO will use instruments to measure both alpha and beta radiation (citing LTP § 5.7.2.1, which allegedly fails to specify such conditions); (2) the criteria for “cases where alpha scan surveys” will be required (citing LTP § 5.7.2.4.3, which allegedly fails to specify such criteria); and (3) the steps that will be taken to detect alpha particles on scabbled or porous surfaces (citing LTP § 5.7.3.1, which allegedly fails to specify such steps). *Id.* at 9.

CYAPCO opposes the contention, asserting a lack of basis, stating in some detail what the plant has done with regard to alpha particles, asserting that “hot particles” are unrelated to the sections of the LTP to which CDPUC refers, and citing *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-99-14, 49 NRC 238, 252 (1999), for the proposition that the instrumentation issues raised by CDPUC are implementation issues outside the scope of the LTP proceeding. CYAPCO Response to CDPUC Contentions at 11-14. The Staff opposes this contention, arguing that it lacks adequate factual support and that the relief sought is disproportionate to the facts alleged. Staff Response to Contentions at 25.

RULING: CONTENTION I.D

We find the subject matter of Contention I.D to overlap with that of Contention I.A, in that information relating to the fuel failures would be part of a complete historical assessment of the site, and with that part of Contention I.E relating to fuel failures. CDPUC also connects this issue with the unplanned release events that are the subject of its Contention I.B. Therefore, although we do not admit Contention I.D as stated, we will, in the interest of more efficient resolution of these related subjects, permit the allegations supporting Contention I.D to be litigated under CDPUC Contentions I.A/B and I.E (which we admit below), to the extent that such evidence bears upon those contentions and is otherwise admissible.

h. CDPUC Contention I.E: Adequacy of Site Characterization, Justification for Initial Area Classifications

CDPUC Contention I.E states as follows:

The Site Characterization in the LTP Is Inadequate and Must Be Extensively Supplemented and Modified.

- E. The LTP Does Not Provide Adequate Justification for Its Initial Area Classifications, and Those Classifications Must Be Changed.

CDPUC Contentions at 9. As was noted relative to Contention I.D above, CDPUC asserts that the LTP's description of Class 1 areas is inconsistent with the relevant MARSSIM requirement, and argues that CYAPCO has a burden to provide justification in the LTP for "any lesser scrutiny classification than Class 1" under MARSSIM's specification that "all areas are initially considered Class 1 areas unless some basis for reclassification as non-impacted, Class 3, or Class 2 is provided." *Id.* at 10; MARSSIM § 4.4 at 4-11. CDPUC provides examples of eleven specific area classifications in the LTP that it challenges. CDPUC Contentions at 11-13.

The Staff does not oppose the admission of this contention with regard to its calling for reclassification of these eleven areas, stating that "[i]n all instances CDPUC provides factual background to substantiate the assertions of incorrect classifications." Staff Response to Contentions at 25-26. CYAPCO agrees that the contention provides sufficient basis for six of the eleven areas and does not oppose the contention with regard to them. CYAPCO Response to CDPUC Contentions at 14-20.

The areas that both the Staff and CYAPCO agree are the subject of an admissible contention are:

Area 9522 (part of the "Woodland Areas East of the Plant"), which CDPUC asserts has been erroneously classified as Class 2.

Area 9308 ("Southeast Industrial Area") which CDPUC asserts has been erroneously classified as Class 2.

Area 9106 (Discharge Canal) which CDPUC asserts has been erroneously classified as Class 2.

Area 9508 (Pond) which CDPUC asserts has been erroneously classified as Class 3.

Area 9527 (East Mountain Side) which CDPUC asserts has been erroneously classified as Class 2.

Area 9535 (South East Landfill Area) which CDPUC asserts has been erroneously classified as Class 2.

CDPUC Contentions at 11-13; Staff Response to Contentions at 26; CYAPCO Response to CDPUC Contentions at 15-20. The remaining areas in contention in CDPUC I.E (quoting the actual language of CDPUC with regard to each) are:

Survey Area 1404, Unit Code 5 (Fuel Building East and West Walls) is initially assigned to Class 3 (LTP Table 2-6 at page 2-26), but it is between two Class 1 areas, thus warranting classification as at least Class 2.

Survey Area 3403 (Containment Enclosure Inside Surfaces) is assigned to Class 2 (LTP Table 2-6 at page 2-30), but there is no justification or basis provided for deviating from a Class 1 designation inside Containment. The Characterization Report does not even separately analyze this survey area (Attachment 15 (Characterization Report, Section 2)), and there is no explanation in the LTP for this classification.

Survey Area 9406 (South Warehouse) is assigned a Class 3 initial designation (LTP table 2-6 at page 2-36), but its historical use as a storage area for radioactive materials (Attachment 16 (Characterization Report Section 334 at 2)) necessitates reclassification as at least Class 2.

There is no justification for classification of Survey Area 9521 (adjacent to the "leach field", Survey Area 9522) as Class 3 when the LTP provides no basis for this designation and this area is inexplicably omitted entirely from the Characterization Report. *See* Attachment 17 (Characterization Report Table of Contents).

As noted [with regard to Contentions I.C and I.D], because of the apparent inoperability of stack particulate monitors and the history of hot particles and fuel failures, there is no basis in the LTP for identifying Survey Area 9532 as non-impacted (LTP Table 2-6 at page 2-37).

CDPUC Contentions at 12-13. CYAPCO argues that the contention with regard to area 9521 is inadmissible; agrees that areas 1404, 3403, 9406, and 9532 are admissible in scope; but argues that they are not supported by adequate bases. CYAPCO Response to CDPUC Contentions at 16-20.

CDPUC's challenge to the classification of survey area 1404, the east and west exterior walls of the fuel building, as Class 3 is based upon the fact that the walls are between two Class 1 areas, the roof of the building, and ground level in the area of the building. CDPUC Contentions at 12, Tr. 171-72. Noting the LTP's definition for Class 3 as "[a]ny impacted areas that are not expected to contain any residual radioactivity, or are expected to contain levels of residual radioactivity at a small fraction of the DCGL, based on site operating history and previous radiological surveys," and noting as well CYAPCO's asserted justification for the classification being that "one would not expect airborne particles to cling to the side of this wall, at least not after a moderate rain shower," CDPUC asserts that "there are undoubtedly some crevasses and crannies on the wall that would be capable of holding contamination that [came from] either the roof or the ground." Tr. 172. In addition, CDPUC notes that at least one side of the fuel building in question was used as a cask wash-down area, which would, it is asserted, "have permitted contaminated particles to be put onto the wall during

that cask wash-down process.” All this leads the State to contend that area 1404 should be classified as at least Class 2. Tr. 172-73.

CDPUC’s challenge to the classification of survey area 3403, the containment enclosure inside surfaces, as Class 2 is based upon CYAPCO’s asserted lack of justification or basis for deviating from a Class 1 classification under its MARSSIM. CDPUC Contentions at 12; Tr. 175. CDPUC refers to the Characterization Report submitted as Attachment 15 to its contentions in support of this part of Contention I.E, asserting that it does not separately analyze this survey area, which is asserted to be “inside Containment.” *Id.*

CDPUC’s challenge to the classification of survey area 9406, the “South Warehouse,” as Class 3 is based upon the historical use of this area for the storage of radioactive materials. As support for this argument CDPUC refers to and attaches a document entitled “South Warehouse Radiological and Hazardous Material Characterization Report,” in which the past usage of a part of this warehouse as a controlled Radioactive Materials Area (RMA) is discussed. CDPUC asserts that the prior use of the area for such storage warrants classifying this area as at least Class 2. CDPUC Contentions at 13, Attachment 16. In oral argument, CDPUC Counsel noted with regard to the South Warehouse the MARSSIM definition for Class 2, as “hav[ing], or [having] had prior to remediation, a potential for radioactive contamination or known contamination, but . . . not expected to exceed the DCGL_w.” Tr. 187; *see also* MARSSIM § 4.4 at 4-12.

CDPUC’s challenge to the classification of survey area 9521 as Class 3 is based upon an asserted lack of justification, by virtue of the LTP providing no basis for the designation and the omission of the area from the Characterization Report. CDPUC Contentions at 13. Counsel stated during oral argument that area 9521 was immediately adjacent to an area known during plant operations as the “leach field,” in which “the outfall came from liquid releases, particularly within the radioactively controlled area.” Tr. 195. Relying on the absence of any justification being provided in the LTP for classifying area 9521 as Class 3 in light of this proximity, CDPUC argues that the classification for this area should be “at least Class 2.” *Id.*

CDPUC’s challenge to the classification of survey area 9532 as nonimpacted is based upon “the apparent inoperability of stack particulate monitors and the history of hot particles and fuel failures” at the Haddam Neck plant, which are asserted to lead to the conclusion that there is no basis for identifying area 9532 as nonimpacted. Noting that the significance of characterizing an area as nonimpacted is that this will result in its never being surveyed for radiation, Tr. 116; *see also* Tr. 224-25 (Staff indicates nonimpacted area surveys not generally done), CDPUC argues that, although all areas are subject to reclassification as additional surveying is done and new information comes to light, any change of

a nonimpacted classification would be based only on new information, since it is not required to be resurveyed. Tr. 219.

RULING: CDPUC CONTENTION I.E

Giving due regard to CYAPCO's objections with regard to some of the areas used by CDPUC as examples in Contention I.E, we find that CDPUC has provided sufficient basis for the contention, supported by sufficient facts and information to show a genuine dispute on material issues as required in 10 C.F.R. § 2.714. CDPUC's references to MARSSIM and to various historical information provide the support necessary to render the contention admissible, and we therefore admit CDPUC Contention I.E.

i. CDPUC Contention I.F: Adequacy of Site Characterization, Buried Piping and Drains

CDPUC in Contention I.F asserts that the LTP does not adequately characterize buried piping and drains where contamination is likely to be found. The contention reads:

The Site Characterization in the LTP Is Inadequate and Must Be Extensively Supplemented and Modified.

F. The LTP Does Not Characterize — or Even Describe Reliable Methods for Characterizing — Buried Piping and Drains and Must Be Modified to Include Such Characterization.

CDPUC Contentions at 13. CDPUC asserts that the LTP does not characterize the full length of buried drains and pipes but relies instead on measurements at traps and other access points. *Id.* at 13-14 (citing LTP §§ 5.4.6.5, 5.6, 5.7.3.1.2, and 5.7.3.2.5). CDPUC supports this contention with documents relating to unplanned liquid and stack particulate releases, drains, pipes, and tanks. *Id.* at 14, Attachments 3, 18-24. It asserts that, although some cleanup has been done at easily accessible locations, no attempt has been made to identify and remove remaining contamination. Further, while acknowledging that the LTP says "pipe crawlers" may be employed, CDPUC declares that there is no indication this method will be used to determine the full length of underground contamination.

The significance of such omissions, according to CDPUC, is that the LTP has not adequately addressed the possibility that numerous unplanned releases over the life of the plant deposited contaminants in the drains and pipes, which will not be discovered and remedied unless there is a "thorough, full-length characterization for all underground piping and drains to establish a baseline for determining the extent of decommissioning activities that must be undertaken and for defining the scope of the Final Status Survey." *Id.* at 14. CDPUC asserts

that it is not arguing that all the buried piping must be removed, merely that such piping and the surrounding soil must be characterized in order to proceed with the final status survey. Tr. 245-46.

CYAPCO recognizes that all the buried piping has not been characterized, Tr. 247, but points out that the LTP, pragmatically, provides that:

In the case of such piping systems, CY will characterize the entire run based on data collected at traps and other access points *if the circumstances permit one to conclude that the latter describes the former.*

In other cases, CY will make a decision (based on pragmatics and economics) either:

- To remediate and take final status survey data from the run itself, or
- To proceed directly to remove the system.

CYAPCO Response to CDPUC Contentions at 21 (citing LTP § 2.3.3.1.1) (emphasis in original). CYAPCO also asserts that the contention amounts to a technical conclusion that the piping systems are contaminated and incapable of decontamination. It concludes that some buried piping may be contaminated and some may not, that some may be capable of being decontaminated and others may not, and that Contention I.F is based not on facts but on “broad *a priori* conclusions not supported by either data or analysis.” *Id.* at 22.

The Staff opposes Contention I.F, arguing that “[w]hile CDPUC makes general statements regarding contamination onsite, it does not allege sufficient facts to support its allegation that the proposed use of measurements at traps and other access points will be inadequate to determine the extent of contamination,” and that CDPUC’s evidence of releases at the site is “not sufficient to support the broad claim that the full length of drains and pipes must be examined for characterization.” Staff Response to Contentions at 26-27. Thus, the Staff asserts, CDPUC has failed to provide “sufficient detail to show that there exists a genuine dispute on an issue of material law or fact pursuant to 10 C.F.R. § 2.714(b)(2)(iii).” *Id.* (citing *Private Fuel Storage*, LBP-98-7, 47 NRC at 180-81; *Yankee Atomic*, CLI-96-7, 43 NRC at 248-49).

RULING: CONTENTION I.F

CDPUC supports this contention with various reports relating to unplanned releases, drains, pipes, and tanks. It does not suggest specific methods but seeks characterization of the “full length” of drains and pipes,” and “modification” of the LTP to include characterization of buried piping and drains. CDPUC Contentions at 13-14, Attachments 3, 18-24. On its face, we observe, this contention is similar to the Staff’s request for additional information on drains and piping, which states:

Describe the extent and range of radiological contamination (i.e. types and activity) of structures, systems (including sewer systems and waste management systems), floor drains, . . . piping and embedded piping . . .

CDPUC Contentions, Attachment 1 at 3 of Enclosure (referenced in Introduction to CDPUC Contentions).

CDPUC has explained the bases of its contention briefly, to the effect that the measurement methods utilized and planned to be utilized by CYAPCO do not adequately characterize the piping and drains; it has provided alleged facts concerning releases into pipes and drains, and documents to support these facts; and it has provided information, including its Attachment 1 with the Staff's RAI relating to drains and piping, sufficient to show that there is a genuine dispute with CYAPCO on the material matter of whether the piping and drains have been characterized adequately to meet the requirements of 10 C.F.R. § 50.82(a)(9)(ii)(A). Our analysis on interpretation of this section and the term "site characterization" is stated above and is incorporated herein.

We find that enough has been shown by CDPUC to support an admissible contention to litigate. As stated by the Commission in *Yankee*:

Although section 2.714 imposes on a petitioner the burden of going forward with a sufficient factual basis, it does not shift the ultimate burden of proof from the applicant to the petitioner. . . . Nor does section 2.714 require a petitioner to prove its case at the contention stage. For factual disputes, a petitioner need not proffer facts in "formal affidavit or evidentiary form," sufficient "to withstand a summary disposition motion." . . . On the other hand, a petitioner "must present sufficient information to show a genuine dispute" and reasonably "indicating that a further inquiry is appropriate."

Yankee, CLI-96-7, 43 NRC at 249. We conclude that further inquiry is appropriate based upon what CDPUC has provided at this point, and therefore admit Contention I.F.

j. CAN Contention 1.1: Adequacy of Site Characterization, Information on Extent of Contamination on Site

In its Contention 1.1, CAN asserts that:

[CYAPCO's] site characterization is inadequate. Under NRC regulations at 10 CFR 50.82, CYAPCO should withdraw the LTP or the Board in this matter should order that the LTP as submitted is rejected and the application for a license amendment is disapproved. Although CYAPCO met the threshold requirement of NUREG-1700 and 10 CFR 50.82(a)(9) merely by submitting a License Termination Plan to NRC for review, the supporting site characterization and LTP are so lacking in explicit information concerning the extent of contamination on site that the submitted LTP cannot be approved under the license amendment. Moreover, the 272 page Millenium Site Characterization Report which was submitted after the LTP was

issued and after the public hearing on the LTP, is hardly a comprehensive site characterization, having, for example, too few data points.

CAN Contentions at 2. In support of the contention, CAN offers the expert testimony of Dr. Marvin Resnikoff, who opines that the LTP, “instead of being site specific, as required under 10 CFR Parts 50 and 51, is merely a ‘generic’ or ‘textbook’ form that could apply to any site.” *Id.* at 3. CAN also relies on NUREG-1700 and quotes a Staff RAI stating that “the LTP must be sufficiently detailed to permit the staff to independently verify that the facility can be decommissioned safely and the license can be terminated,” and that “[t]he description of the current radiological status of the site is not adequate because it does not provide sufficient information to allow the staff to fully understand the types and levels of radioactive material contamination at the site.” *Id.* at 2-3.

CAN alleges as examples of the inadequacy of the site characterization “the impact of failed fuel and primary to secondary leakage events in light of the potential for the existence of transuranics (TRU) and hard-to-detect nuclide (HTDN) contamination of soils, waters and structures,” and “gross alpha contamination above drinking water standards,” among others. *Id.* at 3-4. CAN also asks that this proceeding be delayed until after CYAPCO has provided sufficient information for the LTP to be reviewed by Staff. *Id.* at 5.

CYAPCO opposes this contention because, among other things, the present site characterization is merely an “initial” site characterization, the contention as framed is too broad to meet the contention requirements of section 2.714, and there is no reference to specific portions of the LTP. CYAPCO Response to CAN Contentions at 5-6. The Staff opposes the contention, arguing a lack of factual support, and that EPA drinking water standards are not relevant to NRC decommissioning regulations. Staff Response to Contentions at 6.

RULING: CAN CONTENTION 1.1

We find CAN Contention 1.1 to be inadmissible. We note, as Staff argues, that the EPA drinking water standard was intentionally not adopted by the NRC. *See* 62 Fed. Reg. 39,058, 39,074-75 (1997). With regard to the request to delay the proceedings, as indicated above, this has been resolved otherwise, based upon the authority of *Calvert Cliffs*, CLI-98-25, 48 NRC at 351 n.12. Finally, we deny the contention for failing to comply with the requirement of 10 C.F.R. § 2.714(b)(2)(iii) that support for a contention must include “references to specific portions of the application,” in this case the LTP.

k. *CAN Contention 1.2: Adequacy of Site Characterization, Supporting Documentation*

CAN asserts in Contention 1.2 as follows:

CYAPCO's LTP is in violation of 10 CFR 50.82(a)(9)(ii)(A), as it lacks a sufficient site characterization, as well as additional supporting documentation and information required by 10 CFR 50.75(g). As a result, CYAPCO cannot demonstrate that it can assure the level of protection of public health and safety required under 10 CFR 50.82.

CAN Contentions at 5. CAN provides several arguments on the various ways in which the LTP does not meet the criteria of NUREG-1700 and other asserted requirements, but, as Staff notes, again does not point to specific portions of the LTP. Staff Response to Contentions at 8.

RULING: CAN CONTENTION 1.2

We therefore find CAN Contention 1.2 inadmissible for its failure to comply with 10 C.F.R. § 2.714(b)(2)(iii).

l. *CAN Contention 1.3: Adequacy of Site Characterization, Effect on Final Status Survey*

In Contention 1.3 CAN asserts that:

Contrary to the requirements of 10 CFR 50.82, NUREG-1727, and NUREG-1700, CYAPCO's site characterization, and, consequently, its Final Status Survey, are insufficient in specificity to determine the extent and range of on-site radiological contamination. As a result, CY cannot demonstrate that it can assure the level of protection of occupational and public health and safety that 10 CFR 50.82 requires.

CAN Contentions at 7.

In support of Contention 1.3, CAN offers the testimony of nuclear energy expert James K. Joosten from the previously mentioned FERC proceeding, along with documents related to various events at the plant, and some Staff RAIs. *Id.* at 8-12.

RULING: CAN CONTENTION 1.3

Again, CAN's contention fails to include references to specific portions of the LTP and is therefore inadmissible.

m. CAN Contention 1.4: Adequacy of Site Characterization, Extent of Transuranic, Hard-to-Detect Nuclide (HTDN), and “Hot Particle” Contamination

In Contention 1.4 CAN states:

Contrary to the requirements of 10 CFR 50.82 and NUREG-1700, CYAPCO’s site characterization and LTP lack explicit information concerning the extent of transuranic, Hard-To-Detect Nuclides (HTDN), and “hot particle” contamination. Contrary to NUREG-1700, the LTP is not sufficiently detailed to permit the staff to independently verify that the facility can be decommissioned safely and the license can be terminated for unrestricted use.

CAN Contentions at 13. In support of Contention 1.4, CAN offers Dr. Resnikoff’s statement, Mr. Joosten’s testimony, the testimony of a CYAPCO Health Physics supervisor, and fairly detailed facts on the subject of the contention. *Id.* at 13-19.

RULING: CAN CONTENTION 1.4

Again, however, Contention 1.4 fails to include references to specific portions of the LTP and is therefore inadmissible.

n. CAN Contention 1.5: Adequacy of Site Characterization, Methodology for Detection and Cleanup of Transuranic, HTDN, and “Hot Particle” Contamination

In Contention 1.5 CAN asserts that:

CYAPCO’s LTP is insufficient in providing the methodology that will insure adequate detection and cleanup of transuranics (TRU), “hot particles,” and hard-to-detect-nuclide (HTDN) contamination. Contrary to the requirements of 10 CFR 50.82, the measurement methodology CYAPCO provides in its LTP Site Characterization and Final Site Survey Plan to determine alpha and beta emitting radioactivity, “hot particles,” and HTDN, is not adequate to demonstrate that public and occupational health and safety will be protected.

CAN Contentions at 19-20. CAN also contends that “laboratory soil analysis must be done to specifically measure for gross alpha contamination over the entire 500-acre site.” *Id.* at 25.

In support of Contention 1.5, CAN offers Dr. Resnikoff’s and Mr. Joosten’s testimony, along with the statement of a CYAPCO health physicist, and references to MARSSIM and other documents, all of which present in some detail facts and expert opinion on the extent of contamination at the site and the adequacy of the methods CYAPCO indicates it will use to analyze it, including surrogate analysis. *Id.* at 20-22. CAN asserts a genuine dispute with CYAPCO on whether the LTP provides adequate supporting data and methodology to determine whether the

LTP is adequate to ensure a cleanup sufficient to protect health and safety. *Id.* at 26. In addition, CAN refers to two specific portions of the LTP, at 5-15 and 2-11.

CYAPCO opposes this contention, asserting that the use of surrogate measurements is a “well-established practice,” summarizing the phases of the final survey process, stating that CAN cites “nothing that says that such a process is either forbidden or technically unacceptable,” and arguing that the contention is lacking in basis. CYAPCO Response to CAN Contentions at 13-14.

The Staff opposes the contention, arguing that CAN has failed adequately to support its allegation that CYAPCO’s use of surrogate analysis is so flawed that it will fail to provide sufficient information to ensure that public health and safety will be protected. The Staff argues that there is also no basis for the claim made by CAN that use of this methodology will not produce adequate assays of radionuclides, asserting that “[t]he fact that this process must be done with care to ensure that the correct ratio is used does not reflect a fundamental flaw in the methodology.” Staff Response to Contentions at 10.

RULING: CAN CONTENTION 1.5

CAN’s basis for Contention 1.5 includes assertions of fact, supported by expert testimony, that CYAPCO’s survey practices and cleanup efforts have not been sufficient to identify or remove alpha contamination or “hot particles.” CAN Contentions at 21. CAN also supports Contention 1.5 with expert assertions that adequate and consistent isotopic ratios at the site are problematic, that there is great variation of radionuclide ratios in the soil at the site, and that MARSSIM provides that a “surrogate method can only be used with confidence when dealing with the same media in the same surroundings — for example, soil samples with similar physical and geological characteristics.” *Id.* at 22-26 (citing MARSSIM at 4-5).

Although CAN has not “made its case” with regard to Contention 1.5, we find that it has provided sufficient explanation, facts, expert opinion, sources, and documents to show that a genuine dispute exists with CYAPCO on the material issue of the appropriate methodology to use to test for alpha contamination and “hot particles” on the site, so as to warrant further inquiry. We therefore admit CAN Contention 1.5.

o. CAN Contention 3.1: Identification of Subsurface Contamination

CAN asserts the following in Contention 3.1:

Contrary to the requirements of 10 C.F.R. 50.82, the methodology CYAPCO employs in its Site Characterization and Final Site Survey Plan will not allow for subsurface contamination to be identified, remediated and included in final status surveys. Since CYAPCO has failed to provide adequate methodology to address subsoil contamination in their LTP, the site can

exceed the release limits for unrestricted use in 10 C.F.R. 20 Subpart E (and ALARA), and public health and safety will be jeopardized. For this reason the Board must reject the LTP.

CAN Contentions at 33-34. CAN contends that the LTP's site characterization and final status survey are inadequate because the proposed final status survey would not determine the full extent of onsite, subsurface contamination. *Id.* at 34. Relying on section 50.82(a)(9)(ii)(D)'s requirement for "detailed plans for the final radiation survey," and the requirement in section 50.82 that the LTP demonstrate that the remainder of decommissioning activities are not "inimical to . . . the health and safety of the public," CAN also asserts that CYAPCO's LTP is inconsistent with NUREG-1700. *Id.* CAN posits that since CYAPCO plans merely to consult the allegedly faulty historical site assessment record to identify those areas where the potential exists for subsurface radioactivity, CYAPCO will not survey for the full extent of onsite subsurface contamination. *Id.* at 35. CAN also maintains that the LTP provides no description of a methodology to be used in the cases where the historical record is lacking, incomplete or unavailable, and cites NRC Confirmatory Action Letters (CALs), an Inspection Report, and Preliminary Notifications (PNOs) as evidence that CYAPCO's past monitoring practices were inadequate. *Id.* at 35-36; Tr. 387-90.

CAN further complains that the LTP provides no methodology to provide assurance that buried waste will be identified, surveyed, or remediated. Noting that MARSSIM provides no guidance on soil monitoring, CAN argues that in its absence the LTP must be more definitive. Tr. 391-92; CAN Contentions at 37. CAN cites the FERC testimony of Mr. Joosten in support of this contention, as well as the professional opinion of Dr. Resnikoff that CYAPCO has not carried out a systematic subsurface sampling program to identify the source and extent of subsurface soil contamination. CAN Contentions at 35-38, Exhibits 1, 2. Raising concerns about hot particles and resin beads in the soil, CAN provides evidence from past practices at the plant to bolster its position that the LTP does not properly scope, characterize, or survey soil under tanks, paved areas, and elsewhere. *Id.* at 38-41.

CYAPCO opposes this contention on the basis that it lacks specificity, claiming that CYAPCO has used the results of its historical assessment and surveys to perform an initial site characterization and classify survey areas. CYAPCO asserts that CAN has made broad allegations without specifically challenging specific areas of the LTP. (CAN agrees that they do not challenge the classification of survey areas.) Tr. 389-90. CYAPCO disputes CAN's characterization of its expert's opinion with regard to potential contamination of groundwater from radioactivity in soil, as well as CAN's claim that contamination levels may increase with depth of soil. CYAPCO Response to CAN Contentions at 18-22. Finally, CYAPCO cites LTP § 5.7.3.2.1 as evidence that it has a plan for

dealing with subsurface soil contamination and is not relying on MARSSIM for a subsurface soil surveying plan. Tr. 401-03, 408-11.

The Staff opposes the contention on the basis that the evidence presented does not support the alleged insufficiency of the LTP. Arguing that “[w]ithout providing more definitive evidence of what CYAPCO will do for sampling, CAN cannot argue simply that it will be insufficient.” Staff Response to Contentions at 14; *but see* Tr. 425-36. The Staff also claims that CAN’s allegation, that exceeding EPA standards demonstrates “greatly contaminated” subsurface soil, is speculative and not supported by facts presented. Staff Response to Contentions at 14.

RULING: CAN CONTENTION 3.1

This contention challenges the adequacy of the LTP’s plans for performing a final status survey for subsurface soil. We find that CAN has provided sufficient facts and expert opinion to support its contention and to justify litigating this issue. It appears to be undisputed that MARSSIM does not address this issue, *see* Tr. 401, and from our reading of the cited LTP section, we believe that there is a material dispute whether the LTP outlines a sufficiently detailed plan for performing subsurface soil surveys as part of the final status survey.

We therefore admit CAN Contention 3.1.

p. CAN Contention 3.2: Deep Pockets and Potential Concentrations of Subsoil Contamination

CAN Contention 3.2 states:

Contrary to 10 C.F.R. 50.82 the LTP does not adequately characterize the assay of deep pockets of contamination and/or potential concentrations of contamination in subsoil areas where it is likely to occur. For example, piping tunnels, conduits, foundation penetrations, draining units, and naturally occurring rock cavities are places where radioactive contamination would be trapped and accumulate.

CAN Contentions at 42. Citing NUREG-1700 and Staff RAIs as evidence, CAN asserts in support of this contention that the LTP has not identified all locations, inside and outside the facility, where contamination in piping, drains, ducts, etc., is likely to occur. CAN claims that such unidentified contamination leads to subsurface contamination of soil and of drinking water supplies, states that there is still one unidentified active leak, and further supports the contention with reference to a specific Staff RAI requesting similar information. CAN Contentions at 42-43; Tr. 441-42.

CYAPCO and the Staff oppose this contention, asserting a lack of specificity and that there is no requirement for a list of spills to be included in the LTP.

CYAPCO Response to CAN Contentions at 22-23; Staff Response to Contentions at 14-15.

RULING: CAN CONTENTION 3.2

We agree with the Staff and CYAPCO that CAN has not supported Contention 3.2 with sufficient facts or expert opinion to show a genuine dispute on a material issue of fact or law. For example, although Dr. Resnikoff states in his affidavit that he helped draft Contention 3.0 and would testify in support of the conclusions drawn in this and other contentions, his statement lacks specificity with regard to Contention 3.2. This contention is essentially an inadequately supported extension of CAN Contention 3.1.

We therefore deny CAN Contention 3.2. We note, however, that, to the extent the facts submitted as bases for this contention bear upon CAN's contention 3.1, they may be presented in litigation of that contention, assuming they are otherwise admissible.

CONTENTIONS RELATING TO WORK SCOPE

q. CDPUC Contention II.A: Scope of Work To Remove Contaminated Soil and Asphalt

CDPUC Contention II.A states as follows:

The LTP Does Not Adequately Describe the Scope of the Work Necessary to Remove Contaminated Soil and Asphalt.

- A. The LTP Must Address Earlier Estimates of Necessary Soil Removal and Justify All Proposed Limitations on Soil Survey and Removal.

CDPUC Contentions at 14. CDPUC asserts that the LTP's program for surveying and removing surface and subsurface soil and asphalt should be evaluated in light of CYAPCO's economic motivation to minimize costs. *Id.* In the FERC case referenced above, a settlement was entered into, which provides that CYAPCO may not collect from its customers any costs in excess of \$12.6 million (as escalated from 1996), for removing and disposing of contaminated soil and asphalt from within the plant boundary. *Id.* at 14-15; LTP Appendix C at C-9. CDPUC points out that the LTP justifies proposed limitations on soil remediation "due to the high cost of waste disposal," and argues that because of this economic disincentive to remove contaminated soil and asphalt, CYAPCO should be required to analyze and explain in the LTP "any deviations from a thorough, comprehensive survey of surface and subsurface soil and asphalt." CDPUC Contentions at 15; LTP § 4.2.1 at 4-1, 4-2. Noting and attaching a 1996 evaluation of a "ballfield" area describing it as "filled with contaminated soil

before paving’’ so as to require excavation and disposal of 200,000 cubic feet of soil and asphalt, and a contemporaneous note that this analysis was reconsidered by CYAPCO because it would “‘cause[] the decommissioning cost estimate to explode by approximately \$100,000,000,’’ CDPUC asserts that any deviation from this analysis must be justified on some other basis than a financial one. CDPUC Contentions at 15, Attachments 25, 13, and 26.

CYAPCO asserts that this contention is of the “‘cost estimate’’ sort that the Commission has categorically declared inadmissible. CYAPCO Response to CDPUC Contentions at 22 (citing *Yankee*, CLI-96-1, 43 NRC at 9). In *Yankee*, the Commission stated that Petitioners must assert not only that a cost estimate is not reasonable or in error, “‘but that there is not reasonable assurance that the amount will be paid.’’ *Yankee*, CLI-96-1, 43 NRC at 9. CYAPCO further states that the contract it has entered into with the Bechtel Power Corporation to perform “‘all of the tasks necessary to site release’’ is the “‘same sort of Power Contract[]’’ as in *Yankee*. CYAPCO Response to CDPUC Contentions at 22 n.16 (citing *Yankee*, CLI-96-7, 43 NRC at 259-60). The Commission in CLI-96-7 explained that “‘to be significant enough to be ‘material,’ within the meaning of the contention rule, there needs to be some indication that an alleged flaw in a plan will result in a shortfall of the funds actually needed for decommissioning.’’ *Id.* at 259. The “‘Power Contracts’’ on which the *Yankee* licensee relied, which are apparently undisputedly of the same sort as CYAPCO has entered into, were found by the Commission to “‘offer solid evidence that the necessary funds will be available when needed.’’ *Yankee*, CLI-96-7, 43 NRC at 260. CYAPCO also argues that the amount of offsite disposal will be dictated “‘not by any *a priori* estimates of their volume, but by the result of the site characterization and final status survey process,’’ and will be in whatever amount is necessary to meet the survey requirements. CYAPCO Response to CDPUC Contentions at 23.

CDPUC responds to CYAPCO’s arguments relating to cost issues by referring to the FERC case settlement and limitation on the amount CYAPCO can collect from its customers for removal of soil and asphalt, which is asserted to distinguish this case from that in *Yankee* and bring into question whether there is a reasonable assurance that the amount necessary to do a proper cleanup will be paid. Tr. 446, 453. CDPUC also argues that Contractor Bechtel will have the same incentive as CYAPCO to minimize costs and resulting “‘disincentive to look for and find, and remove contaminated soil and asphalt,’’ and that the prior estimates provide relevant support for the contention. Tr. 447-48.

The Staff opposes this contention as being overly vague and unsupported, arguing that being sensitive to costs is not a sufficient basis to impose additional requirements on the LTP, and citing the Commission’s consideration of practicality and reasonableness of costs in decommissioning. Staff Response to Contentions at 27 (citing 62 Fed. Reg. 39,058, 39,060 (July 21, 1997)).

RULING: CDPUC CONTENTION II.A

Keeping in mind the Commission's rulings in *Yankee*, CLI-96-1 and CLI-96-7, concerning the need to show "that there is not reasonable assurance that the amount will be paid," *Yankee*, CLI-96-1, 43 NRC at 9, and to provide "some indication that an alleged flaw in a plan will result in a shortfall of the funds actually needed for decommissioning," *Yankee*, CLI-96-7, 43 NRC at 259, we find that CDPUC has sufficiently distinguished the financial situation as well as the factual situation with regard to the Haddam site to present a different case than that previously considered by the Commission. CDPUC has supported its contention with the FERC settlement, which indicates arguable financial limitations not present in *Yankee* and which, in combination with the prior evaluations/estimates, could arguably indicate "that there is not reasonable assurance that the amount will be paid," notwithstanding the Power Contract with Bechtel. Although it has not proven its case, we find that it has provided enough factual support and information to show a genuine dispute on a material issue of fact, sufficient to warrant further inquiry.

We therefore admit CDPUC Contention II.A, but, because we find it does not provide adequate support for its reference to justifying "all" proposed limitations on soil survey and removal, we limit it as follows:

The LTP Does Not Adequately Describe the Scope of the Work Necessary to Remove Contaminated Soil and Asphalt, and Must Address Earlier Estimates of Necessary Soil Removal and Justify Proposed Limitations on Soil Survey and Removal.

r. CDPUC Contention II.B: Potential Releases from Drains

CDPUC Contention II.B states as follows:

The LTP Does Not Adequately Describe the Scope of the Work Necessary to Remove Contaminated Soil and Asphalt.

- B. Absent Conclusive Empirical Evidence to the Contrary, the LTP Must Assume That Potentially Contaminated Floor and Equipment Drains Released Contaminants into the Surrounding Soil.

CDPUC Contentions at 16. In this contention CDPUC provides various documents in support of its thesis that the LTP "mistakenly assumes that potentially contaminated floor and equipment drains flowed to controlled disposal." *Id.* Attachments 4, 18-24, 28. These documents concern various leaks and "dumping" of contaminated liquids, which lead CDPUC to argue that the LTP "must presume that all buried drains are radiologically contaminated until there is empirical proof otherwise." CDPUC Contentions at 17. CDPUC declares that the LTP must therefore (1) justify leaving any storm drains, drain line, or

buried piping in situ; (2) explain all steps that will be taken to trace contamination that may have leaked from piping, culverts, and drains into the surrounding soil; (3) spell out the proposed sampling techniques for soil and sediments adjacent to buried piping, culverts, or drains; and (4) require surveys of paved areas for residual radioactivity beneath the surface. *Id.*

CYAPCO argues that this contention is inadmissible because it offers nothing for litigation, since the LTP provides that any drain that does not pass the final status survey will be removed. CYAPCO Response to CDPUC Contentions at 24-25 (citing LTP § 2.3.3.1.1). CYAPCO also questions CDPUC's reference to section 3.4.2.30.3 of the LTP, which relates to only one set of drains and provides that they will be removed. *Id.* at 25. The Staff objects to this contention as being overbroad and unsupported by specific citation of how each leak relates to each drain, such that the relief it calls for — an assumption that all drains are contaminated, along with the additional requirements CDPUC seeks — is unjustified. Staff Response to Contentions at 28.

In response to CYAPCO and Staff arguments in opposition to Contention II.B, CDPUC effectively limits its contention, stating that it merely seeks a complete survey of the drains and pipes, and that the LTP contains an inadequately detailed plan for how this will be done, given the plant's history of leaks and contamination. Tr. 455-56. CDPUC agrees that the focus of the contention is on the plans for the final status survey.

RULING: CDPUC CONTENTION II.B

We find that CDPUC has presented sufficient factual support and information, including a number of relevant documents, to show a genuine dispute on the material factual issue of whether the plans for the final radiation survey are sufficiently detailed with regard to drains, and therefore admit this contention in modified form as follows:

The LTP does not adequately describe the scope of work necessary to remove soil and asphalt contaminated through floor and equipment drains.

s. CDPUC Contention II.C: Whether Residual Radioactivity Confined to Surface Soil

CDPUC Contention II.C states as follows:

The LTP Does Not Adequately Describe the Scope of the Work Necessary to Remove Contaminated Soil and Asphalt.

C. Absent Conclusive Empirical Evidence to the Contrary, the LTP Must Assume the Residual Radioactivity Will Not Be Confined to Surface Soil Layers.

CDPUC Contentions at 17. In this contention CDPUC challenges the LTP's conclusion that "residual radioactivity is generally confined to surface soil layer," referring back to the history of contamination at the plant, and argues that the LTP therefore (1) may not limit the "contaminated zone" to the top meter of soil, (2) must identify each "localized area where soil contamination is [or may be] deeper" than the top 3 meters, (3) may not limit surveys to the top 3 meters of soil, and also must specify the details for subsurface soil sampling because the MARSSIM methodology is only applicable to surface soils, defined as the top 15 centimeters. *Id.* at 17-18; LTP §§ 6.4.2 at 6-6, 6.4.4 at 6-9, 6.4.2 at 6-7.

CYAPCO asserts that the contention misreads the LTP and is premised on an incorrect characterization of what the LTP provides, stating that the LTP specifically recognizes that "there may be localized areas where the soil contamination is deeper [than the surface soil layer]." CYAPCO Response to CDPUC Contentions at 25-26 (citing LTP § 6.4.2 at 6-6, 6-7). CYAPCO also contests the factual assertions of CDPUC, stating that "[i]n point of fact, the 'empirical evidence' gleaned during initial site characterization shows that the average depth of contamination on site, notwithstanding a few localized areas, is limited to the asphalt and top 0.3 to 0.6 meters of soil." CYAPCO Response to CDPUC Contentions at 26. CYAPCO continues:

By definition, the model will be run on the basis of conditions that exist *after* any sub-surface soils requiring remediation have been removed, as it should be if the results are to be related to the *released* site. The fact that some sub-surface soil may have to be removed as part of the remediation purpose does not mean that the soil that has been removed should be modeled as if it had not been removed.

Finally, LTP § 6.4 states "that soil DCGLs have been developed based on the preliminary site characterization data. Site characterization will continue as part of the decommissioning process. If future site characterization data indicate contaminant characteristics to be (non-conservatively) different from those stated in this LTP, soil DCGLs will be revised as appropriate using the change criteria process presented in Section 1.5." By definition, and as MARSSIM requires, the ultimate validation of model parameters should be driven by data collected during the process, not fixed *a priori*.

Id. at 26-27 (emphasis in original).

The Staff opposes this contention as being overly vague, having an inadequate basis, and lacking the requisite specificity. Staff Response to Contentions at 29 (citing *Georgia Tech*, CLI-95-12, 42 NRC at 117-18).

RULING: CDPUC CONTENTION ILC

We find that CDPUC has provided insufficient supporting facts or expert opinion to render this contention admissible. Although CDPUC seeks to rely on information set forth with regard to other contentions, it has not specifically tied

this information in any particulars to this contention. We therefore deny CDPUC Contention II.C.

t. CDPUC Contention III: Estimate of Low-Level Waste

CDPUC Contention III states as follows:

The LTP Does Not Provide a Reliable Estimate of the Volume of Low-Level Radioactive Waste for Disposal and Must Be Modified.

CDPUC Contentions at 18. CDPUC contends that the LTP's estimate for the volume of low-level radioactive waste has no factual basis, citing the FERC ALJ's findings to this effect, along with some of the exhibits from the FERC proceeding.

CYAPCO objects to the contention on the basis that it fails to meet the pleading requirement for a "cost estimate" contention, noting that CDPUC ties the issue to the accuracy of a cost estimate, which was at issue in the FERC proceeding. CYAPCO Response to CDPUC Contentions at 27. The Staff opposes this contention as lacking relevance and materiality, and "simply alleg[ing] that some matter ought to be considered[, which] does not provide the basis for an admissible contention." Staff Response to Contentions at 30 (citing *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993)).

RULING: CDPUC CONTENTION III

We deny this contention. First, although testimony from the FERC proceeding may be relevant in support of a contention depending upon its source, absent some assertion that estoppel or issue preclusion is applicable, which has not been made here, we do not consider the FERC ALJ's findings to constitute the type of facts or expert opinion that is required to support a contention. In addition, the references in this contention to the FERC exhibits are indeed in the nature, not of making a fact-based argument, but of bare assertions or "simply alleging," as the Staff argues. Finally, to the degree this contention relates to cost estimates, we find it insufficient in this regard as well, in the context of the subject matter it addresses and the facts presented in its support. *Compare* discussion of CDPUC Contention II.A above.

CONTENTIONS RELATING TO DOSE CALCULATIONS

The contentions relating to dose calculations include CAN Contentions 2.1 through 2.3, 6.1, and 6.2. CDPUC Contention V, relating to RESRAD input

parameters, was withdrawn at oral argument, Tr. 488, and thus it is not addressed or ruled on in this Memorandum and Order.

u. CAN Contention 2.1: Background Radiation Measurements

CAN Contention 2.1 states:

The LTP as written does not assure that background radiation measurements for the Haddam Neck reactor site and surrounding environs will be conducted in areas not impacted by plant operations. Contrary to requirements of 10 C.F.R. 50.82 the methodology CYAPCO employs in its LTP Site Characterization and Final Site Survey Plan to determine background radiation levels is vague, lacks justification, and fails to demonstrate that site release criteria will be met and public health and safety will be protected.

CAN Contentions at 26. As its basis for this contention CAN complains that the LTP does not provide an adequate scientific process for distinguishing preexisting background radiation from radioactive contamination resulting from the Haddam Neck reactor operations. CAN asserts that CYAPCO has not justified its random selection of background sample locations with the meteorology of the area and contradicts itself in selecting one location in the East Site Grounds. CAN provides statements from its expert Dr. Resnikoff, and from Dr. Marvin Rosenstein, USEPA, along with an RAI from the Staff as support for this contention. CAN Contentions at 27-29, Exhibit 1; CAN Letter of May 25, 2001, Enclosure; Staff letter to CYAPCO dated February 1, 2001, Haddam Neck Plant (HNP) — Request for Additional Information regarding the License Termination Plan (TAC No. MA9791) [Staff RAI] at 13.

CYAPCO and the Staff oppose this contention. CYAPCO argues that nonimpacted areas selected for background determination have been previously surveyed. CYAPCO Response to CAN Contentions at 15; Tr. 505. The Staff argues that CAN has not provided sufficient facts or opinion to raise a genuine dispute of law or fact. Staff Response to Contentions at 12.

RULING: CAN CONTENTION 2.1

We find CAN raises issues in Contention 2.1 that are in genuine dispute. The contention sufficiently raises and supports questions concerning alleged deficiencies in the LTP concerning the methodology CYAPCO plans to use in the determination of background radiation and radioactivity levels. The Board recognizes that this methodology is critical for performing the final status survey and for the ultimate determination of compliance with the NRC's radiological criteria for license termination. CAN has provided adequate allegations and expert opinion to support its claim that CYAPCO's plan in the LTP for determining

background is inadequate, vague, inconsistent, and lacking justification for its plan. We therefore admit CAN Contention 2.1.

v. *CAN Contention 2.2: Methodology for Determining Background Radiation Levels for Construction Materials To Be Left in Place*

CAN Contention 2.2 states:

The LTP as written does not provide methodology for the determination of background radiation levels for concrete, asphalt, pipes and other construction materials that CYAPCO intends to leave in place during the Final Status Surveys. Contrary to the requirements of 10 C.F.R. 50.82, the LTP fails to demonstrate that site release limits will be met and that public health and safety will not be jeopardized thereby.

CAN Contentions at 29-30. CAN cites requirements found in Regulatory Guide 1.179 that LTPs include methods to be used to establish background radiation levels as a basis for this contention. CAN alleges that the LTP does not provide any detail regarding how site materials will be deemed “unaffected” or where representative materials may be obtained. In support of this contention, CAN also cites an EPA concern that the LTP does not discuss the difficulties in determining background in multimedia; provides Dr. Resnikoff’s expert opinion that this is a serious problem; cites comments from a CYAPCO health physicist on the difficulty of making such background determinations; and refers to a Staff RAI that asks CYAPCO to “explain . . . the background material and areas in the design of the FSS[, and, i]f credit is to be taken[, to] cite the background areas and materials to be used and provide a summary of the background levels.” CAN Contentions at 30-32 nn.85-86, Exh. 1.

CYAPCO oppose this contention, arguing that its plan for determining background radioactivity and radiation levels in various materials is included in LTP § 5.4.4. CYAPCO Response to CAN Contentions at 17. The Staff also opposes the contention, arguing that reliance on an NRC Regulatory Guide is not an adequate basis for admitting a contention. Staff Response to Contentions at 12.

RULING: CAN CONTENTION 2.2

The Board finds the expert support for this contention to be unparticularized and lacking in reasonable specificity. *See* Resnikoff Affidavit at 4, ¶13. To the degree that the subject matter of this contention is supported by CAN’s factual allegations, we find that it is effectively subsumed within the subject, the “Haddam Neck reactor site and surrounding environs,” in CAN Contention 2.1. Therefore, we deny CAN Contention 2.2 as stated, but will permit evidence that would be proffered in support of this subject matter, assuming it is otherwise admissible, to be presented in support of CAN Contention 2.1.

w. *CAN Contention 2.3: Instruments Used To Determine Background Radiation Levels*

CAN Contention 2.3 states:

The LTP does not provide adequate methodology regarding which instruments will be used to determine background radiation levels for the Haddam Neck site, surrounding environs, and for concrete, asphalt and other construction materials that CYAPCO intends to leave in place during Final Status Surveys. Contrary to the requirements of 10 C.F.R. 50.82, the methodology on instrumentation CYAPCO provides in its LTP for background determination is scant and does not assure that release site criteria will be met and public health and safety will not be jeopardized.

CAN Contentions at 32. CAN avers that the LTP provides no specific information on which instruments will be used to determine background radiation, nor justification as to why each instrument is adequate. CAN cites a requirement in NUREG/CR-5849 concerning the determination of background, refers to a Staff RAI asking for information on the derivation of MDCs, and refers again to the expert opinion of Dr. Resnikoff concerning background. CAN asserts that the LTP must be revised if it is to ensure compliance with 10 C.F.R. Part 20, Subpart E and ALARA. CAN Contentions at 32-33.

CYAPCO and the Staff and CYAPCO oppose this contention, arguing that there is no regulatory requirement for the information CAN alleges to be required. CYAPCO Response to CAN Contentions at 18; Staff Response to Contentions at 13. CYAPCO also argues that it has met the requirements of MARSSIM, which supercedes NUREG/CR-5849. *Id.*

RULING: CAN CONTENTION 2.3

We find that CAN in Contention 2.3 has not raised a genuine dispute on a material area of fact or law. We find no basis in the sources cited in support of Contention 2.3 for the proposition that the LTP must provide the sort of information relating to instruments that CAN seeks. We therefore deny admission of CAN Contention 2.3.

x. *CAN Contention 6.1: Dose Modeling Calculation Methodology*

CAN Contention 6.1 states:

Contrary to the requirements of 10 C.F.R. 50.82, the dose modeling calculation methodology CYAPCO employs in the LTP is not adequate to demonstrate that the LTP will assure the protection of the public health and safety.

CAN Contentions at 61. As its bases for this contention, CAN asserts that CYAPCO does not employ the latest version of the RESRAD dose modeling code and, more significantly, employs many nonconservative assumptions in its use of the code. CAN provides facts from the American Farm Bureau challenging CYAPCO's assumption in its RESRAD dose calculations of farm labor exposure as being nonconservative and not correct for Haddam Neck. CAN also provides expert testimony from Dr. Resnikoff, claiming that drinking water intake parameters and other pathway parameters are not correct for the Haddam Neck site. Finally, CAN protests the exclusion of children from the calculation in RESRAD using the family farm scenario, and maintains that children should be considered the average member of the critical population in order to ensure an adequate conservatism in the model. CAN Contentions at 61-65; Resnikoff Affidavit at 4, ¶ 14.

CYAPCO opposes all parts of this contention. CYAPCO claims that the latest version of RESRAD (version 6.0) did not become available until after it filed the LTP. CYAPCO also says that CAN has not demonstrated that the use of a different version of RESRAD will result in CYAPCO not meeting regulatory requirements. In addition, CYAPCO argues that CAN uses improper statistics to make its point that incorrect time-spent-outdoors parameters are used in CYAPCO's dose calculations. With regard to CAN's protest about the non-conservative use of inhalation and water consumption parameters in the RESRAD dose calculation, CYAPCO disagrees and claims that the LTP shows that some parameters may have no effect on the overall dose calculation. CYAPCO Response to CAN Contentions at 34-39.

The Staff does not object to CAN's challenge to the parameters used in CYAPCO's dose calculations using RESRAD, but objects to the admission of that part of CAN's contention that challenges the version of the RESRAD code used, and also argues that CAN's claim that children should be considered the average member of the critical population is a challenge to the Commission's regulations at 10 C.F.R. § 20.1402, and thus not litigable before this Board. Staff Response to Contentions at 18-19. We note that during oral argument, CAN effectively withdrew that part of its contention to the effect that children should be considered "the average member" of the critical group, arguing instead to the effect that children should be *included* in the determination of such "average" member, and that it was not challenging the regulation or the 25-millirem per year total effective dose equivalent (TEDE). Tr. 521-26.

RULING: CAN CONTENTION 6.1

The Board denies in part and admits in part this contention. With regard to CAN's allegation of CYAPCO's use of an earlier version of the RESRAD code, CAN has not alleged or raised any genuine dispute that such use could result

in any significant change or effect on the determination of compliance with the NRC's release criteria in 10 C.F.R. Part 20, Subpart E. This part of the basis for the contention is therefore denied. The Board finds, however, that CAN has otherwise provided sufficient alleged facts and expert opinion to show a genuine dispute on material issues of fact, relating to CAN's challenge to the parameters used by CYAPCO being insufficiently conservative in various ways.

With regard to the inclusion of children into the determination of the "average" member of the critical group, we recognize that the Staff still opposed the contention on the basis that it challenges a regulation, even after CAN's clarification as summarized above. *See* Tr. 527-28. We nonetheless find this issue to be litigable based on CAN's clarification, and on the fact that the Staff's argument rests not on language in the regulation itself but on Counsel's reading of language in the Commission's SOC. We do not find the language referenced by Counsel — that "[i]f a site were converted to residential use, the critical group *could* be persons whose occupations involve resident farming at the site, not an average of all residents on the site" — to be so unequivocal as Counsel suggests, and leave the matter open for further argument and litigation. *See* 62 Fed. Reg. 39,058, 39,067-68 (July 21, 1997) (emphasis added).

We therefore admit CAN Contention 6.1, excluding from litigation the issue of the different RESRAD versions, as noted above.

y. *CAN Contention 6.2: Derived Concentration Guideline Level (DCGL) Methodology and Data*

CAN Contention 6.2 states:

Contrary to NUREG-1727, CYAPCO does not provide adequate Derived Concentration Guideline Level (DCGL) methodology or data in their LTP. Lacking such critical information, it is unlikely that CYAPCO will be able to meet 10 C.F.R. Part 20 Subpart E site release limits and ALARA.

CAN Contentions at 65. CAN states that the LTP does not provide DCGLs, arguing that DCGLs are so essential for designing, implementing, and evaluating the final status survey that without them CYAPCO cannot adequately design or conduct such a survey, and so will likely fail in meeting the limits of Subpart E. CAN cites NUREG-1727 and MARSSIM as the basis for its contention that CYAPCO merely includes generic material in the LTP but fails to provide adequate site-specific methodology to justify DCGLs in the LTP. CAN also refers back to the bases provided for its Contention 1, which includes reference to the statement of Dr. Resnikoff, who states that he participated in drafting this contention and attests to the technical facts presented. CAN Contentions at 65-66, Exh. 1.

CYAPCO argues that the contention should be rejected on the basis that CAN's allegations are vague and unsubstantiated. CYAPCO claims site-specific DCGLs have been developed and are presented in LTP § 6. CYAPCO Response to CAN Contentions at 39-40. The Staff opposes this contention, arguing that CAN does not provide adequate support for its thesis that the methodology for site-specific DCGLs is inadequate. Staff Response to Contentions at 19-20.

RULING: CAN CONTENTION 6.2

The Board finds that CAN has not supported its allegations that the LTP presents an inadequate methodology for determining site-specific DCGLs or DCGL data. CAN cites NUREG-1727 and MARSSIM, but provides us with little if any substance to evaluate its concerns about the treatment of DCGLs in section 6 of the LTP. We note that, although Dr. Resnikoff states he helped prepare Contention 6.0, in contrast to his support on CAN Contention 6.1 we find no particularized, reasonably specific facts or opinion in his affidavit to support this contention. Indeed, there is no mention of DCGLs in his discussion of this contention in his affidavit. In the absence of more specific facts or expert opinion to bolster this contention, we are left with no choice but to deny its admission.

CONTENTIONS RELATING TO WATER CONTAMINATION

z. CAN Contention 4.1: Monitoring of Contaminated Groundwater

CAN Contention 4.1 states:

CYAPCO's monitoring of contaminated groundwater is inadequate to assure 10 C.F.R. Part 20 Subpart E site release requirements and ALARA will be met. The LTP as written fails to identify pockets of radioactive contamination that exist within the unconsolidated sediment above the bedrock, and fails to determine the extent of contamination in the bedrock and its migration both on and offsite.

CAN Contentions at 44. CAN's basis for this contention is that data in a CYAPCO-sponsored Groundwater Monitoring Report¹³ do not support the conclusions in the LTP that the general flow of groundwater on the Haddam Neck site is from north to south and hillside to river. CAN also postulates that the thickness of the sediments overlaying bedrock at the site will foster ponding and allow groundwater to penetrate bedrock. CAN concludes that, in the absence of pump tests in bedrock boreholes and more thorough hydrology work, there is insufficient information about groundwater flow in the bedrock to determine the extent of any

¹³Malcolm Pirnie, Inc., Groundwater Monitoring Report, Final Report, Connecticut Yankee Atomic Power Station, July 1999, Revised September 1999.

reactor-derived contamination in groundwater, as necessary to ensure compliance with Subpart E dose criteria. CAN Contentions at 44-46.

CYAPCO and the Staff oppose this contention. CYAPCO argues that CAN has offered only its own explanation of the data in the Groundwater report, that CAN's theory of ponding of groundwater does not account for equilibrium flow in a saturated system, and that pump tests will not tell much about groundwater flow. CYAPCO Response to CAN Contentions at 23-24. The Staff argues that CAN has not proffered any expert analysis of its concerns and makes allegations only from the data in the report. Staff Response to Contentions at 15.

RULING: CAN CONTENTION 4.1

In ruling on this contention, we note that the expert with whom CAN consulted in preparing the contention and basis does not wish at this time to come forward to attest to it, nor has Dr. Resnikoff included this part of CAN Contention 4.0 among those to which he attests. Nor does CAN on its own show how its theory would affect the calculation of DCGLs, the adequacy of the final status survey, or the ultimate determination of whether the 10 C.F.R. Part 20, Subpart E, release criteria are met. The same problem applies to the contents of a March 26, 2001, letter, presented by CAN at oral argument on May 9, 2001, from the Connecticut Department of Environmental Protection to a CYAPCO vice-president, regarding two groundwater monitoring reports that CYAPCO had provided to the Department, which had been reviewed by the "Permitting, Enforcement and Remediation Division of the Bureau of Water Management." Letter from Peter G. Hill, Environmental Analyst 3, to Russell A. Mellor, (CYAPCO) Vice President (March 26, 2001), attached to Transcript of May 9, 2001, proceedings, Tr. 565-71, 600-02.¹⁴

We note statements in the letter cited by CAN, to the effect that it would be "prudent and efficient to perform a preliminary evaluation of geologic and hydrogeologic conditions at the site prior to the installation and testing of additional wells," that "[s]uch characterization is necessary to form the basis that the groundwater plumes at the site have been adequately and thoroughly

¹⁴We note CYAPCO's opposition to our consideration of this letter based on its not having been provided earlier, and on CYAPCO's argument that it addresses different subjects than the groundwater contribution to the site release criteria. CAN argues that this letter should be considered in support of its Contention 4.1 despite its not having been filed with the contention itself, because, among other things, the March 26 letter had not been written and CAN had no knowledge of it as of the final March 12, 2001, deadline for the filing of amended and supplemented petitions and contentions, and the letter would, it is asserted, assist in providing a good record in this proceeding. We find it unnecessary to rule on these issues formally, given our ruling on Contention 4.1, but do note that the date of the letter provides good cause for not having provided the letter with the original contention, and that its admission would likely be supported in an analysis performed under the late-filing criteria of 10 C.F.R. § 2.714(a), even if not strictly applicable with regard to additional basis or support for a contention already timely filed: in addition to good cause for the lateness of the filing, also supporting late-filing would be the lack of other parties or means to protect the petitioner's interest, while the factors regarding broadening the issues and assistance in developing a sound record would have a neutral impact at this point in the proceeding.

characterized,” and requesting that the company look at “bedrock contour maps.” *Id.* at 1-2. CAN has not, however, specifically tied these “prudent” activities requested by the Connecticut Department of Environmental Protection to the calculation of DCGLs, to the ultimate determination of whether the Subpart E release criteria are met, or to the adequacy of the final status survey under sections 50.82(a)(9), (10). Nor has the State of Connecticut Department of Public Utility Control supported CAN with regard to this contention.

We therefore will not admit CAN Contention 4.1 as stated. However, to the extent that the proffered basis for this contention is relevant to CAN Contention 4.3 (which we admit below), CAN may present evidence with regard to the groundwater/hydrological issues it raises in the litigation of Contention 4.3, assuming it is otherwise admissible.

aa. CAN Contention 4.2: Identification of Unmonitored Leaks

CAN Contention 4.2 states:

Contrary to 10 C.F.R. 50.82 (iii) (A), CYAPCO’s LTP does not identify ongoing unmonitored leaks into the ground and aquifer. CYAPCO’s failure to identify the locations of such leaks precludes their ability to eliminate them and consequently permits increasing groundwater contamination at a time when remediation is supposed to take place.

CAN Contentions at 46. As a basis for this contention, CAN points to statements in the LTP that the Reactor Water Storage Tank was the source of tritium contamination in the groundwater onsite and contends that, even if that source were eliminated by draining as stated in the LTP, other sources, listed in the LTP at 2.22, have not been eliminated. CAN also reads a CYAPCO Groundwater Monitoring Report as stating that EPA drinking water standards have been exceeded for tritium and gross alpha contamination. CAN Contentions at 46; Malcolm Pirnie Groundwater Monitoring Report (July 1999, Revised September 1999). Citing a March 7, 2001, CYAPCO publication, “CY Today,” in which mention is made of a condition report that “[a] Historical Data Review is ongoing to determine if the ‘A’ Water Test Tank is leaking,” CAN also hypothesizes that there are ongoing leaks into the aquifer. CAN Contentions Exh. 7.

CYAPCO opposes admission of this contention, arguing that CAN has misread the LTP, which does plan to deal with groundwater contamination. CYAPCO Response to CAN Contentions at 25-26. The Staff argues that CAN has not provided any evidence that there are ongoing leaks or that the LTP is in violation of Commission regulations. Staff Response to Contentions at 16.

**RULING: CAN CONTENTION 4.2 AND CAN MOTION TO RECONSIDER
EXCLUSION OF EVIDENCE**

The Board finds that CAN provides inadequate expert analysis of the facts submitted to support its contention. Neither CAN nor its expert, Dr. Resnikoff, demonstrates with reasonable specificity how the information in the LTP or the minimal information in the CY publication supports its speculation of ongoing leaks into the groundwater. *See* Resnikoff Affidavit at 3, ¶ 11. Nor does CAN show how the information it puts forth renders the LTP deficient in meeting the requirements of sections 50.82(a)(9), (10), or in ultimately meeting the NRC radiation release criteria in subpart E. We therefore conclude that CAN has not shown a genuine dispute on a material issue of law or fact.

We note CAN's proffer of a "Draft Evaluation of the Dec-Mar, 2001 Groundwater Tritium Fluctuations" purportedly written by Allen D. Yates, who allegedly works for CYAPCO and whose "evaluation" begins with the remark, "I am admittedly not a hydrologist [and any] speculations referring to groundwater movement . . . would be pure speculation." Tr. 609; Attachment to May 9, 2001, Transcript. This document was provided to CAN by an anonymous source. Tr. 609. An objection to consideration of this document was sustained at oral argument, Tr. 614, and CAN has subsequently moved for reconsideration of our exclusion of the report, which it contends was provided by a "whistleblower [believed to be] employed by Bechtel, the company CYAPCO contracted to do site cleanup," and which it further contends "directly support[s]" Contention 4.2 and the argument that there are ongoing leaks at the plant and that "tritium contamination is unlikely to come from a single source." CAN Motion to Reconsider Admission of Draft Report Titled "Evaluation for the Dec-Mar, 2001 Groundwater Tritium Fluctuations" by Allen D. Yates (May 16, 2001) (hereinafter CAN Motion to Reconsider), at 1-2.

CYAPCO opposes CAN's Motion to Reconsider, questioning the authenticity and significance of the document, arguing among other things that the LTP does in fact describe in detail the status of ongoing groundwater characterization efforts, which "is a continuing activity," and recounting some of what CYAPCO is doing with regard to addressing the situation at issue. Opposition of Connecticut Yankee to CAN Motion for Reconsideration (May 24, 2001) (hereinafter CYAPCO Opposition to CAN Motion), at 1-4. The Staff opposes, also arguing the unreliability of the document in question and that it was untimely provided. NRC Staff Response to Motion to Reconsider Admission of Draft Report Titled "Evaluation for the Dec-Mar, 2001 Groundwater Tritium Fluctuations" by Allen D. Yates (June 7, 2001) at 2.

Our review of the technical significance of this document leads us to conclude that, even putting aside the questions about its reliability, it does not support CAN's thesis that CYAPCO and the LTP do not address ongoing leaks. The report

appears to be an historical assessment of the admitted groundwater contamination problem existing at the Haddam Neck site, with its conclusions on the fourth page thereof mentioning the period 1972-2000. There is no information in the report that addresses the question whether there is a present ongoing leak, nor does it shed any light on how CAN's allegation shows that the LTP is deficient, or why the contention would lead to not complying with release criteria. And indeed, if the document is an authentic CYAPCO document, it reflects that an effort is being made by CYAPCO to address at least historical data. We deny reconsideration of our exclusion of consideration of this document with regard to Contention 4.2.

Finally, given our finding that CAN has not shown a genuine dispute on a material issue of law or fact with regard to its Contention 4.2, we deny admission of the contention.

bb. CAN Contention 4.3: Gross Alpha and Beta Concentrations in Monitoring Wells

CAN Contention 4.3 states:

CYAPCO's LTP fails to demonstrate that gross alpha and beta concentrations in monitoring wells, particularly those wells which have radioactive contamination in excess of EPA drinking water standards, are not reactor derived. Therefore, CYAPCO has no justification to exclude gross alpha and gross beta concentrations from dose modeling calculations and, consequently, the site can exceed site release criteria upon license termination contrary to requirements of 10 C.F.R. Part 20, subpart E.

CAN Contentions at 48. CAN contends that the Groundwater Monitoring Report indicates that as of April 1999 four test wells exceeded EPA's gross alpha Maximum Contaminant Level (MCL) and three wells exceeded EPA's gross beta MCL for drinking water. Groundwater Report § 2, Table 6. CAN's expert, Dr. Resnikoff, has determined there was no correlation between gross alpha and gross beta in the wells, and CAN alleges that the LTP fails to identify the radionuclides responsible for the excessive gross alpha and beta levels in the wells. CAN argues that without knowledge of the radionuclides emitting the alpha and beta radiations, CYAPCO can not determine whether water in these wells meets site release limits of 10 C.F.R. Part 20, Subpart E. CAN Contentions at 48-49; Resnikoff Affidavit at 3, ¶ 11.

CYAPCO and the Staff oppose this contention. CYAPCO's position is that CAN has not demonstrated that the observed radioactivity levels will be excluded from the final dose calculations and states that neither the measurements nor the dose calculations need to be included in the LTP. CYAPCO Response to CAN Contentions at 26-27. The Staff opposes on the basis that CAN has not shown any support for its position that CYAPCO's dose modeling is inadequate. The Staff states further that radioactivity levels near EPA standards is not shown by

CAN to reflect a failure in dose modeling, noting that the NRC doesn't rely on EPA standards in assessing dose criteria. Staff at 16-17; 62 Fed. Reg. 39,058, 39,074-75 (July 21, 1997).

RULING: CAN CONTENTION 4.3

The Board finds that CAN has demonstrated with sufficient specificity that the alleged deficiencies in the Groundwater Monitoring report could arguably result in an inadequacy in the LTP. We find further that CAN's facts and expert opinion show a genuine dispute on the material issue of whether the LTP will properly include appropriate radionuclides in final dose calculations. We therefore admit CAN contention 4.3; but, because the NRC has not adopted EPA drinking water standards within the LTP context, we limit the contention to the following form:

CYAPCO's LTP fails to demonstrate that gross alpha and beta concentrations in monitoring wells are not reactor derived, and CYAPCO therefore has no justification to exclude gross alpha and gross beta concentrations from dose modeling calculations, and the site may exceed the site release criteria of 10 C.F.R. Part 20, subpart E.

cc. CAN Contention 4.4: Contamination in Discharge Canal

CAN Contention 4.4 states:

CYAPCO's LTP neither adequately describes the contamination within the discharge canal, nor discusses the need or techniques to be used to remediate this area. It is likely that without changes to the LTP, 10 C.F.R. Part 20 site release limits will be exceeded in the canal and in near offsite areas.

CAN Contentions at 49. CAN claims CYAPCO doesn't justify classifications of 2 and 3 for the discharge canal. CAN cites numerous planned and unplanned discharges into the canal as bases for claiming that LTP must include appropriate sampling methodology for the canal and justify its classification. CAN provides factual support from an NRC inspection report, an NRC Historical Review, and the above-referenced testimony of Mr. Joosten. CAN Contentions at 49-51. Although CYAPCO claims this contention is too speculative to be admitted, the Staff supports its admission.

RULING: CAN CONTENTION 4.4

We find that CAN has submitted adequate factual evidence to admit this contention. For example, in the NRC Historical Review report cited by CAN the Staff makes the following observation:

The licensee's report also identified residual levels of radioactive material in mud sediments along a storm drain runoff leading from the facility grounds to the discharge canal. The licensee identified that the contamination likely resulted from the discharge of contaminated liquid from the storm drain which originated within the radiologically controlled area and from runoff from the protected area. The contaminated runoff likely originated from contamination on the ground, which resulted from leaking radioactive liquid storage tanks and from radioactive waste handling operations in the outside environment but within the radiologically controlled area.

Staff Letter to CYAPCO dated March 26, 1998, "Subject: NRC Historical Review Team Report — Radiological Control and Area Contamination Issues at Haddam Neck," Appendix A at 3. The Board considers that CAN has in Contention 4.4 met its burden of providing sufficient factual support to establish a material dispute with CYAPCO that warrants further inquiry. We therefore admit CAN Contention 4.4.

dd. CAN Contention 4.5: EPA Maximum Contaminant Levels (MCL) for Drinking Water

CAN Contention 4.5 states:

CYAPCO's LTP does not assure that groundwater contamination will not exceed the EPA's Maximum Contaminant Levels (MCL) for drinking water, thereby threatening public health and safety.

CAN Contentions at 52. Although CAN admits that this contention challenges relevant NRC regulations, Tr. 630, its basis for the contention is its allegation that numerous groundwater test wells exceed the EPA standard for drinking water. CAN complains that CYAPCO's LTP does not commit to meeting EPA MCLs, and cites CYAPCO's Groundwater Monitoring Report for evidence that test wells have excessive gross alpha and gross beta radioactivity levels. As additional bases for its concern, CAN cites an EPA statement at a NRC public meeting on October 17, 2000, which indicates that EPA is interested to see that groundwater MCLs will be met. CAN also cites a Staff RAI asking CYAPCO to "determine whether the radionuclide concentrations in the water bearing units and the surface water represent a health concern utilizing dose modeling." CAN Contentions at 52-53.

Both the Staff and CYAPCO oppose this contention on the basis that EPA standards are not part of the NRC release criteria and that there is no authority for the NRC or this Board to enforce EPA standards. Staff Response to Contentions at 17; CYAPCO Response to CAN Contentions at 28.

RULING: CAN CONTENTION 4.5

The Board agrees with the Staff and CYAPCO that it has no authority to enforce EPA standards not adopted by the NRC. We therefore deny admission of CAN Contention 4.5.

CONTENTION RELATING TO RUBBLIZATION

ee. CAN Contention 5.0, Subparts 5.1-5.4

CAN Contention 5.0 has four parts, the entire grouping of which we address in our analysis and ruling below. The four parts of the contention are:

- 5.1 The LTP does not assure that the foundations in which rubble is to be buried are adequately characterized and will meet NRC 10 C.F.R. Part 20 limits for unrestricted use. Characterization and remediation where necessary of interior and exterior foundation surfaces and inner concrete mass must be included in the LTP. CAN Contentions at 53-54.
- 5.2 Rubblization is not a permitted means of disposal of buildings and other debris under existing NRC regulations. The NRC has never conducted a rulemaking on rubblization. Rubblization has not been the subject of an EIS. There is no site-specific EIS for the Haddam Neck reactor site dealing with the environmental consequences of rubblization. Under these circumstances, use of rubblization at Haddam Neck constitutes illegal low-level radioactive waste burial, and violates both existing NRC regulations under Parts 20 and 50, and the National Environmental Policy Act, 42 USC § 4321 et seq. (1988). If the NRC allows CYAPCO to use rubblization without a proper rulemaking, and with existing rules and guidance that appear to prohibit it, there will be a violation of the Administrative Procedure Act, 5 U.S.C. § 501 et seq. CAN Contentions at 56.
- 5.3 Contrary to 10 C.F.R. 50.82, CYAPCO's LTP fails to demonstrate that intentional burial of contaminated building debris in foundations on-site is ALARA. CAN Contentions at 58.
- 5.4 Rubblization should not be permitted at the Haddam Neck reactor site given the potential for transuranic materials, "hot particles" and HTDN to go undetected and 10 C.F.R. Part 20 site release limits to be exceeded. CAN Contentions at 60.

All of CAN's contentions on rubblization in one sense rise or fall on whether what CYAPCO plans to do with regard to possible demolition and burial of building parts in foundations actually constitutes "rubblization." The Staff and CYAPCO contend that what CYAPCO plans to do is not rubblization, which the Staff defines as "the burying of demolition debris which may have detectable levels of radioactive contamination." Staff Response to Contentions at 17-18. The Staff also refers to a document on the "Use of Rubblized Concrete Dismantlement to Address 10 CFR Part 20, Subpart E, Radiological Criteria for License Termination," in which it is stated that, "[o]nce a facility's license is

terminated, structures can be demolished and buried, provided relevant Federal, State, and local requirements are met,” and that “[u]nrestricted release means that once the license is terminated anything could be done with the site or facility including excavation and reuse of any buried material.” SECY-00-0041 (Feb. 13, 2000), at 2. It is also indicated in this document, regarding the purpose of “rubblization,” that to “reduce the level of surface decontamination required to be removed could save a licensee several million dollars.” *Id.* By contrast, CYAPCO and the Staff argue, CYAPCO intends to meet the decontamination requirements for standing buildings, which are more stringent, and then possibly demolish buildings only *after* release. Staff Response to Contentions at 17-18; CYAPCO Response to CAN Contentions at 29-30.

With regard to such post-release activities, SECY-00-0041 quotes the Generic Environmental Impact Statement (GEIS) in Support of Rulemaking on Radiological Criteria for License Termination of NRC-Licenses Nuclear Facilities, NUREG-1496, from section 4.2.1, “Human Health Impacts Resulting from Decommissioning,” as follows:

Also not specifically addressed in the GEIS are the impacts from future inadvertent recycling of contaminated building rubble and soil following decommissioning of a site. One could postulate that both building rubble and soil containing residual radioactivity could be inadvertently recycled into new construction material, or used as fill, thus causing radiation exposures. Although the analyses in the GEIS does [*sic*] not specifically take this recycling into account, the building occupancy and onsite resident scenarios and assumptions used in the GEIS to estimate public doses from decommissioning lands and structures are considered sufficiently conservative to encompass recycling of such material. The exposure mechanisms are similar, and the resulting individual doses could only be less than those evaluated because contamination of the recycled material will be reduced through dilution with other raw materials. Thus, future inadvertent recycling of soils or structures following decommissioning of the reference sites would not affect the conclusions made in the GEIS regarding public health.

NUREG-1496 § 4.2.1. Reference has also been made to rulemaking that would revise the GEIS on Decommissioning of Nuclear Facilities, NUREG-0586, but Staff has clarified that the resulting revision of NUREG-0586 will “consider only the non-radiological impacts of rubblization,” and that the Staff will review the radiological impacts of rubblization on a site-specific basis when rubblization is incorporated into an LTP.

CAN contends that CYAPCO plans intentionally to bury “rubblized buildings,” or “what will still be contaminated building debris in left-behind foundations,” and refers to CYAPCO’s plans as “a loophole created by unfinished regulations.” CAN Contentions at 54; Tr. 636-37, 640. CAN considers that what CYAPCO terms “post-release demolition of released buildings” is “simply modified rubblization,” and contends that the LTP “does not put forth a methodology that will assure that the interior and the exterior surfaces of the

foundation and inner concrete masses will be properly surveyed and remediated, where necessary.” Tr. 637-38.

CAN also cites a Staff RAI asking CYAPCO to explain the process that will be used to locate and identify radionuclide contamination on and below subsurface foundations remaining onsite. Tr. 638. In addition, CAN argues that the foundations at the site have been subjected to contaminated groundwater, and specifically expresses the concern that alpha contamination can go undetected beneath painted surfaces. *Id.*; CAN Contentions at 53-61. CAN argues that “it doesn’t matter what you call this waste management tactic, it has to do with whether or not they have surveyed the foundations properly, and whether or not the methodology is actually in the plan.” Tr. 639.

CAN contends further that, “even if the material has met NRC site release criteria,” it would violate Connecticut law, and the EPA has questioned the absence of any reference to this in CYAPCO’s environmental report. Tr. 640-41. CAN argues that in order to comply with NEPA requirements CYAPCO must do an environmental impact statement as part of the LTP. Tr. 642. CAN argues that if building parts are to be buried, they must be made “even cleaner than what would have been if those buildings had been left standing, because of how they will contribute to the TEDE.” Tr. 643.

The central thrust of CAN Contention 5 is, as expressed in oral argument, that the building surfaces and foundations must be measured accurately for radiological contamination, and that this cannot be done if they are permitted to be buried, even after release. Tr. 645-46. We note that CYAPCO concedes that “there is a little element of [Contention] 5.1 that has nothing to do with rubblization,” and that “the residual part of 5.1 talks about the methodology by which you reach site release conclusions with respect to inaccessible surfaces, the buried part of the outside foundation wall of a building.” Tr. 665, 664.

RULING: CAN CONTENTION 5

We find that we do not have the authority under the LTP rule to determine what a licensee may do after unrestricted release, once it is determined that the requirements for unrestricted release have been met. Although, as Staff Counsel indicated at oral argument, Part 20 requires a licensee when calculating TEDE to the average member of the critical group to “determine the peak annual TEDE dose expected within the first 1000 years after decommissioning,” 10 C.F.R. § 20.1401(d), our authority is limited by sections 50.82(a)(9), (10), and the Commission’s guidance in *Yankee*, CLI-98-21, 48 NRC 185, *supra*.

On the other hand, we also find, as CYAPCO has conceded, that CAN in Contention 5 raises an issue that concerns what occurs *before* release, relating to the adequacy of the characterization and plan for cleanup and survey of buried foundations and surfaces of buildings, to assure and demonstrate that the

release criteria for unrestricted use will be met. Recognizing that CYAPCO's position is that the LTP addresses this, Tr. 664, we find that, to the extent that the contention challenges the adequacy of the cleanup and measurement of residual contamination on building surfaces and foundations prior to release, the contention raises and supports issues that should not lightly be dismissed.

Taking all of the above considerations into account, we deny admission of CAN Contention 5.0, including Contentions 5.1 through 5.4, as stated. However, we expressly permit CAN to present otherwise admissible evidence on the issue of appropriate characterization and plans for final cleanup and survey of above-ground building surfaces, taking into account possible post-release demolition and burial activities such as are described in the LTP, in the litigation of its Contention 1.5; and to present otherwise admissible evidence relating to the appropriate characterization and plans for final cleanup and survey of buried foundations, taking into account possible post-release demolition and burial activities such as are described in the LTP, in the litigation of its Contention 3.1. In addition, we note that, should information come to light as a result of the RAI and/or discovery process that would indicate further attention should be given to the EIS issue raised by CAN or other related issues, late-filed contentions may be submitted based on such information, which would be ruled on in accordance with the provisions of 10 C.F.R. § 2.714(a)(1), (b)(2), and (d)(2).

III. CONCLUSION

A. Admitted Contentions

In conclusion, we admit the following contentions:

Site Characterization Contentions

CDPUC Contentions I.A/B as reframed above; I.C; I.E; and I.F; with CDPUC granted leave to support Contentions I.A/B and I.E with relevant, otherwise admissible evidence relating to allegations originally presented in support of its Contention I.D, as set forth above;

CAN Contentions 1.5 and 3.1, with leave to support these contentions with relevant, otherwise admissible evidence relating to allegations originally presented in support of its Contention 5.0, as set forth above;

Work Scope Contentions

CDPUC Contentions II.A and II.B, as limited and modified above;

Dose Calculation Contentions

CAN Contention 2.1, with leave to support this contention with relevant, otherwise admissible evidence relating to allegations originally presented in support of Contention 2.2, as set forth above;

CAN Contention 6.1 in part, as set forth above;

Water Contamination Contentions

CAN Contentions 4.3 as reframed above; and 4.4; with leave to support Contention 4.3 with relevant, otherwise admissible evidence with regard to allegations originally supporting Contention 4.1.

B. Efficient Conduct of Proceedings

In the interest of the efficient conduct of the proceedings in this matter, we encourage the consolidation of contentions and proof on the same or related subject areas to the extent possible, invite the parties to suggest consolidation of any of the above contentions as appropriate and possible, and will address such consolidation, as well as the definition of lead parties, further in the context of prehearing conferences. For such purposes and as necessary and appropriate, the Board retains the authority under 10 C.F.R. § 2.714(f)(3) to determine priorities and control the compass of the hearing through these and other measures, giving due consideration to circumstances including the possibility of the filing of additional, late-filed contentions after the issuance of the Staff's SER.

C. Settlement

Commission regulations recognize that it is in the public interest for particular issues or an entire matter to be settled, and encourage parties and licensing boards to seek fair and reasonable settlements. 10 C.F.R. § 2.759. We believe that the issues in this proceeding may be amenable to settlement, encourage the parties to seek a fair and reasonable settlement of any or all of the contentions that we are approving in this Memorandum and Order, and advise the parties that they may contact the Board Chair if they wish to have a Licensing Board Panel-appointed Settlement Judge or Mediator assist in this endeavor.

IV. ORDER

In light of the foregoing discussion, and based upon the entire record of this proceeding to date, it is, on this 9th day of July 2001, ORDERED:

1. CDPUC Contentions I.A/B, I.C, I.E, I.F, II.A, and II.B, and CAN Contentions 1.5, 2.1, 3.1, 4.3, 4.4, and 6.1 in part are hereby admitted as contentions in this proceeding, as set forth above in this Memorandum and Order. The requests of CDPUC and CAN for a hearing on these contentions are hereby granted, and CDPUC and CAN are hereby admitted as parties to this proceeding. The Licensing Board will issue a Notice of Hearing in the near future.

2. The remaining CDPUC and CAN contentions are hereby rejected.

3. A telephone prehearing conference will be convened on *July 25, 2001, at 1:30 p.m.*, to address administrative and other appropriate matters, including defining schedules for discovery against parties other than the Staff; the filing of summary disposition motions; additional prehearing conferences; periodic status reports relating to the RAI/SER process, discovery, late-filed contentions and other matters; a possible site visit; the hearing of limited appearance statements; and, insofar as possible, the evidentiary hearing. Parties should be prepared at the prehearing conference to discuss these matters as well as the possible consolidation of contentions and definition of lead parties, and the possibility of settling some or all parts of this proceeding.

4. This Order is subject to appeal in accordance with the provisions of 10 C.F.R. § 2.714a(a). Any petitions for review meeting applicable requirements set forth in that section must be filed within 10 days of service of this Memorandum and Order.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD¹⁵

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 9, 2001

¹⁵Copies of this Memorandum and Order were sent this date by Internet e-mail or facsimile transmission, if available, to all participants or counsel for participants.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

**Docket Nos. 50-003-LT
50-247-LT
(consolidated)**

**CONSOLIDATED EDISON COMPANY
OF NEW YORK and
ENERGY NUCLEAR INDIAN
POINT 2 LLC, and
ENERGY NUCLEAR OPERATIONS, INC.
(Indian Point, Units 1 and 2)**

August 22, 2001

This proceeding concerns the application for approval of license transfers for Indian Point 1 and Indian Point 2 nuclear power plants. The Commission finds that three Petitioners to intervene have demonstrated standing and that each has proffered at least one admissible issue. Therefore, the Commission grants their requests for hearing. The Commission also addresses various procedural issues and sets a schedule for the remainder of the proceeding.

LICENSE TRANSFER: FINANCIAL QUALIFICATIONS

10 C.F.R. § 50.33(f)

The new owner and the new operator of the Indian Point plant are not “electric utilities” under our rules. Thus, they must demonstrate their financial qualifications to own and/or operate the plants. *See* 10 C.F.R. § 50.33(f).

LICENSE TRANSFER

RULES OF PRACTICE: SUBPART M (FORMAL HEARING)

CAN's request for a Subpart G proceeding is expressly prohibited in a license transfer proceeding. See 10 C.F.R. § 2.1322(d) and *Vermont Yankee Nuclear Power Corp. and Amergen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 162 (2000).

RULES OF PRACTICE: WAIVER OF REGULATION

10 C.F.R. § 2.1329

The Subpart M process is adequate to address CAN's proposed issues which, according to CAN, involve more than "mere financial matters." We see no basis at this time for a rule waiver pursuant to 10 C.F.R. § 2.1329.

LICENSE TRANSFER

RULES OF PRACTICE: SUBPART M

Our Subpart M rules cover all license transfer issues:

Our Subpart M rules are intended to apply to more than just those cases presenting only financial issues. We expected when promulgating Subpart M that most issues would be financial However, we also predicted that Petitioners would raise other categories of issues as well (such as foreign ownership, technical qualifications, and appropriate critical staffing levels) For that reason, when promulgating Subpart M, we expressly declined to adopt [a commenter's] suggestion that we limit the scope of Subpart M proceedings to financial matters.

Power Authority of the State of New York (James A. Fitzpatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 290-91 (2000). We see no basis for finding the Subpart M process inadequate to address CAN's proposed issues.

LICENSE TRANSFER

RULES OF PRACTICE: SUBPART M

CAN requests a "broad-ranging" hearing under Subpart M. The Commission's regulations provide that the Commission, on its own motion or in response to a request from a Presiding Officer, may use additional procedures, such as a formal hearing or an opportunity to cross-examine witnesses, if necessary for "sufficient accuracy." See 10 C.F.R. § 2.1322(d). The regulations prohibit motions by parties

for “special procedures or formal hearings.” *Id.* Thus, we deny CAN’s request for a “broad ranging” hearing. *See Indian Point 3*, CLI-00-22, 52 NRC at 291.

LICENSE TRANSFER: FINANCIAL DATA

RULES OF PRACTICE: INTERPRETATION OF REGULATION

10 C.F.R. § 50.33(f)(2)

The financial qualifications rule, 10 C.F.R. § 50.33(f)(2), requires data for the first five 12-month periods after the proposed transfer.

**LICENSE TRANSFER: DISMISSAL OF APPLICATION;
FINANCIAL DATA**

We decline to dismiss this license transfer application. An application need not be automatically rejected whenever an omission or error is found. *See Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 95-96 (1995), *reconsideration denied*, CLI-95-8, 41 NRC 386, 395 (1995). The missing data can be submitted for consideration by the Presiding Officer at the adjudicatory hearing. Dismissing this proceeding would not serve the parties’ best interests, as the deficiency in the application can easily be cured and the focus should be on the numerous substantive matters that remain to be resolved.

**LICENSE TRANSFER: ISSUES (INCORPORATION BY
REFERENCE)**

ISSUES: INCORPORATION BY REFERENCE

CAN has stated that it incorporates Cortlandt’s “contentions” by reference, and Cortlandt has done the same for CAN’s issues. Cortlandt has presented several admissible issues, and CAN has presented one. As both Petitioners have independently met the requirements for participation, we will provisionally permit Petitioners to adopt each other’s issues at this early stage of the proceeding. But if the primary sponsor of an issue later withdraws from this proceeding, the remaining sponsor must then demonstrate to the Presiding Officer its independent ability to litigate this issue. A failure to do so renders the issue subject to dismissal prior to the hearing.

ISSUES: INCORPORATION BY REFERENCE

RULES OF PRACTICE: ISSUES (UNTIMELY FILING)

If the requests to incorporate another petitioner's issues had been made later, the requesting party would have had to meet the standards for late filing of issues. *See Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225, 229-30 (2001) (applying to late-filed issues the Commission's rule, 10 C.F.R. § 2.1308(b), regarding late-filed petitions to intervene).

RULES OF PRACTICE: SUBPART M

10 C.F.R. §§ 2.1321(a), 2.1322(a)(1)

Under our rules governing license transfer proceedings, all participants are permitted to submit statements of position and written testimony with supporting affidavits "on the issues." *See* 10 C.F.R. §§ 2.1321(a) and 2.1322(a)(1). In promulgating these two procedural rules, we did not limit parties to filing such statements and affidavits on only *their own* issues. Thus, CAN and Cortlandt are entitled to address all of the issues, whether or not they were the original sponsor. *See Power Authority of the State of New York* (James A. Fitzpatrick Nuclear Power Plant; Indian Point, Unit 3), LBP-00-34, 52 NRC 361, 363 (2000) (referring to "an intervenor [being] permitted to participate in litigation of another intervenor's issues").

ISSUES: INCORPORATION BY REFERENCE

Although we are provisionally permitting incorporation of issues by reference here, where each Petitioner has shown substantial effort in preparing its own issues, we do not give *carte blanche* approval of the practice for all contexts. For instance, we will not permit incorporation by reference where the effect would be to circumvent NRC-prescribed page limits or specificity requirements. Nor will we permit wholesale incorporation by reference by a petitioner who, in a written submission, merely establishes standing and attempts, without more, to incorporate the issues of other petitioners. Further, we would not accept incorporation by reference of another petitioner's issues in an instance where the petitioner has not independently established compliance with our requirements for admission as a party in its own pleadings by submitting at least one admissible issue of its own. Our contention-pleading rules are designed, in part, "to ensure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999).

LICENSE TRANSFER: INTERVENTION

To intervene as of right in a licensing proceeding, a petitioner must demonstrate standing, i.e., that its “interest may be affected by the proceeding.” *See* AEA § 189a, 42 U.S.C. § 2239(a). In addition, in a license transfer proceeding, the petition to intervene must raise at least one admissible issue. *See* 10 C.F.R. § 2.1306.

RULES OF PRACTICE: SUBPART M

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

Our rules specify that, to demonstrate that issues are admissible in a Subpart M proceeding, a petitioner must

- (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those issues fall within the scope of the proceeding,
- (3) demonstrate that those issues are relevant to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant regarding the issues, and
- (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner’s position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. § 2.1306; *Indian Point 3*, CLI-00-22, 52 NRC at 295 and references cited therein. Mere “notice pleading” is insufficient under these standards; however, our requirement for specificity and factual support rather than vague or conclusory statements is not intended to prevent intervention when material and concrete issues exist. *See id.*

RULES OF PRACTICE: SUBPART M

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

10 C.F.R. § 2.1306

Our rules expressly require an intervention petitioner to state the facts or expert opinions supporting its position. *See* 10 C.F.R. § 2.1306.

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

If an application lacks detail, a petitioner may meet its pleading burden by providing “plausible and adequately supported” claims that the data are either inaccurate or insufficient. *See GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000).

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES (AFFIDAVITS)

CAN has offered an affidavit by its expert, Edward A. Smeloff, but he prepared that affidavit for the *Indian Point 3* license transfer proceeding. We will consider only the paragraphs of that affidavit that are of general applicability, and we will ignore any paragraph that specifically relates to the Indian Point 3 plant.

RULES OF PRACTICE: ADMISSIBILITY OF ISSUES

“[I]f the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner’s belief” constitute sufficient information to show that a genuine dispute exists under the Subpart G analog of 10 C.F.R. § 2.1306. *See* 10 C.F.R. § 2.714(b)(2)(iii).

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

10 C.F.R. § 50.33(f)

Both Cortlandt and CAN express strong doubts that the Entergy companies have the level of financial qualifications necessary to operate the Indian Point plant safely. *See* 10 C.F.R. § 50.33(f)(2). Cortlandt asserts that the application does not demonstrate an appropriate margin between anticipated operating costs and revenue projections, and that the Applicants do not provide evidence of access to sufficient reserve funding. CAN alleges more generally that Applicants’ revenue projections are unreasonable and their operating and maintenance cost projections are far too low. We admit the jointly sponsored financial qualifications issue.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

Petitioners assert that the Applicants' revenue projections are unreasonable because they rest on achieving an average annual capacity factor of 85% for IP2. We recently approved a Presiding Officer's admission of a similar capacity-factor issue in *Indian Point 3*. See *Power Authority of the State of New York* (James A. Fitzpatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 NRC 488, 518-19, approving LBP-01-4, 53 NRC 121, 128 (2001). We accept Cortlandt and CAN's issue for adjudication.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

Cortlandt questions whether the Entergy companies' operating experience with other plants is even relevant to IP2 achieving an average plant factor of 85% in light of IP2's recent operating history. This issue, too, warrants further inquiry at a hearing. See *Indian Point 3*, CLI-01-14, 53 NRC at 520-21. Accordingly, we accept this subissue for litigation.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

Cortlandt disputes whether the projected revenues for operation of IP2 are reasonable and reliable. As this subissue not only has been backed by calculations derived from the Applicants' own data but also relates to Cortlandt's and CAN's challenge to the Applicants' 85% capacity-factor projection, we accept it for litigation.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

Cortlandt presents several interrelated subissues that amount to a claim that Entergy's costs will prove higher than anticipated. Cortlandt relies on an analysis of data available from FERC Form 1 for the years 1995 through 1999. These figures include the costs of operation, fuel, and maintenance reported by ConEd and the estimated costs of capital to finance the purchase of the facility and nuclear fuel and fuel oil inventories. Cortlandt alleges that the projected cost figures are not only unsupported but also "plainly in contradiction with known historical operating data." We accept this issue for adjudication.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

Cortlandt states that, according to the license transfer application, the Entergy companies anticipate being able to fund fixed operating expenses from retained earnings or by lines of credit. Cortlandt contends that, in the event of an extended outage, Entergy Indian Point 2 will not be able to pay its projected fixed operating expenses from retained earnings. We accept this subissue for adjudication, as it rests on expert-backed claims that the transfer application relies on unexplained or noncredible data.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

Cortlandt's final cost-based concern is whether achieving an average plant capacity factor of 85% will cause the Applicants to incur additional costs, in excess of those projected. We find that Cortlandt has not stated this proposed basis with the particularity required for consideration in a license transfer adjudication. Therefore, we reject it.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

Cortlandt has briefly raised the issue of whether the expiration of a collective bargaining agreement with IP2 employees in 2004 will result in costs beyond those accounted for in cost projections. Since Cortlandt relies only on speculation to frame this issue, we decline to consider it further.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

Cortlandt contends that, under Applicants' projections, "retained earnings will be reduced drastically and possibly wiped out entirely before IP2's operating license expires." Cortlandt foresees that, after 2003, a shortfall in retained earnings will require Entergy Indian Point 2 to access monies available to it under intercompany agreements. Further, Cortlandt worries that any deficiency in Entergy Indian Point 2's showing of financial strength would be exacerbated by any adverse operating events such as an extended shutdown. Here, Cortlandt's queries are based on information contained in the license transfer application itself and questions that follow logically after considering IP2's operating history. We therefore accept this subissue for adjudication.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

Cortlandt raises an issue about the availability of funds under a line of credit with Entergy Global Investments, Inc. But "[g]iven that our regulations do not require supplemental funding as part of a showing of financial qualifications, we do not see why the creditworthiness of the guarantor would be any more germane than the amount of the supplemental funding guarantee itself" *Indian Point 3*, CLI-01-14, 53 NRC at 540. We would consider this issue only if the Entergy companies intended to rely on these credit arrangements to demonstrate their financial qualifications to own and operate the Indian Point plant. We have held

that, “absent a demonstrated shortfall in the revenue predictions required by 10 C.F.R. § 50.33(f), the adequacy of a corporate parent’s supplemental commitment is not material to our license transfer decision.” See *Vermont Yankee*, CLI-00-20, 52 NRC at 177. *Accord Oyster Creek*, CLI-00-6, 51 NRC at 205. Therefore, we decline to consider the supplemental funding issue given that the Applicants do not rely on supplemental funding as a basis for financial qualification.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

NRC: AUTHORITY

Cortlandt next inquires whether the Entergy-ConEd power purchase agreement should be revised to ensure that Entergy Indian Point 2 has adequate financial resources to cover total costs to operate in compliance with NRC requirements. The sale of the Indian Point plant is, in Cortlandt’s view, tied to a power purchase agreement with ConEd that provides for significantly below market rates for electricity; moreover, the sale of electricity is the only source of income to cover costs of operation. We find this issue well outside the bounds of a license transfer proceeding and reject it. Enforcement or revision of a power purchase contract between private parties, even when the parties are within the regulatory authority of the NRC, is not within the jurisdiction of the NRC.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

NRC: AUTHORITY

Cortlandt submits that the proposed operating agreement is unenforceable under New York State law because it “purports to indemnify” Entergy Indian Point 2 for claims that may be lodged against it. An NRC adjudicatory proceeding is simply not the appropriate forum for examining a contractual agreement’s legality under state law. To be effective, the license transfer application must be approved by the New York Public Service Commission, among other agencies. NRC’s charge is to protect the health and safety of the nuclear workforce and the general population by ensuring the safe use of nuclear power. We depend on

the State of New York to handle any issues — such as contractual issues — that are not in conflict with our jurisdiction and that are properly contested under that state’s laws.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

We reject Cortlandt’s assertion that the operating agreement may interfere with Entergy Indian Point 2’s financial ability to operate the Indian Point plant safely. Cortlandt’s assertion is too vague and speculative to serve as a basis for adjudication. *See Indian Point 3*, CLI-00-22, 52 NRC at 312. The distribution of project revenues and profits pursuant to the operating agreement is not within NRC’s purview, so long as the Indian Point plant has sufficient money to operate safely and to meet decommissioning requirements. Although Cortlandt’s assertions are couched in terms of jeopardy to the plant’s ability to operate safely, we cannot admit an issue for adjudication based on mere conjecture. “Unsupported hypothetical theories or projections . . . will not support invocation of the hearing process.” *Indian Point 3*, CLI-00-22, 52 NRC at 315.

TECHNICAL QUALIFICATIONS

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

The Entergy companies assert they are technically qualified to operate IP2 because existing staff and personnel will become employees of Entergy Nuclear Operations. CAN asserts that the Entergy companies are not technically qualified to operate IP2. CAN urges that conditions be placed on the sale to protect the health and safety of workers and the public; that the FSAR be verified; and that an independent evaluation of IP2 be required before transfer because of historical problems in NRC Region I. We decline to admit this issue, as CAN’s claims are not directly linked to the license transfers at issue in this proceeding. *See Indian Point 3*, CLI-00-22, 52 NRC at 309. With continuity in the workforce, any problems alleged by CAN are operational problems that, if shown to exist, will need to be remedied whether or not the license is transferred.

TECHNICAL QUALIFICATIONS

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

CAN has not squarely challenged the technical qualifications of the plant's intended employees. *See Indian Point 3*, CLI-00-22, 52 NRC at 309-10. Rather, CAN has advanced the amorphous allegation that ConEd's "systemic mismanagement" of Indian Point 2 has, in some undefined manner, "compromised the technical qualifications of existing personnel and support organizations there." CAN stresses that "Entergy would be relying on these same technically unqualified staff." CAN's claims are too broad and too vague to be suitable for adjudication.

TECHNICAL QUALIFICATIONS

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

CAN believes that verification of the FSAR and Design Basis Documentation is necessary to meet the requirements for license transfer. This is another operational issue outside the scope of a license transfer proceeding. *See Indian Point 3*, CLI-00-22, 52 NRC at 310-11.

TECHNICAL QUALIFICATIONS

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

Regarding CAN's request for an independent evaluation of IP2 before any license transfer, we declined to admit a similar issue espoused by CAN in *Indian Point 3* and in *Vermont Yankee*. *See Indian Point 3*, CLI-00-22, 52 NRC at 318, citing *Vermont Yankee*, CLI-00-20, 52 NRC at 171. Region I's performance in overseeing the IP2 plant is far outside the scope of a license transfer proceeding. *See Vermont Yankee*, CLI-00-20, 52 NRC at 171 and references cited therein.

LICENSE TRANSFER

DECOMMISSIONING FUNDS

10 C.F.R. § 50.75

A reactor licensee must provide assurance of adequate resources to fund the decommissioning of a nuclear facility by one of the methods described in 10 C.F.R. § 50.75(e). See 10 C.F.R. § 50.75(a). The Commission has held that a showing of compliance with 10 C.F.R. § 50.75 demonstrates sufficient assurance of decommissioning funding. *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 217 (1999).

LICENSE TRANSFER

DECOMMISSIONING FUNDS

10 C.F.R. § 50.75

In determining the amount of prepayment of decommissioning funds, a licensee may take credit for projected earnings on the trust funds using up to a 2% annual rate of return. See 20 C.F.R. § 50.75(e)(1)(i).

LICENSE TRANSFER

DECOMMISSIONING FUNDS

RULES OF PRACTICE: CHALLENGE OF COMMISSION RULE

Cortlandt questions whether the license transfer application contains the information required by 10 C.F.R. § 50.33(k)(1) pertaining to the adequacy of its funding for decommissioning the Indian Point plant. ConEd initially proposed to transfer a total of \$430 million to Entergy Indian Point 2 to fund the decommissioning trust. Cortlandt notes that the derivation of the \$430 million figure is not explained in the application, but surmises that it is the present value, discounted at the rate of 2% real rate of return, of the calculated minimum amount of \$558 million required at the expiration of the licenses in 2013. Cortlandt states that, based on the results of a site-specific cost study contracted by ConEd, \$558 million will be insufficient, as the actual sum required for decommissioning will be \$578 million. In addition, ConEd apparently has committed to restore the Indian Point plant site to “Greenfield” conditions, resulting in an additional cost of \$47 million. Even though the proposed decommissioning fund will meet the NRC minimum amount, Cortlandt states that there will be a shortfall of \$20 million for standard decommissioning and \$67 million for restoring the property to “Greenfield” conditions. Cortlandt’s decommissioning issues, as set out in

its petition, amount to an impermissible challenge to a generic decision made by the Commission in its decommissioning rulemaking. *See Seabrook*, CLI-99-6, 49 NRC at 217 n.8.

LICENSE TRANSFER

DECOMMISSIONING FUNDS

RULES OF PRACTICE: CHALLENGE OF COMMISSION RULE; WAIVER OF COMMISSION RULE

Cortlandt formally requested a waiver of 10 C.F.R. § 50.75(e)(1)(i) to the extent that compliance with the minimum funding requirement described in the regulation is deemed to provide adequate assurance of the ability to decommission. To show unique “special circumstances” supporting its waiver request, Cortlandt cites the fact that the present licensee has performed a site-specific study that purportedly documents the inadequacy of the minimum funding level established by regulatory criteria. This study, according to Cortlandt, warrants the conclusion that application of the rule would not serve the purposes for which it was adopted. *See* 10 C.F.R. § 2.1329. We decline to grant the rule waiver or admit Cortlandt’s decommissioning issue.

LICENSE TRANSFER

DECOMMISSIONING FUNDS

RULES OF PRACTICE: INTERPRETATION OF REGULATION

10 C.F.R. § 50.75

We conclude that our generic funding rule serves *both* purposes for which it was adopted, even in the alleged “special circumstances” of this case. The two purposes of our regulations regarding decommissioning funding are (1) to “minimize the administrative effort of licensees and the Commission” and (2) “to provid[e] reasonable assurance that funds will be available to carry out decommissioning in a manner that protects public health and safety.” *See* Final Rule: “General Requirements for Decommissioning Nuclear Facilities,” 53 Fed. Reg. 24,018, 24,030 (June 27, 1988). Prior to adoption of this rule, many licensing activities concerning decommissioning had to be determined on a case-by-case basis, resulting in inconsistency and “inefficient and unnecessary administrative effort.” *See id.* at 24,019. The generic formulas set out in 10 C.F.R. § 50.75(c) were promulgated to fulfill the dual purposes of the rule. Using site-specific estimates, as Cortlandt demands, would defeat the specific purpose of minimizing inefficient administrative effort.

DECOMMISSIONING FUNDS

We remain confident that our generic formula, along with our end-of-license requirements, will result in adequate decommissioning funds:

[C]ombination of these steps, first establishing a general level of adequate financial responsibility for decommissioning early in life, followed by periodic adjustment, and then evaluation of specific provisions close to the time of decommissioning, will provide reasonable assurance that the Commission's objective is met, namely that at the time of permanent end of operations sufficient funds are available to decommission the facility in a manner which protects public health and safety. More detailed consideration by NRC early in life . . . is not considered necessary

53 Fed. Reg. at 24,030-31.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER: DECOMMISSIONING EXPENSES

Regarding the additional expense to decommission to "Greenfield" conditions, we cannot require the Applicants to provide any monies above and beyond those required for standard decommissioning as defined by NRC rules. *See Indian Point 3*, CLI-00-22, 52 NRC at 303. Decommissioning funding under NRC regulations does not include costs relating to nonradioactive structures and materials beyond that necessary to terminate the NRC license. "Costs of disposal of nonradioactive hazardous wastes not necessary for NRC license termination are not included in the prescribed amounts." 53 Fed. Reg. at 24,031.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER: DECOMMISSIONING EXPENSES

Cortlandt questions whether Applicants have the resources to adequately fund the environmental remediation that it believes will be required at the Indian Point plant site. We decline to admit this issue. The Intervenors have not alleged any specific remediation that is likely to be undertaken in the next 5 years and references to "environmental problems" are too vague to provide a basis for a litigable issue. Because Cortlandt failed to identify a specific environmental remediation activity that is likely to occur within the next 5 years, they have failed to raise a genuine issue about whether the Applicants' 5-year revenue projections are sufficient to cover the cost of any such remediation expense.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER: DECOMMISSIONING EXPENSES

CAN has challenged the adequacy of the provision for remediation of radiological materials after the proposed license transfer because the purchase and sale agreement between ConEd and Entergy Indian Point 2 contains a clause whereby ConEd would retain any liability arising from a recent steam generator tube rupture event. CAN argues that NRC will lose jurisdiction over ConEd if the transfer is permitted, while only ConEd is financially responsible for remediation expenses. CAN has failed to raise a litigable environmental remediation issue because it has not described any specific remediation that will be necessary. Further, the NRC retains enforcement authority to ensure adequate protection of health and safety and the environment irrespective of any contract provision between the parties to a transfer.

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

Vague, unsupported issues are inadmissible. *See* 10 C.F.R. § 2.1306.

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

EMERGENCY PLANNING

Cortlandt requests that we examine whether the application is deficient because it fails to provide a radiological emergency response plan, required by 10 C.F.R. § 50.33(g), to account for the increased population and development of the immediate vicinity of the Indian Point plant. Cortlandt states that, because of the significant expansion of the communities in northern Westchester County in the last 25 years, the evacuation of the population would be more difficult than in the past. Cortlandt alleges that the application is deficient because it does not consider the *probability* that a new evacuation plan will have to be designed and *may* require significant additional expenses, “*possibly* including the construction of new and improved highways to facilitate the rapid transportation of residents away from a nuclear accident.” (Emphasis added). We decline to accept this issue for adjudication. In *Indian Point 3*, we rejected two similar issues, specifically, the impact of the proposed transfers on the need for changes to the Emergency Evacuation Plans and the appropriateness of the proposed license transfer in view

of the plant's proximity to metropolitan areas. *See Indian Point 3*, CLI-00-22, 52 NRC at 317. We noted in the earlier case that the new licensees would have to meet all of our regulatory requirements concerning emergency planning and preparedness. *See id.* We also concluded IP3's proximity to metropolitan areas and to locations for sporting and cultural events was not relevant to the question whether to approve the license transfer. *See id.* The same reasoning applies in the instant case. Cortlandt's emergency response claims relate to the everyday running of the plant, not to license transfer. Moreover, Cortlandt provides nothing more than speculation that Entergy's compliance with our emergency response plan regulations will necessitate large unanticipated expenditures, rendering Entergy's 5-year cost-and-revenue projections unreliable.

FINANCIAL QUALIFICATIONS

LICENSE TRANSFER: DISPOSAL OF SPENT FUEL; INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

Safe and adequate storage or disposal of spent nuclear fuel is an ongoing operational issue that must be addressed by whoever owns the plant; as such, it ordinarily falls outside the scope of a license transfer proceeding. *Oyster Creek*, CLI-00-6, 51 NRC at 213-14. However, Cortlandt bases its challenge primarily on the anticipated *cost* of additional storage capacity rather than on the safety, environmental, or operational aspects of spent fuel storage. Applicants have provided us nothing to show that their projected cost figures have accounted for the undefined expense of solving their admitted short-term problem of interim spent fuel storage. In the past the Commission has refused to consider spent fuel storage issues in the context of license transfer proceedings. *See Vermont Yankee*, CLI-00-20, 52 NRC at 171; *Oyster Creek*, CLI-00-6, 51 NRC at 207-08. In those earlier cases, however, spent fuel issues were proffered in a purely operational context or the anticipated storage problems were too far down the time line to assume a role in the license transfer decision. Unlike those cases, the instant case presents a situation where an expense — not quantified in the application — will be incurred by the transferee within the carefully scrutinized 5-year period after the requested license transfer. Therefore, we admit this issue as a subissue of the financial qualifications question.

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

NRC: AUTHORITY

CAN asserts that approval of the license transfer would compromise NRC's regulatory authority over ConEd's continued responsibility for radiological materials and undermine NRC's ability to protect public health and safety. CAN is concerned because, under the Applicants' Asset Purchase & Sale Agreement, ConEd retains liability for radiological materials deposited offsite under its period of ownership. If NRC approves the license transfer, contends CAN, the agency's authority over ConEd with respect to any such radiological materials would be compromised because the NRC would no longer have direct regulatory authority over ConEd after it is released from the Indian Point plant license. In *Indian Point 3*, CAN similarly asserted that approval of the license transfer would deprive the Commission of any post-transfer regulatory authority to ensure that the previous owner (Power Authority of the State of New York) satisfies the NRC's requirements for decommissioning and remediation of the site because the Commission's regulations do not provide for retention of authority and enforcement power over a former licensee. See *Indian Point 3*, CLI-01-14, 53 NRC at 552-53. We examined in detail the issue of our jurisdiction over unlicensed persons and concluded that our authority extends to any person "who engages in conduct *affecting activities* within the Commission's subject-matter jurisdiction — including those who . . . *have been* engaged in licensed activities." See *id.* at 554-55 and references cited therein. Similarly, we conclude here that CAN's worries about the Commission's continuing authority over ConEd are unfounded. Moreover, the circumstances raised by CAN to justify its contention are purely speculative at this point. We decline to consider this issue further.

LICENSE TRANSFER: INTERVENTION (ADMISSIBILITY OF ISSUES)

INTERVENTION: ADMISSIBILITY OF ISSUES

NRC: AUTHORITY

Cortlandt contends loosely that the proposed transfer is not in the public interest. This issue is too broad and vague to be suitable for adjudication. Moreover, NRC's mission is solely to protect the public health and safety. It is not to make general judgments as to what is or is not otherwise in the public interest — other agencies, such as the Federal Energy Regulatory Commission and state public service commissions, are charged with that responsibility. Because

Cortlandt's "public interest" issue seems to go beyond the NRC's statutory duties, and also lacks sufficient specificity, we decline to admit it.

MEMORANDUM AND ORDER

I. INTRODUCTION

This proceeding involves an application seeking the Commission's authorization for Consolidated Edison Company of New York ("ConEd") to transfer its ownership interest in, and operating/maintenance responsibility for, the Indian Point Nuclear Generating Units No. 1 and 2 (collectively, "the Indian Point plant") to Entergy Nuclear Indian Point 2, LLC ("Entergy Indian Point 2") and Entergy Nuclear Operations, Inc. ("Entergy Nuclear Operations"), respectively. The Indian Point plant is located in Westchester County, New York, beside the Hudson River. Its property lies partially within the Town of Cortlandt and entirely within the Hendrick Hudson School District. ConEd and the Entergy companies (collectively "Applicants") submitted both a redacted and an unredacted version of their application to the Commission on December 12, 2000, pursuant to section 184 of the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. § 2234, and section 50.80 of the Commission's regulations.¹ The redacted version omitted financial information relevant to the estimated costs of the plant's operation and maintenance.

On January 29, 2001, the Commission published in the *Federal Register* a notice of the Indian Point 2 application.² In response to this notice, the Commission received petitions to intervene and requests for hearing from two entities wishing to oppose the license transfer application. The Petitioners are Citizens Awareness Network ("CAN") and the Town of Cortlandt together with the Hendrick Hudson School District (collectively "Cortlandt").³

¹ See 42 U.S.C. § 2234 (precluding the transfer of any NRC license unless the Commission both finds the transfer in accordance with the AEA and gives its consent in writing). See also 10 C.F.R. § 50.80, which reiterates the requirements of AEA § 184, sets forth the filing requirements for a license transfer application, and establishes the following test for approval of such an application: (1) the proposed transferee is qualified to hold the license and (2) the transfer is otherwise consistent with law, regulations, and Commission orders.

² See Consolidated Edison Company of New York, Inc.; Indian Point Nuclear Generating Unit Nos. 1 and 2; Notice of Consideration of Approval of Transfer of Facility Operating Licenses and Conforming Amendments, and Opportunity for a Hearing, 66 Fed. Reg. 8122.

³ See "Citizens Awareness Network's Request for Hearing and Petition to Intervene in the License Transfers for Indian Point Nuclear Generating Units Nos. 1 and 2" (Feb. 20, 2001) ("CAN's Petition") and "Petition for Leave To Intervene and Request for Hearing in the Consideration of Approval of the Proposed License Amendment and Transfer of Indian Point 2 Nuclear Power Plant Operating License and the Indian Point 1 Provisional Operating License to Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Operations, Inc. and Request for Additional Time" (Feb. 20, 2001) ("Cortlandt's Petition").

(Continued)

Cortlandt raised several issues and sought access to the unredacted version of the application.⁴ Citing lack of access to the unredacted application, CAN raised no specific issues, but stated general concerns regarding the technical and financial qualifications of the Entergy companies. CAN also requested that the proceeding be terminated or suspended⁵ or that it be given access to an unredacted version of the transfer application, with appropriate confidentiality arrangements, and additional time to submit its issues. The Commission denied the motion to terminate or suspend the proceeding, but granted both CAN and Cortlandt an extension of time within which to submit or revise any issues after gaining access to the confidential portions of the transfer application. *See* CLI-01-8, 53 NRC 225.

CAN submitted its issues on April 9, 2001,⁶ and Cortlandt submitted its issues on April 12, 2001.⁷ Applicants filed answers and both CAN and Cortlandt filed replies.⁸

The NRC Staff is not participating as a party in the adjudicatory portion of this proceeding. *See generally* 10 C.F.R. § 2.1316(b), (c). We consider the pleadings under Subpart M of our procedural rules. *See* 10 C.F.R. §§ 2.1300-2.1331.

For the reasons set forth below, we grant the requests for hearing of CAN and Cortlandt and we admit certain issues involving whether the Entergy companies have demonstrated their financial ability to operate and maintain the Indian Point plant safely.

Entergy Nuclear Operations and Petitioners CAN and Cortlandt participated in the recently completed license transfer proceeding involving the Indian Point 3 reactor. *See Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 NRC 488 (2001); *id.*, CLI-00-22, 52 NRC 266 (2000) (hereinafter referred to as “*Indian Point 3*”).

⁴ *See* Cortlandt’s Petition.

⁵ CAN requested the Commission to suspend this proceeding until the Commission completes the *Indian Point 3* license transfer proceeding and until the NRC completes consideration of CAN’s Petition for Enforcement Action pursuant to 10 C.F.R. § 2.206 concerning alleged regulatory violations and systemic mismanagement by ConEd at IP2. *See* CLI-01-8, 53 NRC 225, 228 (2001).

⁶ *See* “Citizens Awareness Network, Inc.’s Contentions Challenging the License Transfer Applications for Indian Point Nuclear Generating Unit Nos. 1 and 2” (“CAN’s Contentions”). Although our Subpart M rules refer to *issues*, CAN has consistently used the term “contentions.” *See* 10 C.F.R. § 2.1306(b)(2).

⁷ *See* “Submission of Issues by Town of Cortlandt, New York and Hendrick Hudson School District” (“Cortlandt’s Issues”) and “Submission of Redacted Issues by Town of Cortlandt, New York and Hendrick Hudson School District” (“Cortlandt’s Redacted Issues”).

⁸ *See* “Applicants’ Answer to Citizens Awareness Network, Inc.’s Revised Petition for Leave To Intervene and Request for Hearing” (Apr. 19, 2001) (“Applicants’ Answer to CAN”); “Applicants’ Answer to Submission of Issues by Town of Cortlandt, New York and Hendrick Hudson School District” (Apr. 23, 2001) (“Applicants’ Answer to Cortlandt”); “Proprietary Annex to Applicants’ Answer to Submission of Issues by Town of Cortlandt, New York and Hendrick Hudson School District” (Apr. 23, 2001) (“Applicants’ Cortlandt Annex”); “Citizens Awareness Network, Inc.’s Reply to Applicants’ Answer to CAN’s Petition for Leave To Intervene and Request for Hearing on the License Transfer Applications for Indian Point Nuclear Generating Unit Nos. 1 and 2” (Apr. 26, 2001) (“CAN’s Reply”); “Town of Cortlandt and Hendrick Hudson School District’s Reply to Applicants’ Answer to Submission of Issues” (Apr. 30, 2001) (“Cortlandt’s Reply”); and “Proprietary Annex to Reply of Town of Cortlandt, New York and the Hendrick Hudson School District” (Apr. 30, 2001) (“Cortlandt’s Annex”).

II. THE LICENSE TRANSFER APPLICATIONS

ConEd, Entergy Indian Point 2, and Entergy Nuclear Operations have filed an application seeking to transfer the ownership of the Indian Point plant to Entergy Indian Point 2, and both the operating and maintenance responsibilities for Indian Point Unit 2 (“IP2”) and the maintenance responsibility for Indian Point Unit 1 (“IP1”) to Entergy Nuclear Operations.⁹ ConEd will transfer decommissioning funds for both plants to Entergy Indian Point 2 at the close of the sale. The responsibility for decommissioning both plants would also transfer to Entergy Indian Point 2.

The new owner and the new operator of the Indian Point plant are not “electric utilities” under our rules. Thus, they must demonstrate their financial qualifications to own and/or operate the plants. *See* 10 C.F.R. § 50.33(f). The Entergy companies have submitted 5-year cost-and-revenue projections in accordance with our rules.¹⁰ Much of the material was submitted as proprietary financial information and has been withheld from public disclosure.

Upon closing, essentially all employees within ConEd’s Nuclear Generation Department, and certain other employees supporting that department, will become employees of Entergy Nuclear Operations. The application proposes neither physical changes to Indian Point plant facilities nor operational changes, but does request administrative changes to the licenses that are necessary to reflect the proposed transfers. *See* 66 Fed. Reg. at 8122.

Before deciding Petitioners’ standing and the admissibility of their issues, we first address threshold procedural matters.

III. PRELIMINARY PROCEDURAL ISSUES

A. CAN’s Request for a Formal Subpart G Hearing

CAN has requested a formal hearing under Subpart G of our procedural regulations rather than under Subpart M procedures that normally apply to license transfer adjudications. *See* CAN’s Contentions at 24, 31-32; CAN’s Reply at 5-9. CAN contends that the “special circumstances” of this case warrant a “more in-depth forum” to determine the Entergy companies’ qualifications to own and operate the Indian Point plant. *See* CAN’s Reply at 8. The special circumstances alleged by CAN include allegations of historical and continuing problems at IP2 and its request for an independent evaluation of the plant. CAN acknowledges

⁹ IP1, which ceased to operate in 1974, has been in safe shutdown mode since that time.

¹⁰ CAN and Cortlandt dispute whether the Applicants submitted financial data for a sufficient period of time. *See* Cortlandt’s Petition at 19-20; Cortlandt’s Issues at 11; CAN’s Contentions at 32-33. We address this issue in detail, *infra* Section III.B.

that the issues it considers special are “not properly reviewable within a simple license transfer.” See CAN’s Contentions at 24.

CAN’s request for a Subpart G proceeding is expressly prohibited in a license transfer proceeding. See 10 C.F.R. § 2.1322(d) and *Vermont Yankee Nuclear Power Corp. and Amergen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 162 (2000). As it did in the Indian Point 3 license transfer proceeding, CAN invokes 10 C.F.R. § 2.1329, which authorizes the Commission to waive a rule when, “because of special circumstances concerning the subject of the hearing, application of a rule or regulation would not serve the purposes for which it was adopted.” 10 C.F.R. § 2.1329(b). See CAN’s Contentions at 31; CAN’s Reply at 6.

In the earlier case, the “special circumstances” alleged by CAN were that matters in the license transfer proceeding were not strictly financial in nature. *Indian Point 3*, CLI-00-22, 52 NRC at 290. In this case, CAN again asserts that the issues involve more than “mere financial matters” and that the hearing process needs the “intensive investigatory power” that cross-examination provides. See CAN’s Contentions at 31. In denying CAN’s earlier request, we observed that our Subpart M rules cover all license transfer issues:

Our Subpart M rules are intended to apply to more than just those cases presenting only financial issues. We expected when promulgating Subpart M that most issues would be financial However, we also predicted that Petitioners would raise other categories of issues as well (such as foreign ownership, technical qualifications, and appropriate critical staffing levels) For that reason, when promulgating Subpart M, we expressly declined to adopt [a commenter’s] suggestion that we limit the scope of Subpart M proceedings to financial matters.

Indian Point 3, CLI-00-22, 52 NRC at 290-91. We see no basis at this time for finding the Subpart M process inadequate to address CAN’s proposed issues. Accordingly, we deny CAN’s request for a Subpart G hearing.

In the alternative, CAN requests a “broad-ranging” hearing under Subpart M. See CAN’s Contentions at 31. The Commission’s regulations provide that the Commission, on its own motion or in response to a request from a Presiding Officer, may use additional procedures, such as a formal hearing or an opportunity to cross-examine witnesses, if necessary for “sufficient accuracy.” See 10 C.F.R. § 2.1322(d). The regulations prohibit motions by parties for “special procedures or formal hearings.” *Id.* Thus, we deny CAN’s request for a “broad ranging” hearing. See *Indian Point 3*, CLI-00-22, 52 NRC at 291. The Commission will consider additional procedures if it deems them necessary as this proceeding moves forward.

B. Applicants' Submission of Financial Data

Both Cortlandt and CAN maintain that the license application is deficient because the Applicants submitted financial data only for the years 2001 through 2005.¹¹ As the Applicants had requested that the license transfer be effective on May 11, 2001, CAN and Cortlandt contend that the data are insufficient because Applicants provided projections for only 1 partial year (i.e., 2001) and 4 full years of operation by the transferee. CAN argues that “the Entergy companies have disregarded the most basic requirement — a simple filing requirement — for demonstrating financial qualifications.” *See* CAN’s Reply at 23. Further, Cortlandt questions whether the alleged shortcoming renders the application “so patently deficient that it should be dismissed or supplemented” for failure to provide the required financial information. *See* Cortlandt’s Issues at 11.

The Applicants argue that the data are sufficient under our rule, which states: “The applicant shall submit estimates for total annual operating costs for each of the first five years of operation of the facility.” *See* 10 C.F.R. § 50.33(f)(2). The Applicants apparently believe that, since 2001 was to be the first year of operation, supplying figures for 2001 through 2005 complies with our rule. The Petitioners, on the other hand, contend that the rule requires data for five full 12-month periods after the effective date of the license transfer.

We agree with the Petitioners that the financial qualifications rule requires data for the first five 12-month periods after the proposed transfer; however, we decline to dismiss this license transfer application. An application need not be automatically rejected whenever an omission or error is found. *See Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 95-96 (1995), *reconsideration denied*, CLI-95-8, 41 NRC 386, 395 (1995). The missing data can be submitted for consideration by the Presiding Officer at the adjudicatory hearing. *See id.* Dismissing this proceeding would not serve the parties’ best interests, as the deficiency in the application can easily be cured and the focus should be on the numerous substantive matters that remain to be resolved.¹²

C. Incorporation of Issues by Reference

CAN has stated that it incorporates Cortlandt’s “contentions” by reference, and Cortlandt has done the same for CAN’s issues. *See* CAN’s Contentions at 1; Cortlandt’s Issues at 15. Applicants, however, argue that such incorporation should be rejected because each petitioner must independently meet the threshold requirements for participation, i.e., both demonstrate standing to participate and

¹¹ *See* Cortlandt’s Petition at 19-20; Cortlandt’s Issues at 11; CAN’s Contentions at 32-33.

¹² We note that the Applicants have supplied the missing data to the NRC Staff and to the Petitioners.

proffer at least one admissible issue. *See* Applicants' Answer to Cortlandt at 14; Applicants' Answer to CAN at 7-8.

Cortlandt has presented several admissible issues, and CAN has presented one. *See* Section IV.B, *infra*. As both Petitioners have independently met the requirements for participation, we will provisionally permit Petitioners to adopt each other's issues at this early stage of the proceeding.¹³ But if the primary sponsor of an issue later withdraws from this proceeding, the remaining sponsor must then demonstrate to the Presiding Officer its independent ability to litigate this issue. A failure to do so renders the issue subject to dismissal prior to the hearing.

Under our rules governing license transfer proceedings, all participants are permitted to submit statements of position and written testimony with supporting affidavits "on the issues." *See* 10 C.F.R. §§ 2.1321(a) and 2.1322(a)(1). In promulgating these procedural rules, we did not limit parties to filing such statements and affidavits on only *their own* issues. Thus, CAN and Cortlandt are entitled to address all of the issues, whether or not they were the original sponsor.¹⁴ The agency has permitted incorporation of others' contentions or issues in the past¹⁵ and the practice is also consistent with that of the federal courts.¹⁶

We add a cautionary note. Although we are provisionally permitting incorporation of issues by reference here, where each Petitioner has shown substantial effort in preparing its own issues, we do not give *carte blanche* approval of the practice for all contexts. For instance, we will not permit incorporation by reference where the effect would be to circumvent NRC-prescribed page

¹³ If the requests had been made later, they would have had to meet the standards for late filing of issues. *See Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225, 229-30 (2001) (applying to late-filed issues the Commission's rule, 10 C.F.R. § 2.1308(b), regarding late-filed petitions to intervene); *Indian Point 3*, CLI-00-22, 52 NRC at 319 ("The Commission will not consider new issues or new arguments or assertions related to the admitted issues at the hearing, unless they satisfy our rules for late-filed issues (10 C.F.R. § 2.1308(b))"). *See also Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), LBP-00-34, 52 NRC 361, 363 (2000) ("further consideration . . . of the dismissed contention, should another party seek to litigate it, would require a balancing of the factors applicable to late-filed contentions").

¹⁴ *See Indian Point 3*, LBP-00-34, 52 NRC at 363 (referring to "an intervenor [being] permitted to participate in litigation of another intervenor's issues").

¹⁵ *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC 1073, 1074 (1983); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-86-22, 24 NRC 103, 106 (1986) (relying on ALAB-731, *supra*).

¹⁶ *See* 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1326 (available in WestLaw, FPP Library) (regarding Fed. R. Civ. P. 10(c): ("allegations in a prior effective pleading in the same action can be incorporated by reference regardless of the pleading in which the matter appears and regardless of the identity of the party who issued the pleading"); Fed. R. Civ. P. 10(c) ("Statements in a pleading may be adopted by reference in . . . another pleading or in any motion").

limits¹⁷ or specificity requirements.¹⁸ Nor will we permit wholesale incorporation by reference by a petitioner who, in a written submission, merely establishes standing and attempts, without more, to incorporate the issues of other petitioners. Further, we would not accept incorporation by reference of another petitioner's issues in an instance where the petitioner has not independently established compliance with our requirements for admission as a party in its own pleadings by submitting at least one admissible issue of its own. Our contention-pleading rules are designed, in part, "to ensure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions."¹⁹

IV. DISCUSSION

To intervene as of right in a licensing proceeding, a petitioner must demonstrate standing, i.e., that its "interest may be affected by the proceeding." See AEA § 189a, 42 U.S.C. § 2239(a). In addition, in a license transfer proceeding, the petition to intervene must raise at least one admissible issue. See 10 C.F.R. § 2.1306. As discussed below, both CAN and Cortlandt have demonstrated standing and have raised at least one admissible issue. We therefore set the case for hearing.

A. Standing

Applicants do not contest the standing of any of the three entities. We recently granted standing to CAN and Cortlandt in a license transfer proceeding involving another nuclear unit on the same site as the Indian Point plant. See *Indian Point 3*, CLI-00-22, 52 NRC at 293-95. We grant standing to CAN and Cortlandt in this proceeding for the same reasons.

B. Admissibility of Issues

Our rules specify that, to demonstrate that issues are admissible in a Subpart M proceeding, a petitioner must

¹⁷ See, e.g., *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-5, 47 NRC 119, 121 n.1 (1998) ("Incorporating the Petitioners' hearing petition by reference is an inartful attempt to bypass [the regulation's 10-page limitation]", *interlocutory appeal dismissed*, CLI-98-8, 47 NRC 314 (1998)).

¹⁸ See, e.g., *International Uranium (USA) Corp.* (Receipt of Material from Tonawanda, New York), LBP-98-21, 48 NRC 137, 142 n.7 (1998); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989), *aff'd*, ALAB-915, 29 NRC 427 (1989); *Tennessee Valley Authority* (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 209, 216 (1976).

¹⁹ *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999).

- (1) set forth the issues (factual and/or legal) that petitioner seeks to raise,
- (2) demonstrate that those issues fall within the scope of the proceeding,
- (3) demonstrate that those issues are relevant to the findings necessary to a grant of the license transfer application,
- (4) show that a genuine dispute exists with the applicant regarding the issues, and
- (5) provide a concise statement of the alleged facts or expert opinions supporting petitioner's position on such issues, together with references to the sources and documents on which petitioner intends to rely.

See 10 C.F.R. § 2.1306; *Indian Point 3*, CLI-00-22, 52 NRC at 295 and references cited therein. Mere “notice pleading” is insufficient under these standards; however, our requirement for specificity and factual support rather than vague or conclusory statements is not intended to prevent intervention when material and concrete issues exist. See *id.*

Our rules expressly require an intervention petitioner to state the facts or expert opinions supporting its position. See 10 C.F.R. § 2.1306. If an application lacks detail, a Petitioner may meet its pleading burden by providing “plausible and adequately supported” claims that the data are either inaccurate or insufficient. See *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000).²⁰

To support its proposed issues, Cortlandt relies primarily on the affidavit of its expert, George E. Sansoucy.²¹ Mr. Sansoucy has used information available from public sources (e.g., data from FERC-1 forms filed by Applicants) as a starting point and made assumptions within his area of expertise to interpret such information. Cortlandt has also used information — often generated or commissioned by ConEd — obtained from filings before other government agencies which are separately considering the instant license transfer. CAN, too, has supplied extensive material, but some of it is irrelevant to a license transfer proceeding (e.g., its petition under 10 C.F.R. § 2.206 and an analysis by David Lochbaum of the Union of Concerned Scientists that might serve as support in the 2.206 proceeding, but has little or no value in this license transfer proceeding). CAN has offered an affidavit by its expert, Edward A. Smeloff, but he prepared that affidavit for the *Indian Point 3* license transfer proceeding.²² We will consider only the paragraphs of that affidavit that are of general applicability, and we will ignore any paragraph that specifically relates to the Indian Point 3 plant. CAN has

²⁰ “[I]f the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner’s belief” constitute sufficient information to show that a genuine dispute exists under the Subpart G analog of 10 C.F.R. § 2.1306. See 10 C.F.R. § 2.714(b)(2)(iii).

²¹ Applicants have not challenged Mr. Sansoucy’s expertise.

²² See “Declaration of Edward A Smeloff” (Jan. 10, 2001) in the matter of Power Authority of the State of New York and Entergy Nuclear Fitzpatrick LLC, Entergy Nuclear Indian Point 3 LLC, and Entergy Nuclear Operations, Inc., Docket Nos. 50-333-LT and 50-286-LT.

also used information available in NRC publications to provide factual support for its proposed issues.

We now turn to the actual proposed issues in this case to determine whether they are admissible under 10 C.F.R. § 2.1308. Some issues we find admissible, and some not. For convenience, we have grouped related issues.

1. Financial Qualifications Issues

Both Cortlandt and CAN express strong doubts that the Entergy companies have the level of financial qualifications necessary to operate the Indian Point plant safely. *See* 10 C.F.R. § 50.33(f)(2). Cortlandt asserts that the application does not demonstrate an appropriate margin between anticipated operating costs and revenue projections, and that the Applicants do not provide evidence of access to sufficient reserve funding. Under the “financial qualifications” umbrella, Cortlandt raises numerous subissues — some of which overlap.²³ CAN alleges more generally that Applicants’ revenue projections are unreasonable and their operating and maintenance cost projections are far too low. We admit the jointly sponsored financial qualifications issue, limited to the bases approved in the following discussion of Petitioners’ itemized claims.

a. Applicants’ 85% Capacity-Factor Projection

Petitioners assert that the Applicants’ revenue projections are unreasonable because they rest on achieving an average annual capacity factor²⁴ of 85% for IP2. Cortlandt challenges this projection as “fantasy,” and both Petitioners note that no supporting information for this assertion appears in the license transfer application. *See* Cortlandt’s Issues at 5-6; CAN’s Contentions at 34; CAN’s Reply at 23-24. Citing data obtained from Federal Energy Regulatory Commission forms filed by Applicants, George E. Sansoucy, the expert retained by Cortlandt, notes that the average annual capacity factor for IP2 from 1995 through 1999 was 57.66% if no adjustment is taken for an extended shutdown. *See* Letter from George E. Sansoucy to Paul V. Nolan at 2, Feb. 20, 2001 (“Sansoucy Letter”). According to CAN, the NRC Staff has stated that, without taking an extended shutdown into account, the average for 1994 through 1999 was 66.1%.²⁵ Focusing on recent operation, CAN says that the average capacity factor for 1997-1998

²³ In Section III.B, *supra*, we considered CAN’s and Cortlandt’s objection that the Applicants provided only 4½ years of cost-and-revenue projections.

²⁴ “Capacity factor” is “the ratio of the . . . electricity generated, for the period of time considered, to the energy that could have been generated at continuous full-power operation during the same period.” *See Indian Point 3*, CLI-01-14, 53 NRC at 510, *citing* “Glossary of Nuclear Terms,” at <http://www.nrc.gov/NRC/EDUCATE/GLOSSARY>.

²⁵ *See* CAN’s Contentions at 35, *citing* the NRC Web site at http://www.nrc.gov/NRC/NUREGS/SR1350/V12/sr1350v12.html#_1_58.

was 30.7%, as IP2 suffered 17 months of outage in that 2-year period. *See* CAN's Contentions at 34-35.

CAN claims generally that ConEd has repeatedly failed to address the fundamental problems responsible for loss of production and, in light of IP2's history of being a "troubled" reactor, cost-and-revenue projections should be tested for a 1-year outage to determine whether the Entergy companies are financially qualified to own and operate the Indian Point plant. *See* CAN's Contentions at 35. CAN argues that "[t]he mere claim that Entergy's performance record at other reactors justifies their assumption that such performance would be immediately achievable at Indian Point 2 does not constitute evidence in support of these newly formed non-utilities' financial qualifications." *See* CAN's Reply at 26-27.

We recently approved a Presiding Officer's admission of a similar capacity-factor issue in *Indian Point 3*. *See Indian Point 3*, CLI-01-14, 53 NRC at 518-19, *approving* LBP-01-4, 53 NRC 121, 128 (2001). We accept Cortlandt and CAN's issue for adjudication in this case as well.

In a related vein, Cortlandt also questions whether the Entergy companies' operating experience with other plants is even relevant to IP2 achieving an average plant factor of 85% in light of IP2's recent operating history. *See* Cortlandt's Issues at 7. Further, Cortlandt maintains that "[e]ven if a description of experience with other plants was provided, such experience would be totally irrelevant because it would not consider the particular capital improvements needs, or operating history of IP2, which is the sole source of Plant generated revenues." *Id.* This issue, too, warrants further inquiry at a hearing. *See Indian Point 3*, CLI-01-14, 53 NRC at 520-21. Accordingly, we accept this subissue for litigation.

b. Projected Revenues

Cortlandt also disputes whether the projected revenues for operation of IP2 are reasonable and reliable. Specifically, Cortlandt claims that Applicants' estimates of costs and revenues are "facially incredible and cannot be reconciled with known information." *See* Cortlandt's Redacted Issues at 6. Citing proprietary data,²⁶ Cortlandt notes that the average revenue claimed by Applicants for 2002-2004 exceeds the figure calculated using an 85% capacity factor and the fixed price for electricity under contract to ConEd. *See id.* at 7. Similarly, according to Cortlandt, Applicants' revenue estimates for 2005, the first year not covered by the power purchase agreement with ConEd, greatly exceed the revenues available using an 85% capacity factor and Applicants' estimate of sale price per megawatt hour. *See id.* at 8. Cortlandt concludes that Applicants' projections "grossly

²⁶ Specific figures will not be revealed here.

overstate” the anticipated revenues. *See id.* As this subissue not only is backed by calculations derived from the Applicants’ own data but also relates to Cortlandt and CAN’s challenge to the Applicants’ 85% capacity factor projection, we accept it for litigation.

c. Estimated Costs

CAN asserts generally that Applicants’ operating and maintenance cost projections are far too low. CAN alleges that Applicants have not accounted for “the increased expenses to take on the project of restoring the reactor to regulatory compliance and resolving the organizational and personnel problems the Entergy companies would inherit.” *See* CAN’s Contentions at 36. Based only on a comparison with operations and maintenance costs in the FitzPatrick/IP3 license transfer application, CAN concludes that the Entergy companies expect to resolve the foregoing problems with a “hopelessly inadequate” additional investment of less than \$50 million. *See id.* CAN has advanced no documentary support or expert opinion for its claim.²⁷

Cortlandt, however, contests Applicants’ estimated costs in four better documented subissues: (1) whether the estimated project costs are reasonable in light of IP2’s previous operating history; (2) whether projected costs are reasonable and reliable in their own right; (3) whether the projected total operating expenses jeopardize Applicants’ financial ability to operate IP2 safely;²⁸ and (4) whether achieving an average plant capacity factor of 85% will cause Applicants to incur additional costs for maintenance of plant safety (increased variable costs for refueling, repairs, and maintenance) in excess of those projected. *See* Cortlandt’s Issues at 7-10; Cortlandt’s Redacted Issues at 6, 8-10. These interrelated subissues amount to a claim that Entergy’s costs will prove higher than anticipated.

Cortlandt relies on an analysis of data available from FERC Form 1 for the years 1995 through 1999. *See* Sansoucy Letter. These figures include the costs of operation, fuel, and maintenance reported by ConEd and the estimated costs of capital to finance the purchase of the facility and nuclear fuel and fuel oil inventories.²⁹ Cortlandt compares these historic costs to the income expected under the proposed power purchase agreement between ConEd and Entergy Indian Point 2, and concludes that, if IP2 performs at its 1995-1999 levels, the total cost of operation may exceed the revenues obtainable under the power purchase

²⁷ As noted, *supra*, CAN submitted an affidavit its expert prepared for another license transfer proceeding. We do not find the general paragraphs of that affidavit applicable here.

²⁸ This subissue warrants no separate discussion, as it inheres in the first two subissues.

²⁹ Cortlandt cites the Affidavit of George Jee, page 2, Applicants’ Joint Petition filed with the New York Public Service Commission, PSC Case No. 01-M-0075. *See* Cortlandt’s Issues at 9. Annual capital requirements were estimated by George Sansoucy using a 10% cost of capital to finance the purchase over a 10-year period. *See* Sansoucy Letter at 2, ¶ 3. Applicants have not stated whether they will finance the purchase of the Indian Point plant.

agreement by 20% or more. *See* Cortlandt's Issues at 9. Cortlandt argues that "the financial capability of [Entergy Indian Point 2] is dependent on performance levels that the facility did not maintain during the years 1995 to 1999 or cost savings which have not been identified in the Transfer Application." *See id.*

Cortlandt also relies on proprietary data submitted by Applicants and publicly available data regarding annual operating expenses of ConEd for IP2 for 1997-1999. Cortlandt argues that Applicants do not explain why their cost estimates appear to be substantially lower than those experienced by ConEd, and why certain estimates, such as cost of fuel, do not harmonize with historic costs. *See id.* at 8-9. Cortlandt alleges that the projected cost figures are not only unsupported but also "plainly in contradiction with known historical operating data." *See* Cortlandt's Redacted Issues at 8. Cortlandt states that, according to the license transfer application, the Entergy companies anticipate being able to fund fixed operating expenses from retained earnings or by lines of credit. *See id.* at 9, *citing* License Transfer Application. Cortlandt contends that, in the event of an extended outage, Entergy Indian Point 2 will not be able to pay its projected fixed operating expenses from retained earnings.

We accept this subissue for adjudication, as it, like some of Cortlandt's other issues, rests on expert-backed claims that the transfer application relies on unexplained or noncredible data.

Cortlandt's final cost-based concern is whether achieving an average plant capacity factor of 85% will cause the Applicants to incur additional costs, in excess of those projected. We find that Cortlandt has not stated this proposed basis with the particularity required for consideration in a license transfer adjudication. *See* Cortlandt's Issues at 7-8. Therefore, we reject it.³⁰

d. Decreasing Retained Earnings

Cortlandt contends that, under Applicants' projections, "retained earnings will be reduced drastically and possibly wiped out entirely before IP2's operating license expires." *See* Cortlandt's Redacted Issues at 2-3. Cortlandt foresees that, after 2003, a shortfall in retained earnings will require Entergy Indian Point 2 to access monies available to it under intercompany agreements. Further, Cortlandt worries that any deficiency in Entergy Indian Point 2's showing of financial strength would be exacerbated by any adverse operating events such as an extended shutdown. *See id.* at 3. Here, Cortlandt's queries are based on information contained in the license transfer application itself and questions that

³⁰ Cortlandt has briefly raised the issue of whether the expiration of a collective bargaining agreement with IP2 employees in 2004 will result in costs beyond those accounted for in cost projections. *See* Cortlandt's Petition at 20. Since Cortlandt relies only on speculation to frame this issue, we decline to consider it further.

follow logically after considering IP2's operating history. We therefore accept this subissue for adjudication.

Cortlandt also raises an issue about the availability of funds under a \$20,000,000 line of credit with Entergy Global Investments, Inc. Specifically, Cortlandt questions whether the lines of credit available to the Entergy companies from Entergy Global Investments and Entergy International Ltd. LLC are sufficient and reliable. *See* Cortlandt's Petition at 17-19. But "[g]iven that our regulations do not require supplemental funding as part of a showing of financial qualifications, we do not see why the creditworthiness of the guarantor would be any more germane than the amount of the supplemental funding guarantee itself . . ." *Indian Point 3*, CLI-01-14, 53 NRC at 540. We would consider this issue only if the Entergy companies intended to rely on these credit arrangements to demonstrate their financial qualifications to own and operate the Indian Point plant. We have held that, "absent a demonstrated shortfall in the revenue predictions required by 10 C.F.R. § 50.33(f), the adequacy of a corporate parent's supplemental commitment is not material to our license transfer decision." *See Vermont Yankee*, CLI-00-20, 52 NRC at 177. *Accord Oyster Creek*, CLI-00-6, 51 NRC at 205 (adequacy of a credit line is not an issue if the credit line is not part of the financial qualifications showing, but offered merely as an additional demonstration of financial assurance). Therefore, we decline to consider the supplemental funding issue given that the Applicants do not rely on supplemental funding as a basis for financial qualification.

e. Revision of the Power Purchase Agreement

Cortlandt next inquires whether the Entergy-ConEd power purchase agreement should be revised to ensure that Entergy Indian Point 2 has adequate financial resources to cover total costs to operate in compliance with NRC requirements. *See* Cortlandt's Issues at 10. The sale of the Indian Point plant is, in Cortlandt's view, tied to a power purchase agreement with ConEd that provides for significantly below market rates for electricity; moreover, the sale of electricity is the only source of income to cover costs of operation.

We find this issue well outside the bounds of a license transfer proceeding and reject it. Enforcement or revision of a power purchase contract between private parties, even when the parties are within the regulatory authority of the NRC, is not within the jurisdiction of the NRC. While a change in such an agreement could in theory make the difference between proving an entity is financially qualified to own and operate a nuclear power plant and being unable to do so, the NRC has authority only to make a "yes or no" decision regarding financial qualifications or, at most, to give a conditional "yes" answer. Any financial conditions attached to a nuclear power plant license transfer would ordinarily be concerned with an additional sum of money or credit deemed necessary to

demonstrate financial qualifications; NRC-imposed conditions normally would not direct that a particular source, such as a power purchase agreement, provide the additional funds. The remedy sought by Cortlandt lies outside the scope of this proceeding.

f. Legality of the Proposed Operating Agreement

As a “catch-all” financial issue, Cortlandt asks “whether the proposed operating agreement: A) is legal under New York State law, B) endangers [Entergy Indian Point 2’s] financial ability to operate [the Indian Point plant] safely, and C) requires supplemental information.” *See* Cortlandt’s Redacted Issues at 3-5.

Cortlandt submits that the proposed operating agreement is unenforceable under New York State law because it “purports to indemnify” Entergy Indian Point 2 for claims that may be lodged against it. *See id.* at 4. An NRC adjudicatory proceeding is simply not the appropriate forum for examining a contractual agreement’s legality under state law. To be effective, the license transfer application must be approved by the New York Public Service Commission, among other agencies. NRC’s charge is to protect the health and safety of the nuclear workforce and the general population by ensuring the safe use of nuclear power. We depend on the State of New York to handle any issues — such as contractual issues — which are not in conflict with our jurisdiction and which are properly contested under that state’s laws.

We also reject Cortlandt’s assertion that the operating agreement may interfere with Entergy Indian Point 2’s financial ability to operate the Indian Point plant safely. Cortlandt’s assertion is too vague and speculative to serve as a basis for adjudication. *See Indian Point 3*, CLI-00-22, 52 NRC at 312. Cortlandt believes that, under the proposed operating agreement, the ability of Entergy Nuclear Operations to incur costs is “unfettered” and, consequently, Entergy Indian Point 2 is “likely” to be “embroil[ed] . . . in expensive disputes.” *See* Cortlandt’s Redacted Issues at 4. In another apparent criticism of the agreement, Cortlandt characterizes the prepayment of expenses by Entergy Nuclear Operations and the obligation of Entergy Indian Point 2 to reimburse the former entity as “nothing more than a means for ‘conveying’ project revenues to [Entergy Nuclear Operations], out of the coffers of [Entergy Indian Point 2] — a limited liability corporation, and into the hands of upstream and nonregulated affiliates of [Entergy Indian Point 2].” *See id.* The distribution of project revenues and profits is not within NRC’s purview, so long as the Indian Point plant has sufficient money to operate safely and to meet decommissioning obligations. Although Cortlandt’s assertions are couched in terms of jeopardy to the plant’s ability to operate safely, we cannot admit an issue for adjudication based on mere conjecture.

“Unsupported hypothetical theories or projections . . . will not support invocation of the hearing process.” *Indian Point 3*, CLI-00-22, 52 NRC at 315.

2. *Technical Qualifications*

The Entergy companies assert they are technically qualified to operate IP2 because existing staff and personnel will become employees of Entergy Nuclear Operations. CAN asserts that the Entergy companies are not technically qualified to operate IP2 and that the application does not acknowledge any of ConEd’s special circumstances and problems, specifically, that ConEd’s “history of systemic mismanagement . . . has compromised the material condition, licensing and design basis, and technical qualifications of the existing personnel.” *See* CAN’s Contentions at 11. Further, according to CAN, a “culture of non-compliance [at IP2] threatens occupational and public health and safety.” *Id.* at 17. CAN considers it “imperative to consider the legacy problems that undermine the Entergy companies’ technical qualifications” in the context of this license transfer proceeding. *See* CAN’s reply at 21. CAN urges that conditions be placed on the sale to protect the health and safety of workers and the public; that the FSAR be verified; and that an independent evaluation of IP2 be required before transfer because of historical problems in NRC Region I. *See* CAN’s Contentions at 16-18, 24-29.

We decline to admit this issue, as CAN’s claims are not directly linked to the license transfers at issue in this proceeding. *See Indian Point 3*, CLI-00-22, 52 NRC at 309. With continuity in the workforce, any problems alleged by CAN are operational problems that, if shown to exist, will need to be remedied whether or not the license is transferred. Indeed, CAN’s concerns are under review as the subject of an enforcement petition filed by CAN under 10 C.F.R. § 2.206, which provides for any person to “file a request to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper.”³¹

CAN has not squarely challenged the technical qualifications of the plant’s intended employees. *See Indian Point 3*, CLI-00-22, 52 NRC at 309-10. Rather, CAN has advanced the amorphous allegation that ConEd’s “systemic mismanagement” of Indian Point 2 has, in some undefined manner, “compromised the technical qualifications of existing personnel and support organizations there.” *See* CAN’s Contentions at 15. CAN stresses that “Entergy would be

³¹ *See* CAN’s “Formal Petition for Enforcement Action Pursuant to 10 CFR 2.206 to Revoke Con Edison’s Operating License for Indian Point Unit 2 Due to Chronic, Systemic Mismanagement Resulting in Significant Violations of NRC Safety Regulations,” Docket No. 50-247 (Dec. 4, 2000) (CAN’s 2.206 Petition”). CAN’s petition has been accepted for review by NRC’s Director of Nuclear Reactor Regulation. *See* License No. DPR-26, Consolidated Edison Company of New York, Inc., Receipt of Petition for Director’s Decision Under 10 C.F.R. 2.206, 66 Fed. Reg. 15,301 (Mar. 16, 2001).

relying on these same technically unqualified staff.’’ See CAN’s Reply at 19. CAN’s claims are too broad and too vague to be suitable for adjudication.

CAN believes that verification of the FSAR and Design Basis Documentation is necessary to meet the requirements for license transfer. See CAN’s Contentions at 24-27. Applicants maintain that ConEd updated the FSAR in 1982 and subsequently updated it pursuant to our regulations. See License Transfer Application, Enclosure 1, at 15, ¶B. This is another operational issue outside the scope of a license transfer proceeding. See *Indian Point 3*, CLI-00-22, 52 NRC at 310-11. As with CAN’s other operational grievances, the NRC Staff is considering CAN’s FSAR concern in conjunction with the petition CAN filed in December 2000. See CAN’s 2.206 Petition at 3; see also *supra* note 5.

Regarding CAN’s request for an independent evaluation of IP2 before any license transfer, we declined to admit a similar issue espoused by CAN in *Indian Point 3* and in *Vermont Yankee*. See *Indian Point 3*, CLI-00-22, 52 NRC at 318, citing *Vermont Yankee*, CLI-00-20, 52 NRC at 171. Region I’s performance in overseeing the IP2 plant is far outside the scope of a license transfer proceeding. See *Vermont Yankee*, CLI-00-20, 52 NRC at 171 and references cited therein.

3. Decommissioning Funding

Cortlandt questions whether the license transfer application contains the information required by 10 C.F.R. § 50.33(k)(1) pertaining to the adequacy of its funding for decommissioning the Indian Point plant. See Cortlandt’s Petition at 21-23, Cortlandt’s Reply at 2-4. A reactor licensee must provide assurance of adequate resources to fund the decommissioning of a nuclear facility by one of the methods described in 10 C.F.R. § 50.75(e). See 10 C.F.R. § 50.75(a). The Commission has held that a showing of compliance with 10 C.F.R. § 50.75 demonstrates sufficient assurance of decommissioning funding. *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 217 (1999). Applicants initially proposed to meet this requirement by prepaying a deposit in an amount sufficient to cover the decommissioning costs at the time termination of operation is expected. See 10 C.F.R. § 50.75(e)(1)(i); License Transfer Application, Enclosure 1, at 13, ¶K. In determining the amount of prepayment, a licensee may take credit for projected earnings on the trust funds using up to a 2% annual rate of return. See 10 C.F.R. § 50.75(e)(1)(i).

ConEd initially proposed to transfer a total of \$430 million to Entergy Indian Point 2 to fund the decommissioning trust. Cortlandt notes that the derivation of the \$430 million figure is not explained in the application, but surmises that it is the present value, discounted at the rate of 2% real rate of return, of the calculated minimum amount of \$558 million required at the expiration of the licenses in 2013. See Cortlandt’s Petition at 21.

Cortlandt states that, based on the results of a site-specific cost study contracted by ConEd, \$558 million will be insufficient, as the actual sum required for decommissioning will be \$578 million.³² In addition, ConEd apparently has committed to restore the Indian Point plant site to “Greenfield” conditions, resulting in an additional cost of \$47 million. *See id.* at 22. Even though the proposed decommissioning fund will meet the NRC minimum amount, Cortlandt states that there will be a shortfall of \$20 million for standard decommissioning and \$67 million for restoring the property to “Greenfield” conditions. *See id.* Cortlandt suggests three additional factors that could add to the decommissioning shortfall: the total decommissioning cost is based on the assumption that the decommissioning of IP1, IP2, and IP3 will all be done by one owner; due to the uncertainty in financial markets, the decommissioning fund may not appreciate at the estimated 2% real growth rate; and a significant source of funding for decommissioning will no longer be available after the transfer of the licenses. *See id.* at 22-23.

Cortlandt’s decommissioning issues, as set out in its petition, amount to an impermissible challenge to a generic decision made by the Commission in its decommissioning rulemaking. *See Seabrook*, CLI-99-6, 49 NRC at 217 n.8.³³ In its reply, however, Cortlandt formally requested a waiver of 10 C.F.R. § 50.75(e)(1)(i) to the extent that compliance with the minimum funding requirement described in the regulation is deemed to provide adequate assurance of the ability to decommission. *See Cortlandt’s Reply* at 3. To show unique “special circumstances” supporting its waiver request, Cortlandt cites the fact that the present licensee has performed a site-specific study that purportedly documents the inadequacy of the minimum funding level established by regulatory criteria. *See id.* at 4. This study, according to Cortlandt, warrants the conclusion that application of the rule would not serve the purposes for which it was adopted. *See* 10 C.F.R. § 2.1329.

We decline to grant the rule waiver or admit Cortlandt’s decommissioning issue. We conclude that our generic funding rule serves *both* purposes for which it was adopted, even in the alleged “special circumstances” of this case. The two purposes of our regulations regarding decommissioning funding are (1) to “minimize the administrative effort of licensees and the Commission” and (2) “to provid[e] reasonable assurance that funds will be available to carry out decommissioning in a manner which protects public health and safety.” *See* Final Rule: “General Requirements for Decommissioning Nuclear Facilities,”

³² *See* Cortlandt’s Petition at 21-22, *citing* Affidavit of Edward Rasmussen, annexed to Draft Supplemental Environmental Impact Statement prepared by ConEd, dated Jan. 19, 2001, with respect to the transfer of Indian Point Units 1 and 2 to Entergy, pursuant to section 70 of the New York State Public Service Law.

³³ We agree with Applicants that “Cortlandt’s petition implicitly concedes that, absent a waiver of the NRC’s regulatory position, it is barred from challenging the adequacy of a decommissioning funding approach that complies with the requirements of 10 C.F.R. § 50.75.” *See* Applicants’ Answer to Cortlandt at 8.

53 Fed. Reg. 24,018, 24,030 (June 27, 1988). Prior to adoption of this rule, many licensing activities concerning decommissioning had to be determined on a case-by-case basis, resulting in inconsistency and “inefficient and unnecessary administrative effort.” *See id.* at 24,019. The generic formulas set out in 10 C.F.R. § 50.75(c) fulfill the dual purposes of the rule. Using site-specific estimates, as Cortlandt demands, would defeat the specific purpose of minimizing inefficient administrative effort. Indeed, in our decommissioning rulemaking we explicitly rejected the use of site-specific estimates,³⁴ although we recognized that site-specific cost estimates may have to be prepared for rate regulators. *See* Final Rule: “Financial Assurance Requirements for Decommissioning Nuclear Power Reactors,” 63 Fed. Reg. 50,465, 50,468-69 (Sept. 22, 1998); 53 Fed. Reg. at 24,030.

Our adherence to the regulatory formulas does not mean that we do not share Cortlandt’s concerns about decommissioning funds. Use of the generic formula, however, is only the first step in ensuring adequate funds for decommissioning, and our rules take into account the possibility of changes over time. Five years prior to the expected end of operation, the licensee is required to submit a cost estimate for decommissioning based on an up-to-date assessment of the actions necessary for decommissioning and plans for adjusting levels of funds assured for decommissioning. This estimate would be based on a “then current assessment of major factors that could affect decommissioning costs.” *See* 53 Fed. Reg. at 24,030. “These factors could include site specific factors as well as then current information on . . . disposal of waste, residual radioactivity criteria, etc., and would present a realistic appraisal of the decommissioning of the specific reactor, taking into account actual factors and details specific to the reactor and the time period.” *Id.* We remain confident that our generic formula, along with our end-of-license requirements, will result in reasonable assurance of adequate decommissioning funding:

[C]ombination of these steps, first establishing a general level of adequate financial responsibility for decommissioning early in life, followed by periodic adjustment, and then evaluation of specific provisions close to the time of decommissioning, will provide reasonable assurance that the Commission’s objective is met, namely that at the time of permanent end of operations sufficient funds are available to decommission the facility in a manner which protects public health and safety. More detailed consideration by NRC early in life . . . is not considered necessary . . .

Id. at 24,030-31.

³⁴ Although we did not actually reach the question addressed here, we stated in an earlier license transfer proceeding that “no one would be free to argue in a license transfer case that site-specific conditions at a particular nuclear power reactor render unusable the generic projected costs calculated under our rule’s cost formula.” *See Seabrook*, CLI-99-6, 49 NRC at 217 n.8.

Regarding the additional expense to decommission to “Greenfield” conditions, we cannot require the Applicants to provide funds above and beyond those required for standard decommissioning as defined by NRC rules. *See Indian Point 3*, CLI-00-22, 52 NRC at 303. Decommissioning funding under NRC regulations does not include costs relating to nonradioactive structures and materials beyond those necessary to terminate the NRC license. “Costs of disposal of nonradioactive hazardous wastes not necessary for NRC license termination are not included in the prescribed amounts.” 53 Fed. Reg. at 24,031.

The other factors (in addition to the alleged shortfall between the generic formula and the contractor’s site-specific estimate and restoring to “Greenfield” conditions) mentioned by Cortlandt do not change our analysis.³⁵ *See* Cortlandt’s Petition at 22-24. Therefore, we decline to admit Cortlandt’s issue.

4. Environmental Remediation

Cortlandt questions whether Applicants have the resources to adequately fund the environmental remediation that it believes will be required at the Indian Point plant site. Cortlandt cites a report prepared by a contractor retained by ConEd to perform an environmental site assessment for IP2. *See* Cortlandt’s Petition at 25. Cortlandt states that the report identified “environmental problems” and “potential actions and remediation that may be required.” *See id.* Cortlandt also refers to a pending renewal of the State Pollutant Discharge Elimination System water discharge permit for IP2 and insists that the cost of compliance with any agreement among the New York State Department of Environmental Conservation, the U.S. Environmental Protection Agency, various electric utilities, and Intervenors needs to be explained before a final determination can be made regarding the adequacy of Entergy Indian Point 2’s financial qualifications. *See id.* at 26.

We decline to admit these issues. The Intervenors have not alleged any specific remediation that is likely to be undertaken in the next 5 years and the references to “environmental problems” are too vague to provide a basis for a litigable issue. Substantive questions relating to plant operations, such as whether environmental remediation may be necessary in the future, are not within the scope of license transfer proceedings. *See Indian Point 3*, CLI-00-22, 52 NRC at 311; *Vermont Yankee*, CLI-00-20, 52 NRC at 169; *Oyster Creek*, CLI-00-6, 51 NRC at 213. Issues addressing the sufficiency of the Applicants’ 5-year cost estimates are within the scope of transfer proceedings. However, because Cortlandt failed to identify a specific environmental remediation activity that is likely to occur within the next 5 years, they have failed to raise a genuine issue about whether

³⁵Cortlandt mentions uncertainty in financial markets, unavailability of a significant source of funding, and Entergy Indian Point 2’s lack of assets other than the facilities to be decommissioned.

the Applicants' 5-year revenue projections are sufficient to cover the cost of any such remediation expense.

CAN has also raised an environmental remediation issue. CAN challenged the adequacy of the provision for remediation of radiological materials after the proposed license transfer because the purchase and sale agreement between ConEd and Entergy Indian Point 2 contains a clause whereby ConEd would retain any liability arising from a recent steam generator tube rupture event. *See* CAN's Reply at 34-37. CAN objects to this clause because CAN argues that the NRC will lose jurisdiction over ConEd if the transfer is permitted, while the clause addressing liability in the purchase and sale agreement leaves only ConEd financially responsible for remediation expenses. *See id.* Applicants assert that "there is no basis for any claim that there is any radioactive contamination offsite, let alone any that requires remediation." Applicants' Answer to CAN at 19.

CAN too has failed to raise a litigable environmental remediation issue. Like Cortlandt, CAN has not described any specific remediation that will be necessary. Further, the NRC retains enforcement authority to ensure adequate protection of health and safety and the environment irrespective of any contract provision between the parties to a transfer. Vague, unsupported issues are inadmissible. *See* 10 C.F.R. § 2.1306.

5. Radiological Emergency Response Plans

Cortlandt requests that we examine whether the application is deficient because it fails to provide a radiological emergency response plan, required by 10 C.F.R. § 50.33(g), to account for the increased population and development of the immediate vicinity of the Indian Point plant. *See* Cortlandt's Petition at 26-27. Cortlandt states that, because of the significant expansion of the communities in northern Westchester County in the last 25 years, the evacuation of the population would be more difficult than in the past. Cortlandt alleges that the application is deficient because it does not consider the *probability* that a new evacuation plan will have to be designed and *may* require significant additional expenses, "possibly including the construction of new and improved highways to facilitate the rapid transportation of residents away from a nuclear accident." *See id.* at 26-27 (emphasis added). We decline to accept this issue for adjudication.

In *Indian Point 3*, we rejected two similar issues. Specifically, in that case Cortlandt asked the Commission to consider the impact of the proposed transfers on the need for changes to the Emergency Evacuation Plans and the appropriateness of the proposed license transfer in view of the plant's proximity to metropolitan areas. *See Indian Point 3*, CLI-00-22, 52 NRC at 317. We noted in the earlier case that the new licensees would have to meet all of our regulatory requirements concerning emergency planning and preparedness. *See id.* We also concluded that IP3's proximity to metropolitan areas and to locations

for sporting and cultural events was not relevant to the question whether to approve the license transfer. *See id.* The same reasoning applies in the instant case. As with some of Cortlandt's other issues, its emergency response claims relate to the everyday running of the plant, not to license transfer. Moreover, Cortlandt provides nothing more than speculation that Entergy's compliance with our emergency response plan regulations will necessitate large unanticipated expenditures, rendering Entergy's 5-year cost-and-revenue projections unreliable.

6. *Spent Nuclear Fuel Storage Capacity*

Cortlandt states that IP2's spent nuclear fuel storage capacity will be fully utilized in 2004 and argues that the application is deficient because it fails to demonstrate the capacity to handle onsite nuclear waste after that time. *See* Cortlandt's Petition at 12, 24; Cortlandt's Issues at 11-14. Safe and adequate storage or disposal of spent nuclear fuel is an ongoing operational issue that must be addressed by whoever owns the plant; as such, it ordinarily falls outside the scope of a license transfer proceeding. *Oyster Creek*, CLI-00-6, 51 NRC at 213-14.

In this case, however, Cortlandt bases its challenge primarily on the anticipated *cost* of additional storage capacity rather than on the safety, environmental, or operational aspects of spent fuel storage. As support, Cortlandt points to a study performed a year ago for ConEd. *See* Cortlandt's Issues at 12. According to Cortlandt, the study estimates the cost of addressing the problem of nuclear waste at the Indian Point plant after 2004 as between \$147 million and \$362 million. *See* Cortlandt's Petition at 24-25. Cortlandt may have misinterpreted the figures it quoted — Applicants claim the figures apply to the total costs incurred between unit shutdown and complete restoration of the site, not just the cost of solving the 2004 problem. *See* Applicants Answer to Cortlandt at 28 n.31. Cortlandt offers no other factual support for the implied proposition that Applicants will be unable to afford managing spent nuclear fuel in accordance with our regulations. But Applicants have provided us nothing to show that their projected cost figures have accounted for the undefined expense of solving their admitted short-term problem of interim spent fuel storage.

We are reluctant to permit Cortlandt to transform an operational issue into one of financial qualifications. Cortlandt's issue raises no immediate health or safety concerns, as the plant will simply shut down if the Entergy companies become unable to accommodate spent fuel generated by Indian Point 2. In the past the Commission has refused to consider spent fuel storage issues in the context of license transfer proceedings. *See Vermont Yankee*, CLI-00-20, 52 NRC at 171; *Oyster Creek*, CLI-00-6, 51 NRC at 207-08. In those earlier cases, however, spent fuel issues were proffered in a purely operational context or the anticipated storage problems were too far down the time line to assume a role

in the license transfer decision. Unlike those cases, the instant case presents a situation where an expense — not quantified in the application — will be incurred by the transferee within the carefully scrutinized 5-year period after the requested license transfer. Therefore, we admit this issue as a subissue of the financial qualifications question.

7. *Compromise of NRC's Regulatory Authority*

CAN asserts that approval of the license transfer would compromise NRC's regulatory authority over ConEd's continued responsibility for radiological materials and undermine NRC's ability to protect public health and safety. *See* CAN's Contentions at 39-43. CAN is concerned because, under the Applicants' Asset Purchase & Sale Agreement, ConEd retains liability for radiological materials deposited offsite under its period of ownership. If NRC approves the license transfer, contends CAN, the agency's authority over ConEd with respect to any such radiological materials would be compromised because the NRC would no longer have direct regulatory authority over ConEd after it is released from the Indian Point plant license. *See id.* at 39. CAN believes there is evidence of the need for offsite remediation because the Entergy companies have included contractual language in the purchase and sale agreement that shields them from liability that may be associated with a steam generator tube rupture event that occurred during ConEd's stewardship of the plant. CAN is worried that ConEd may not be able to fulfill its responsibilities if it is released from its license before these matters are resolved. *See id.* at 42.

In *Indian Point 3*, CAN similarly asserted that approval of the license transfer would deprive the Commission of any post-transfer regulatory authority to ensure that the previous owner (Power Authority of the State of New York) satisfies the NRC's requirements for decommissioning and remediation of the site because the Commission's regulations do not provide for retention of authority and enforcement power over a former licensee. *See Indian Point 3*, CLI-01-14, 53 NRC at 552-53. We examined in detail the issue of our jurisdiction over unlicensed persons and concluded that our authority extends to any person "who engages in conduct *affecting activities* within the Commission's subject-matter jurisdiction — including those who . . . *have been* engaged in licensed activities." *See id.* at 554-55 and references cited therein. Similarly, we conclude here that CAN's worries about the Commission's continuing authority over ConEd are unfounded. Moreover, the circumstances raised by CAN to justify its issue are purely speculative at this point. For the foregoing reasons, we decline to consider this issue further.

8. *The Public Interest*

Cortlandt contends loosely that the proposed transfer is not in the public interest. Its entire basis for this issue is as follows:

The proposed transfer will enable an investor owned utility, subject to regulation by the PSC, to transfer a generating asset (IP2) together with a defunct liability (IP1) to a wholesale electric generating company. Even more significant, the assets transferred have serious potential liabilities, both in terms of potential radiological exposure, and undisclosed environmental hazards, and the proposed transferee does not appear to have adequate financial resources to cover either ongoing expenses or decommissioning. Such a transfer is plainly not in the public interest.

Cortlandt's Petition at 28.

This issue is too broad and vague to be suitable for adjudication. Moreover, NRC's mission is solely to protect the public health and safety. It is not to make general judgments as to what is or is not otherwise in the public interest — other agencies, such as the Federal Energy Regulatory Commission and state public service commissions, are charged with that responsibility. Because Cortlandt's "public interest" issue seems to go beyond the NRC's statutory duties, and also lacks sufficient specificity, we decline to admit it.

V. OTHER PROCEDURAL MATTERS

A. Designation of Issues

To avoid confusion regarding the issues we have found to be admissible, we direct the parties to organize their presentations at the hearing around the following issues. All relate to the Applicants' 5-year cost-and-revenue projections:

1. *Revenue*

- a. whether Entergy's 85% capacity-factor assumption is reasonable in its own right and reasonably rests on the Entergy companies' operating experience at other plants;
- b. whether, even assuming an 85% capacity factor, the revenue claimed by Entergy exceeds the revenues likely to be attained, given Entergy's fixed price agreement with ConEd and Entergy's estimate of the sale price per megawatt hour; and
- c. whether Entergy's projected decrease in retained earnings will leave Entergy short of necessary operational funds

2. Costs

- a. whether, given fixed operating costs, Indian Point 2's historical operating expenses, and the application's asserted lack of information on cost savings, Entergy's cost estimates are too low; and
- b. whether Entergy's cost estimates include appropriate amounts to resolve a shortage of spent fuel storage capacity expected to begin in 2004.

The parties should be prepared to offer prefiled testimony and exhibits containing specific facts and/or expert opinion in support of their positions on these issues. Parties shall keep their pleadings as short and as focused as possible. The Commission will not consider new issues or new arguments related to the admitted issues at the hearing unless they satisfy our rules for late-filed issues (*see* 10 C.F.R. § 2.1308(b)), and will not consider claims rejected in this opinion. Redundant, duplicative, unreliable, or irrelevant submissions are not acceptable and will be stricken from the record. *See* 10 C.F.R. § 2.1320(a)(9). We also direct the Intervenors to state explicitly the remedial measures (if any) they believe the Commission should take in addition to those specified in their intervention petitions.

B. Designation of Presiding Officer

The Commission directs the Chief Administrative Judge of the Atomic Safety and Licensing Board promptly to appoint a Presiding Officer for this proceeding. Until the appointment of a Presiding Officer, the parties should file any written submissions with the Office of the Secretary.

C. Notices of Appearance

If they have not already done so, each attorney or representative for each party shall, not later than 11:59 p.m. on September 4, 2001, file a notice of appearance complying with the requirements of 10 C.F.R. § 2.713(b). Each notice of appearance shall specify the attorney's or representative's business address, telephone number, facsimile number, and e-mail address. Any attorney or representative who has already entered an appearance but who has not provided one or more of these pieces of information should do so not later than the date and time specified above.

D. Filing Schedule

If the parties agree to a non-oral hearing, they must file their joint motion for a "hearing consisting of written comments" no later than 11:59 p.m. (Eastern Time) on September 6, 2001 (i.e., 15 days from the date of this Order). *See* 10

C.F.R. § 2.1308(d)(2). We also direct the parties to confer promptly on whether this proceeding might be settled amicably without conducting a hearing.

All initial written statements of position and written direct testimony (with any supporting affidavits) must be filed no later than 11:59 p.m. on September 21, 2001 (30 days after the issuance date of this Order). *See* 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(a), 2.1322(a)(1). All written responses to direct testimony, all rebuttal testimony (with any supporting affidavits), and all proposed questions directed to written direct testimony must be filed no later than 11:59 p.m. on October 11, 2001 (20 days after the submission of written statements of position and written testimony). *See* 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(b), 2.1322(a)(2)-(3). All proposed questions directed to written rebuttal testimony must be submitted to the Presiding Officer no later than 11:59 p.m. on October 22, 2001 (10 days after the submission of rebuttal testimony).³⁶

If the parties do not unanimously seek a hearing consisting of written comments, the Presiding Officer will hold an oral hearing beginning at 9:30 a.m. on October 29, 2001 (5 business days after submission of questions), at the Commission's headquarters in Rockville, MD. The subject of the hearing will be the issues designated above. Portions of the hearing may have to be closed to the public when issues involving proprietary information are being addressed.

Any party submitting prefiled direct testimony should make the sponsor of that testimony available for questioning at the hearing. The Presiding Officer will issue an order establishing the amount of time available for the initial and reply presentations of the parties. Given the expedited nature of license transfer proceedings, the Commission anticipates that the hearing will take no longer than 1 day. The hearing will not include opportunities for cross-examination, although the Presiding Officer may question any witness proffered by any party. *See* 10 C.F.R. §§ 2.1309, 2.1310(a), 2.1322(b); *Indian Point 3*, CLI-01-14, 53 NRC at 560-61.

Finally, all written post-hearing statements of position must be filed no later than 11:59 p.m. on November 19, 2001 (20 days after the oral hearing, pursuant to 10 C.F.R. § 2.1322(c), plus 1 additional day because the due date falls on a Sunday).³⁷

³⁶ *See* 10 C.F.R. §§ 2.1309(a)(4), 2.1310(c), 2.1321(b), 2.1322(a)(4). The 7-day filing period specified in the last two of these regulations is, pursuant to 10 C.F.R. § 2.1314(b) and 2.1314(c), extended by 3 days, because the period includes a Saturday and a Sunday; the period is extended 1 additional day because the prescribed time period ends on a Sunday.

³⁷ *See* 10 C.F.R. § 2.1314(a).

E. Participants in the Hearing; Service List

The parties to this proceeding will be CAN, Cortlandt, ConEd, Entergy Indian Point 2, and Entergy Nuclear Operations. The recipients on the service list will be:

The General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
301-415-1537
E-mail: ogclt@nrc.gov

The Secretary of the Commission
ATTN: Rulemakings and Adjudications
Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
301-415-1101 (FAX)
E-mail: secy@nrc.gov

Timothy L. Judson
Central New York-Citizens
Awareness Network
140 Bassett St.
Syracuse, NY 13210
E-mail: cnycan@rootmedia.org

Paul V. Nolan, Esq.
5515 North 17th Street
Arlington, VA 22205
E-mail: pvnpvn@aol.com

Brent L. Brandenburg, Esq.
Consolidated Edison Co. of New York
4 Irving Place, Room 1830
New York, NY 10003
E-mail: brandenburgb@coned.com

Douglas E. Levanway, Esq.
Wise, Carter, Child and Caraway
P.O. Box 651
Jackson, MS 39205
E-mail: del@wisecarter.com

David A. Repka, Esq.
Mark J. Wetterhahn, Esq.
Winston & Strawn
1400 L Street, NW
Washington, DC 20005-3502
E-mail: drepka@winston.com;
mwetterh@winston.com

Jay E. Silberg, Esq.
Matias F. Travieso-Diaz, Esq.
Shaw Pittman
2300 N Street, NW
Washington, DC 20037-1128
E-mail: jay.silberg@shawpittman.com;
matias.travieso-diaz@shawpittman.com

We direct the parties immediately to supplement or correct the above information to the extent that it is incomplete or inaccurate, and immediately to notify all recipients of any such changes.

Pursuant to 10 C.F.R. § 2.1316(b)-(c), the NRC Staff has indicated that it will not be a party to this proceeding. Nevertheless, the Staff is expected both to offer into evidence its Safety Evaluation Report and to proffer one or more sponsoring witnesses for that document. *See* 10 C.F.R. § 2.1316(b).

F. Service Requirements

The parties have a number of options under 10 C.F.R. § 2.1313(c) for service of their filings, the preferred method of filing in this proceeding is electronic (i.e., by e-mail). Electronic copies should be in WordPerfect format (in a version at least as recent as 6.0). Service will be considered timely if sent not later than 11:59 p.m. of the due date under our Subpart M rules. We also require the parties to submit a single signed hard copy of any filings to the Rulemakings and Adjudications Branch, Office of the Secretary, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Room O-16-H-15, Rockville, MD 20852. As noted above, the fax number for this office is (301) 415-1101 and the e-mail address is secy@nrc.gov.

VI. CONCLUSION

For the reasons set forth above:

1. CAN's and Cortlandt's petitions to intervene and requests for hearing are *granted*.
2. CAN's and Cortlandt's requests to cosponsor each issue admitted for hearing are *provisionally granted*, subject to a requirement that, should the primary sponsor of an issue withdraw from this proceeding, the remaining sponsor demonstrate to the Presiding Officer the ability to litigate the issue.
3. CAN's motion for a Subpart G hearing or an expanded Subpart M hearing is *denied*.
4. Cortlandt's request to dismiss the application is *denied*.
5. Cortlandt's request for a waiver regarding consideration of site-specific decommissioning funding estimates is *denied*.
6. The parties are required to inform the Commission of any court or administrative orders, settlements, or business decisions that may in any way relate to, or render moot, part or all of the instant proceeding.

IT IS SO ORDERED.

For the Commission³⁸

By ANDREW L. BATES
for ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 22d day of August 2001.

³⁸Commissioner Dicus was not present for the affirmation of this Order. If she had been present, she would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

August 1, 2001

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), acting pursuant to 10 C.F.R. § 2.749, the Licensing Board grants a PFS request for summary disposition in its favor regarding contention Utah V, Inadequate Consideration of Transportation-Related Radiological Environmental Impacts, finding that in light of the revised transportation impacts analysis put forth by the NRC Staff in its June 2000 draft environmental impact statement (DEIS), contention Utah V is now moot.

RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PERSUASION; BURDEN OF PROOF)

Under 10 C.F.R. § 2.749(a), (d), summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows that there is “no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.” The movant bears the initial burden of making the requisite showing that

there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

**RULES OF PRACTICE: CONTENTIONS (AMENDMENT;
CHANGED CIRCUMSTANCES)**

When a revised transportation analysis provided in a DEIS is a significant change from the applicant's environmental report transportation analysis, intervenor concerns about flaws and inadequacies in the DEIS analysis should be channeled into a new contention (or perhaps an amended version of the existing contention).

**MEMORANDUM AND ORDER
(Granting Summary Disposition Motion Regarding
Contention Utah V)**

Pending before the Licensing Board in this proceeding concerning the June 1997 application of Private Fuel Storage, L.L.C. (PFS), for authorization to construct and operate a 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI) in Skull Valley, Utah, is a PFS motion for summary disposition regarding Intervenor State of Utah's (State) contention Utah V, Inadequate Consideration of Transportation-Related Radiological Environmental Impacts. As admitted, contention Utah V challenges the sufficiency of the PFS environmental report relative to its analysis of the environmental effects of transporting spent nuclear fuel to and from the proposed ISFSI. PFS asks that summary disposition be granted in its favor on contention Utah V because that issue is now moot, a request that is supported by the NRC Staff and opposed by the State.

For the reasons set forth below, we grant the PFS dispositive motion on this issue.

I. BACKGROUND

In our April 1998 ruling on standing and litigable issues, the Licensing Board admitted a portion of contention Utah V concerning the transportation-related environmental impacts of the proposed ISFSI. *See* LBP-98-7, 47 NRC 142, 199-201, *reconsideration granted in part and denied in part*, LBP-98-10, 47 NRC 288, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998). In admitting the contention, the Licensing Board allowed only that portion of the State's proffered bases for the contention asserting that the weight for a loaded shipping cask to be utilized for transportation of spent nuclear fuel to the facility is outside the parameters of 10 C.F.R. § 51.52 (Summary Table S-4) and that a detailed description of transportation impacts must therefore be provided. LBP-98-7, 47 NRC at 200. As admitted by the Board, the contention reads:

The Environmental Report ("ER") fails to give adequate consideration to the transportation-related environmental impacts of the proposed ISFSI in that PFS does not satisfy the threshold condition for weight specified in 10 C.F.R. § 51.52(a) for use of Summary Table S-4, so that the PFS must provide "a full description and detailed analysis of the environmental effects of transportation of fuel and wastes to and from the reactor" in accordance with 10 C.F.R. § 51.52(b).

Id. at 256. PFS subsequently sought reconsideration or clarification relative to contention Utah V, arguing that the Board's decision to admit the contention relative to the "weight" component of Table S-4, 10 C.F.R. § 51.52(c), should be circumscribed to include only consideration of regional impacts; however, that reconsideration request was denied.¹ *See* LBP-98-10, 47 NRC at 295-96.

In June 2000, the Staff issued its draft environmental impact statement (DEIS) for the PFS facility. *See* Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, NUREG-1714 (June 2000) [hereinafter DEIS]. In addressing the transportation-related environmental impacts of the proposed ISFSI in the DEIS, rather than relying on Table S-4, the Staff utilized PFS-specific computer analyses, specifically the RADTRAN 4 computer

¹ Thereafter, in October 1999, the State submitted what it labeled a late-filed, amended contention Utah V. Based on a discussion of spent fuel shipment convergence impacts in the Las Vegas, Nevada area relative to the proposed Yucca Mountain high-level waste repository in the August 1999 addendum to NUREG-1437, the generic environmental impact statement for nuclear power plant license renewal, the amended contention sought to challenge the adequacy of the PFS ER and Table S-4 relative to those items' consideration of the impacts of the convergence of shipments of spent fuel in the Salt Lake City, Utah area and at the PFS facility. *See* [State] Request for Admission of Late-Filed Amended Utah Contention V (Oct. 4, 1999). After considering the submissions by the parties, in a June 2000 ruling the Board denied the State's request for admission as failing to meet the late-filing criteria of 10 C.F.R. § 2.714(a)(1) and as an untimely request for reconsideration of its April 1998 contention admission decision. *See* LBP-00-14, 51 NRC 301, 308-11 (2000).

model. *See* DEIS at 5-36 to -39; *see also id.* App. C (Rail Routes to the Proposed PFS Site); *id.* App. D (Transportation Risks Analysis). Thereafter, the State requested the admission of five late-filed contentions challenging various aspects of the DEIS transportation impacts analysis, but the Board denied the requests as failing to meet the late-filing criteria of section 2.714(a)(1). *See* LBP-00-28, 52 NRC 226 (2000) (late-filed contentions Utah LL through Utah OO), *petition for interlocutory review denied*, CLI-01-1, 53 NRC 1 (2001); LBP-01-13, 53 NRC 319 (2001) (late-filed contention Utah PP).

On April 16, 2001, PFS filed the motion for summary disposition of contention Utah V that presently is before us for resolution, along with a supporting statement of material facts not in dispute. *See* [PFS] Motion for Summary Disposition of Utah Contention V — Inadequate Consideration of Transportation-Related Radiological Environmental Impacts (Apr. 16, 2001) [hereinafter PFS Dispositive Motion]; *see also id.* Statement of Material Facts on Which No Genuine Dispute Exists [hereinafter PFS Undisputed Facts]. On May 15, 2001, the State and the Staff filed responses to the PFS dispositive motion. *See* [State] Response to [PFS] Motion for Summary Disposition of Utah Contention V (May 15, 2001) [hereinafter State Response]; NRC Staff Response to [PFS] Motion for Summary Disposition of Utah Contention V — Inadequate Consideration of Transportation-Related Radiological Environmental Impacts (May 15, 2001) [hereinafter Staff Response]. In opposing the PFS motion, the State included a statement of disputed and relevant material facts and the affidavit of Radioactive Waste Management Associates Senior Associate Dr. Marvin Resnikoff, with supporting materials. *See* State Response, [State] Statement of Disputed and Relevant Material Facts [hereinafter State Disputed Facts]; *id.* Exh. 1 (Declaration of Dr. Marvin Resnikoff Regarding Material Facts in Dispute with Respect to Contention Utah V) [hereinafter Resnikoff Declaration]. The Staff included the declaration of Office of Nuclear Material Safety and Safeguards Spent Fuel Project Nuclear Engineer Robert J. Lewis in support of its position that the PFS motion should be granted. *See* Staff Response, unnumbered exhibit (Affidavit of Robert J. Lewis Concerning Utah Contention V) [hereinafter Lewis Declaration]. Finally, the Staff's pleading engendered a May 25, 2001 State reply opposing the Staff's support for the PFS contention Utah V summary disposition request. *See* [State] Reply to Staff's Response to [PFS] Motion for Summary Disposition of [Contention Utah V] (May 25, 2001) [hereinafter State Reply].

II. ANALYSIS

A. Summary Disposition Standards

The standard governing a presiding officer's consideration of a motion for summary disposition is well established and has been repeatedly used in this proceeding in ruling on previous PFS motions:

Under 10 C.F.R. § 2.749(a), (d) summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

LBP-01-19, 53 NRC 416, 421-22 (2001) (quoting cited cases from this proceeding).

With these general principles as the backdrop, we now turn to the PFS summary disposition motion regarding contention Utah V.

B. Application to Contention Utah V

1. PFS Position

PFS provides nine undisputed material facts in support of its argument that the State's concerns with respect to the ER analysis of transportation-related impacts, as articulated in contention Utah V as admitted by the Board, have been rendered moot by the subsequent Staff DEIS. Initially, PFS recognizes that its June 1997 ER analysis of the transportation-related environmental impacts was based on 10 C.F.R. § 51.52(a), Table S-4, rather than a detailed, facility-specific analysis. *See* PFS Undisputed Facts at 1. According to PFS, however, the June 2000 issuance of the DEIS displaced the ER Table S-4-based analysis by providing an "independent, detailed analysis — not based on Table S-4 — of potential environmental impacts from transportation of spent nuclear fuel to and from the [PFS facility]." PFS Dispositive Motion at 5. Thus, instead of relying upon Table S-4, the DEIS analysis used the RADTRAN 4 computer code to model and estimate the potential radiological impacts from incident-free transport and potential transportation accidents using the PFS-specific parameters for cask loading.

Although noting agency case law that contentions challenging an ER are considered as also contesting a subsequently prepared DEIS, PFS nonetheless concludes that the upshot of the above-described developments regarding the PFS facility DEIS is that contention Utah V now raises no disputed issues of material fact. *See* PFS Dispositive Motion at 5-6 (citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983)). This result follows, according to PFS, because (1) the State did not revise contention Utah V following issuance of the DEIS, notwithstanding the fact the DEIS did not rely upon Table S-4 that was the focus of contention Utah V as admitted; and (2) the Board rejected late-filed contentions Utah LL through Utah OO by which the State sought to challenge the non-Table S-4 dependent DEIS transportation analysis. The concerns expressed in contention Utah V thus having been addressed so as to render that contention moot, PFS maintains that summary disposition in its favor is appropriate. *See* PFS Dispositive Motion at 7-10.

2. Staff Position

The Staff agrees with PFS that there no longer exists any genuine dispute of material fact with respect to contention Utah V. According to the Staff, the DEIS discussion of transportation-related radiological environmental impacts eliminates any genuine dispute of material fact concerning the assertions contained in contention Utah V. In this regard, the Staff also points out that section 5.7.2 of the DEIS, which provides an analysis of the transportation-related radiological environmental impacts of the proposed PFS facility, does not rely on Table S-4 but uses PFS facility-specific considerations and RADTRAN 4 computer analyses to assess the incident-free and accident-related radiological impacts of cross-country and regional transportation of spent fuel to and from the PFS facility. Arguing, like PFS, that the State may not change the scope of its contention to raise a challenge to the DEIS, in the Staff's view the scope of contention Utah V is limited to whether a case-specific analysis that does not rely upon Table S-4 should be used to determine the transportation-related radiological environmental impacts of the PFS proposal. According to the Staff, the subsequent DEIS, by providing a facility-specific transportation impacts analysis, differs so significantly from the ER that the State had to amend its contention or file a new contention to challenge the adequacy of the DEIS analysis, which it failed to do in a timely manner. In light of these circumstances, the Staff concludes that PFS has met its burden of showing that there are no material facts in dispute regarding contention Utah V and so should have summary disposition entered in its favor. *See* Staff Response at 4-6.

3. State Position

Seeking to establish the existence of a material factual dispute with regard to PFS material facts six and seven, the State notes that the DEIS includes an analysis of the environmental effects of transporting spent nuclear fuel to and from the proposed PFS facility based on RADTRAN 4 computer modeling, but disputes that there is a sufficiently detailed analysis of the environmental effects of transporting fuel and wastes to and from the reactor as required by 10 C.F.R. § 51.52(b), with a listing of what it considers to be specific deficiencies in the DEIS analysis. *See* State Disputed Material Facts at 1-2 (citing Resnikoff Declaration at 3-5). According to the State, contention Utah V is a broad challenge to the adequacy of any analysis of the impacts from the transportation of spent nuclear fuel to and from the proposed PFS facility, and not simply a challenge to an analysis that relies upon Table S-4. As a result, it clearly has established a material factual dispute relative to the adequacy of the DEIS transportation impacts analysis such that summary disposition relative to contention Utah V is not appropriate. *See* State Response at 3-9; *see also* State Reply at 3-4.

4. Board Ruling

As admitted, contention Utah V concerns alleged inadequacies in the use of Table S-4 relative to the analysis of transportation-related radiological impacts. Whatever the situation prior to the submission of the Staff's DEIS transportation analysis, there is no question now that the revised transportation analysis provided in the DEIS is not based on Table S-4, a significant change from the ER transportation analysis. Despite the State's reliance on what it considers flaws and inadequacies in the DEIS analysis relative to the requirements in 10 C.F.R. § 51.52(b) — particularly the ability of certain reactor sites to handle the HI-STAR 100 shipping cask or its railcar — those arguments do not support a denial of summary disposition for contention Utah V. As was the case previously with contention Utah C, *see* LBP-99-23, 49 NRC 485, 492-93 (1999), the State's displeasure with a revised analysis does not mean there is controversy, factual or otherwise, regarding an existing contention relating to the same general subject. In this instance, the State's arguments regarding the alleged current deficiencies in the DEIS transportation analysis should have been channeled into a new contention (or perhaps an amended version of contention Utah V), an action the State already tried to take, albeit unsuccessfully. Thus, absent some additional significant change in the final environmental impact statement, *see* 10 C.F.R.

§ 2.714(b)(2)(iii), the time for introducing such matters into this proceeding appears to have long since passed.²

III. CONCLUSION

In connection with contention Utah V, Inadequate Consideration of Transportation-Related Radiological Environmental Impacts, in light of the revised transportation impacts analysis put forth by the Staff in its June 2000 DEIS, we conclude that PFS has met its burden of establishing there are no material factual issues remaining in dispute regarding contention Utah V so as to entitle it to a judgment in its favor as a matter of law in that contention Utah V is now moot.

For the foregoing reasons, it is, this first day of August 2001, ORDERED that the April 16, 2001 motion for summary disposition of PFS regarding contention Utah V is *granted* and, for the reasons set forth in section II.B.4 of this Memorandum and Order, a decision regarding contention Utah V is rendered in favor of PFS on the ground that the issue is now moot.

THE ATOMIC SAFETY AND
LICENSING BOARD³

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 1, 2001

²As the discussion above makes clear, the ultimate issue of the validity or adequacy of the DEIS transportation analysis is not now before us. We thus do not express a view on the "correctness" of the Staff's revised DEIS analysis. Instead, we consider the Staff's computer-modeled analysis of the transportation-related radiological environmental impacts facially sufficient to support the PFS "mootness" argument regarding contention Utah V.

³Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) Intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

August 1, 2001

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), acting pursuant to 10 C.F.R. § 2.749, the Licensing Board grants a PFS request for summary disposition in its favor regarding contention Utah Z, No Action Alternative, finding that a discussion in the NRC Staff's June 2000 draft environmental impact statement (DEIS) that analyzes both the advantages and disadvantages of the no-action alternative moots this contention asserting that such a discussion was missing from the PFS environmental report (ER).

RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PERSUASION; BURDEN OF PROOF)

Under 10 C.F.R. § 2.749(a), (d) summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter

of law.” The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant’s facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

RULES OF PRACTICE: CONTENTIONS (MODES OF FORMULATION)

At a petitioner’s choosing, a contention can take three forms: a challenge to the application’s adequacy based on the validity of the information that is in the application; a challenge to the application’s adequacy based on its alleged omission of relevant information; or some combination of these two challenges. *See* 10 C.F.R. § 2.714(b)(2)(iii).

RULES OF PRACTICE: CONTENTIONS (SCOPE)

In determining which of the three forms is involved in any contention, a presiding officer should look first to the language of the contention. If that proves unavailing, the language of the bases provided to support the contention may be examined to discern the sponsor’s intent relative to the contention’s scope and meaning. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988) (explaining that when “the issue is the scope of a contention, there is no good reason not to construe the contention and its bases together in order to get a sense of what precise issue the party seeks to raise”).

RULES OF PRACTICE: CONTENTIONS (SCOPE)

NEPA: CONTENTIONS (SCOPE; AMENDMENT)

When a superseding DEIS includes an analysis that discusses matters specifically identified by the intervenor in a contention as missing from the discussion in the applicant’s environmental report, and what the intervenor now questions is the adequacy of that DEIS analysis, the intervenor can do so in the context of a timely, properly framed new or amended contention outlining the intervenor’s concerns about the DEIS discussion.

RULES OF PRACTICE: CONTENTIONS (SCOPE)

NEPA: CONTENTIONS (SCOPE)

A contention contesting an applicant's ER may be viewed as a challenge to the Staff's subsequently issued DEIS/EIS. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998). This "migration" tenet does not, however, change the basic form of the contention, i.e., whether it challenges the soundness of the information provided or claims that necessary information has been omitted (or some combination of the two).

MEMORANDUM AND ORDER
(Granting Summary Disposition Motion Regarding
Contention Utah Z)

Pending before the Licensing Board in this 10 C.F.R. Part 72 proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), for authorization to construct and operate an independent spent fuel storage installation (ISFSI) in Skull Valley, Utah, is a motion for summary disposition filed by PFS regarding contention Utah Z, No Action Alternative. With contention Utah Z, Intervenor State of Utah (State) challenges the adequacy of the "no-action" alternative discussion in the environmental report (ER) that accompanied the PFS ISFSI application. The NRC Staff supports the PFS summary disposition request, while the State opposes this motion.

Pursuant to 10 C.F.R. § 2.749, for the reasons set forth below we grant the PFS dispositive motion.

I. BACKGROUND

In June 1997, as part of its license application for its proposed ISFSI, PFS submitted an ER addressing various issues pertaining to the National Environmental Policy Act of 1969 (NEPA). *See* 10 C.F.R. §§ 51.45, 51.60(b)(iii). On November 23, 1997, the State filed its safety and environmental contentions relating to the PFS application, including a challenge to the adequacy of the ER's discussion of the no-action alternative under NEPA. *See* [State] Contentions on the Construction and Operating License Application by [PFS] for an Independent Spent Fuel Storage Facility (Nov. 23, 1997) [hereinafter Utah Contentions]. The contention now at issue — contention Utah Z — was admitted in its entirety by the Licensing Board in its April 1998 ruling on standing and contentions. *See*

LBP-98-7, 47 NRC 142, 203, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998).

As admitted, that contention reads:

The Environmental Report does not comply with NEPA because it does not adequately discuss the ‘no action’ alternative.

Id. at 256. In describing the basis for the admitted portions of this contention, the State declared that PFS’s ER focused “solely on the perceived disadvantages of the no build alternative” and therefore “fail[ed] to provide [a] balanced comparison of environmental consequences among alternatives.” See Utah Contentions at 169. To illustrate this failure, the State listed several advantages of the no-action alternative that PFS allegedly ignored in its ER: (1) the benefits of foregoing shipment of 4000 casks of spent fuel rods thousands of miles across the country; (2) the diminished potential for sabotage at a centralized storage facility; (3) the decreased risk of accidents from additional cask handling; and (4) the safety gains in storing spent fuel at the reactor sites, whose spent fuel pools will be accessible for transfers or inspections. See *id.* at 169-70.

Thereafter, in a May 18, 1998 ruling on reconsideration motions relating to its April 1998 decision, the Board clarified the scope of the admitted contention by excluding consideration of the aforementioned sabotage aspects of contention Utah Z. See LBP-98-10, 47 NRC 288, 296 (1998). Additionally, in a November 9, 2000 memorandum and order, the Board further clarified the scope of Utah Z by limiting it to environmental impacts and excluding economic impacts. See Licensing Board Memorandum and Order (Ruling on Contention Utah Z Discovery Production Requests) (Nov. 9, 2000) at 4 (unpublished).

In June 2000, the Staff issued its draft environmental impact statement (DEIS) regarding the PFS facility. See Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, NUREG-1714 (June 2000) [hereinafter DEIS]. Among other things, the DEIS provided a “no-action alternative” discussion containing an expanded analysis of the environmental impacts that might stem from the PFS proposal. Compare ER at 8.1-2 to -4 with DEIS at 6-43 to -47, 9-8 to -9 & Table 9.1 (summary and comparison of potential environmental impacts).

On February 14, 2001, PFS filed a motion for summary disposition of contention Utah Z, which is presently before us for resolution, supported by a statement of material facts not in dispute. The premise of this motion is that there is no genuine dispute of material fact with respect to the State’s no-action alternative contention Utah Z challenging the ER in that the State’s contention was rendered moot by the Staff’s subsequent coverage of the no-action alternative

in the DEIS. *See* [PFS] Motion for Summary Disposition of Utah Contention Z — No Action Alternative (Feb. 14, 2001) at 6-18 [hereinafter PFS Dispositive Motion]; *see also id.* Statement of Material Facts on Which No Genuine Dispute Exists [hereinafter PFS Undisputed Facts].

In its March 6, 2001 response to the PFS summary disposition motion, the Staff declared its support for this PFS request. In its response, which is supported by the affidavit of Scott C. Flanders, a Senior Project Manager in the Spent Fuel Project Office of the Office of Nuclear Material Safety and Safeguards, the Staff agrees with PFS that the DEIS renders contention Utah Z moot. *See* NRC Staff's Response to [PFS] Motion for Summary Disposition of Utah Contention Z — No Action Alternative (March 6, 2001) at 5-7 [hereinafter Staff Response]; *see also id.* Attach. A (Affidavit of Scott C. Flanders Concerning Utah Contention Z) [hereinafter Flanders Affidavit]. The State, on the other hand, opposes the PFS motion in all respects, supported by a statement of disputed and relevant and material facts and the affidavit of Dr. Marvin Resnikoff, a senior associate with the private consulting firm Radioactive Waste Management Associates. *See* [State] Response to [PFS] Motion for Summary Disposition on Utah Contention Z (Mar. 13, 2001) at 4-18 [hereinafter State Response]; *see also id.* [State] Statement of Disputed and Relevant Material Facts; *id.* Attach. A (Declaration of Dr. Marvin Resnikoff Regarding Material Facts in Dispute with Respect to Contention Utah Z). Thereafter, pursuant to 10 C.F.R. § 2.749 and in accordance with a Board scheduling order, *see* Licensing Board Order (General Response Schedules) (Apr. 23, 1999) (unpublished), the State expressed its disagreement with the Staff response as well. *See* [State] Reply to Staff's Response to [PFS] Motion for Summary Disposition on Utah Contention Z (March 22, 2001) [hereinafter State Reply].

II. DISCUSSION

A. Summary Disposition Standards

We have articulated the standard governing the consideration of a motion for summary disposition several times in this proceeding in ruling on previous PFS dispositive motions and rely on that same standard here:

Under 10 C.F.R. § 2.749(a), (d) summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own

statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

LBP-01-19, 53 NRC 416, 421-22 (2001) (quoting cited cases from this proceeding).

With these general principles in mind, we turn to the PFS summary disposition motion regarding contention Utah Z.

B. Contention Utah Z

1. PFS Position

In this instance, PFS has provided a statement of purportedly undisputed material facts indicating that the State-alleged deficiencies regarding the no-action alternative discussion in the ER (i.e., the supposed PFS discussion only of the disadvantages of the no-action alternative) are, in fact, addressed in the Staff-issued DEIS. Initially, PFS notes that the DEIS specifically acknowledges in chapter six:

“Under the no-action alternative, no PFS [facility] and no transportation facilities would be constructed in Skull Valley. The impacts described in Chapters 4 and 5 of the DEIS would not occur, and Skull Valley would remain as it is today (see Chapter 3).”

PFS Dispositive Motion at 9 (quoting DEIS at 6-43). According to PFS, DEIS chapters four and five are, respectively, sixty-five page discussions of PFS facility construction and operation impacts and transportation impacts. Also relevant to the State's concerns, PFS declares, is the portion of DEIS chapter six that assesses the impact of the no-action alternative for future at-reactor ISFSIs relative to geology/minerals/soils, water resources, air quality, ecological/socioeconomic/community/cultural resources, and human health. *See id.* at 9-10; *see also* DEIS at 6-45 to -47. And as further evidence that the State's contention Utah Z concern regarding the no-action alternative analysis has now been addressed, PFS maintains that DEIS chapter 9 contains a comparative table summary of the impacts of alternative actions considered in the DEIS, including the no-action alternative. *See* PFS Dispositive Motion at 10.

Moreover, according to PFS, several sections of the DEIS address the particular assertions that form the basis of the State's contention Utah Z challenge to the PFS ER relative to its discussion of the environmental advantages and disadvantages of the no-action alternative.¹ In connection with the State's contention Utah Z

¹PFS notes that the other specific basis for the State's no-action alternative contention — sabotage avoidance — was dismissed by the Board. *See* PFS Dispositive Motion at 2 (citing LBP-98-10, 47 NRC 288, 296 (1998)).

concern about the transportation effect advantages of the no-action alternative, PFS highlights the DEIS chapter five discussion of the effects of transporting 4000 casks of spent fuel across the country, the statement in DEIS chapter six indicating that the impacts described in chapters four and five would not occur if the proposed ISFSI were not built, and the chapter nine table comparison of transportation impacts, including the no-action alternative. *See* PFS Dispositive Motion at 11-13; *see also* DEIS at 5-35, 6-43, 9-34 to -35 (Table 9.1). Relative to the State's contention Utah Z challenge to the lack of ER discussion about the accident risk increase associated with cask handling, PFS points out there is a measurement in DEIS chapter four of the impact of cask handling accidents as well as a conclusion that the effects of such an accident would be insignificant. *See* PFS Dispositive Motion at 13-15; *see also* DEIS at 4-48. Finally, with respect to the State's contention Utah Z challenge regarding the failure to outline the safety advantages of onsite waste storage at existing reactors, PFS declares that the DEIS recognizes another advantage of the no-action alternative, specifically that at-reactor storage is safe and will not have any significant incremental environmental impact. *See* PFS Dispositive Motion at 15-17; *see also* DEIS at 6-44.

Based on this DEIS consideration of the no-action alternative, PFS thus asserts that the concerns raised by contention Utah Z regarding the inadequate PFS ER discussion of the advantages of the no-action alternative have been satisfied. According to PFS, this renders moot any State assertion that a balanced discussion of the no-action alternative was lacking, thus entitling it to summary disposition in its favor on contention Utah Z. *See* PFS Dispositive Motion at 18.

2. Staff Position

For its part, the Staff agrees with PFS, declaring that the DEIS sufficiently covers both the advantages and disadvantages of the no-action alternative so as to satisfy NEPA's requirements as well as the points highlighted by the State as the basis for contention Utah Z. *See* Staff Response at 8-13; *see also* Flanders Affidavit at 2-3. Thus, the Staff concludes that by virtue of the DEIS, there no longer is any genuine issue of material fact relative to contention Utah Z so that summary disposition in favor of PFS is appropriate.

3. State Position

In opposing the PFS dispositive motion, the State rejects the PFS assertion that contention Utah Z is merely a challenge to the failure of the ER to address the advantages of the no-action alternative. The State asserts that this interpretation is contrary to the plain language of contention Utah Z in that the contention

does not state that the ER is devoid of all discussion of the no-action alternative. Instead, the State maintains that the ER did not properly consider the no-action alternative and failed to provide a balanced comparison between the advantages and disadvantages of the option. According to the State, the contention was intended as a challenge to the adequacy of the qualitative discussion of the no-action alternative in the ER. *See* State Response at 5; *see also* State Reply 2-3.

Based on this interpretation of the scope of contention Utah Z, the State insists that PFS has failed to meet its burden relative to its summary disposition request. According to the State, as was the case with the ER, the DEIS presents the no-action alternative in a conclusory, biased manner by claiming and emphasizing the disadvantages of that alternative without justifying them. *See* State Response at 5-7; *see also* State Reply at 4-8, 9-10. The State asserts that this is apparent from the DEIS discussion of the three disadvantages that also were identified in the ER — spent fuel storage space loss leading to power generation loss; delays in reactor decommissioning activities and associated expenses incurred for continued at-reactor spent fuel storage; and the need to construct additional reactor storage sites — each of which is inadequately supported and analyzed. *See* State Response at 7-14; *see also* State Reply at 8. Further, the State declares, as was the case with the ER, the DEIS still fails to discuss adequately each of the three specific “advantage” items referenced in the basis statement to contention Utah Z. According to the State, relative to the question of transportation impacts, the DEIS fails to recognize that postponing spent fuel shipments until a final repository is constructed will result in reduced radioactivity levels, and so reduced occupational and public doses, relative to the transported fuel. So too, the State asserts the DEIS fails to analyze adequately the no-action impacts of reduced exposures and other environmental benefits that would result from (1) fewer fuel handling operations; (2) fewer managerial actions and human errors that could result in transportation accidents or en route delays; and (3) the likelihood that existing reactor facilities will continue to store fuel onsite, regardless of whether an offsite facility like the PFS proposal is constructed. Finally, the State declares that the DEIS no-action alternative analysis is deficient because it does not recognize the benefits of onsite storage at existing reactor facilities vis-a-vis the possibility of military aircraft crash-related radiological releases, which the State asserts are a concern only with regard to the PFS facility. *See* State Response at 14-18; *see also* State Reply at 9.

4. Board Ruling

From this discussion, it is apparent that the parties’ submissions relative to the PFS dispositive motion highlight the initial, and potentially determinative, question that must be answered relative to contention Utah Z, i.e., what is the scope of this State issue statement? In this regard, the Commission has made

it clear that in drafting contentions regarding a challenged licensing action, the application (including an accompanying Safety Analysis Report and ER) is to be the initial focus of any issue statements and their supporting bases. As the Commission also has made clear, at the petitioner's choosing, such statements can take three forms: a challenge to the application's adequacy based on the validity of the information that is in the application; a challenge to the application's adequacy based on its alleged omission of relevant information; or some combination of these two challenges. *See* 10 C.F.R. § 2.714(b)(2)(iii). Further, it is apparent that in determining which of these three forms is involved in any contention, we look first to the language of the contention. Yet, if that proves unavailing, the language of the bases provided to support the contention may be examined to discern the sponsor's intent relative to the contention's scope and meaning. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988) (explaining that when "the issue is the scope of a contention, there is no good reason not to construe the contention and its bases together in order to get a sense of what precise issue the party seeks to raise").

In this instance, the contention in question is relatively succinct, declaring simply that the PFS ER did not "adequately discuss" the no-action alternative. On its face, it is unclear which of the three forms of application challenges outlined above this issue statement is intended to encompass. To ascertain the scope of this contention, therefore, we must examine the two-page basis statement provided by the State. As was noted above, *see supra* p. 166, the basis for contention Utah Z declares the ER does not meaningfully discuss the no build alternative because PFS focuses "solely on the perceived *disadvantages* of the no build alternative." It then provides three examples of this purported deficiency — transportation, spent fuel handling, and existing onsite storage expansion — that the State asserts are not considered at all so as to render the PFS discussion "one-sided." Moreover, in seeking to support this challenge to the "adequacy" of the ER, the State also relied on four judicial decisions, all of which are described as supporting the proposition that an agency failure to discuss the no-build alternative is improper.²

Under the circumstances, it is apparent that contention Utah Z, as framed by the State, was an "omission" challenge to the no-action alternative aspect of the ER that was based on the alleged PFS failure to include a discussion of certain information, specifically the disadvantages of the no-action alternative. Putting aside the question of whether or not an ER (or DEIS/EIS) lacking such a discussion would be adequate, the superseding DEIS includes a no-action

²As PFS points out, only three of these cases actually involve a failure to discuss the no-build alternative. *See* PFS Dispositive Motion at 11. The fourth, *Van Abbema v. Fornell*, 807 F.2d 633, 640-43 (7th Cir. 1986), is based on an agency's reliance on a record containing known factual inconsistencies and ambiguities that the agency made no attempt to resolve, a situation unlike that before the Board.

alternative analysis that discusses both the advantages and disadvantages of the proposed course of action, including the three matters specifically identified by the State. What also is apparent is that the State now questions the adequacy of that analysis in the DEIS. This is certainly something the State can do, so long as it does so in the context of a timely, properly framed contention. As proffered and admitted, however, contention Utah Z does not provide the vehicle to pursue such a challenge. Rather, what is needed is a new or amended contention outlining the State's concerns about the DEIS discussion of the no-action alternative.³ At this point, more than a year after the DEIS was issued, whether the State could gain the admission of such an issue seems problematic. In any event, because the State has made no such request, that is not a matter we need resolve at this juncture.

Instead, relative to the matter before us, for the reasons set forth above, we find that PFS has met its burden of showing there are not material facts at issue so as to be entitled to summary disposition regarding contention Utah Z, as admitted, in that the State concern framed by that issue statement is now moot.⁴

III. CONCLUSION

With regard to contention Utah Z, No Action Alternative, based on the inclusion of a discussion in the DEIS that analyzes both the advantages and disadvantages of the no-action alternative, PFS has established that there are no genuine issues as to any material fact and that it is entitled to judgment in its favor as a matter of law regarding that State issue statement, which is now moot.

For the foregoing reasons, it is, this first day of August 2001, ORDERED that the February 14, 2001 PFS motion for summary disposition of contention Utah Z is *granted* and, for the reasons set forth in section II.B.4 of this Memorandum

³ As the parties noted, the Commission has recognized that a contention contesting an applicant's ER may be viewed as a challenge to the Staff's subsequently issued DEIS/EIS. *See, e.g.*, Staff Response at 9-10 (citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998)). This "migration" tenet does not, however, change the basic form of the contention, i.e., whether it challenges the soundness of the information provided or claims that necessary information has been omitted (or some combination of the two).

⁴ Although the issue of the qualitative validity of the DEIS no-action analysis is not now before us, the Staff's DEIS analysis nonetheless is facially sufficient to support the PFS argument regarding the mootness of contention Utah Z in connection with the asserted failure to discuss the disadvantages of the no-action alternative.

and Order, a decision regarding contention Utah Z is rendered in favor of PFS on the ground that issue is now moot.

THE ATOMIC SAFETY AND
LICENSING BOARD⁵

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 1, 2001

⁵ Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) Intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

August 21, 2001

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), the Licensing Board grants a joint motion of Applicant PFS and Intervenor State of Utah to dismiss, with prejudice, contention Utah T, Inadequate Assessment of Required Permits and Other Entitlements, based on the parties' agreement to record in the PFS environmental report their disagreement concerning the permits, licenses, approvals, and other entitlements that must be obtained in connection with the PFS ISFSI license application.

MEMORANDUM AND ORDER
(Dismissing Contention Utah T)

In this proceeding regarding the August 1997 application of Private Fuel Storage, L.L.C. (PFS), for authorization to construct and operate a 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI) in Skull Valley, Utah, by motion dated August 10, 2001, PFS and Intervenor State of Utah (State)

have requested that the Licensing Board dismiss contention Utah T, Inadequate Assessment of Required Permits and Other Entitlements, with prejudice, on the ground that the parties have reached an acceptable resolution of the contention. According to the joint motion, these parties have successfully completed negotiations regarding this contention, in which the State asserts that the PFS “ ‘Environmental Report does not list’ ” all permits, licenses, approvals and other entitlements that must be obtained in connection with the PFS license application, as required by 10 C.F.R. § 51.45(d). Joint Motion to Dismiss Utah Contention T (Aug. 10, 2001) at 1 (quoting LBP-98-7, 47 NRC 142, 255, *reconsideration granted in part and denied in part on other grounds*, LBP-98-10, 47 NRC 288, *aff’d on other grounds*, CLI-98-13, 48 NRC 26 (1998)).¹ The joint motion also indicates that PFS counsel has discussed this motion with NRC staff counsel, who does not object to the Board granting this request. *See* Joint Motion at 2. No other party has objected to, or otherwise commented on, the PFS/State motion.

According to the joint motion, under the terms of their settlement accord, the parties have agreed to record in the PFS Environmental Report (ER) their disagreement concerning the permits, licenses, approvals, and other entitlements that must be obtained in connection with the PFS ISFSI license application. The State and PFS have agreed that, if a listing and description of the permitting requirements asserted by the State to be applicable to the PFS facility are included as part of the PFS ER, contention Utah T can be dismissed with prejudice. *See id.* at 1. Further, attached as exhibit 1 to the joint motion is a listing of the various permits, licenses, approvals, and other entitlements that the State claims must be obtained by PFS in connection with the PFS facility. According to the motion, PFS believes that the exhibit makes clear that many of the permits identified by the State in exhibit 1 are not required, and that the ER as currently constituted identifies the appropriate environmental permitting needs for the project. The motion also indicates, however, that both PFS and the State have agreed to the addition of exhibit 1 to the PFS ER, upon which basis they further agree that Utah T may be dismissed with prejudice. Finally, the motion declares that PFS will add the new language to the ER as a part of the first ER revision following dismissal of the contention. *See id.* at 2.

After reviewing the joint motion and the accompanying exhibit, and finding nothing therein that is inconsistent with the public interest, we thus *grant* the

¹Subsequent to the admission of what initially was consolidated contention Utah T/Castle Rock 10, 12, 22, *see* LBP-98-7, 47 NRC at 198, sponsoring Intervenor Castle Rock Land and Livestock, L.C., and Skull Valley Company, Ltd., filed a notice of withdrawal, with prejudice, regarding their admitted contentions, to which the State responded with a request that, among other things, asked that all portions of this consolidated contention be retained for further litigation. In LBP-99-6, 49 NRC 114, 122 (1999), ruling on this State request, the Board limited the scope of the contention by excising that portion regarding the Clean Water Act permitting authority of Intervenor Skull Valley Band of Goshute Indians (Skull Valley Band) on whose Skull Valley, Utah reservation the PFS facility is to be constructed and operated.

August 10, 2001 joint motion to dismiss. Further, as requested by PFS and the State, contention Utah T is *dismissed with prejudice*.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD²

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 21, 2001

²Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) Intervenors Skull Valley Band, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ann Marshall Young, Chair
Dr. Peter S. Lam
Thomas D. Murphy

In the Matter of

Docket No. 50-213-OLA
(ASLBP No. 01-787-02-OLA)

CONNECTICUT YANKEE ATOMIC
POWER COMPANY
(Haddam Neck Plant)

September 17, 2001

In this license termination proceeding under 10 C.F.R. § 50.82(a)(9), (10), the Licensing Board denies Applicant Connecticut Yankee's Motion for Reconsideration of the Board's ruling on Petitioner Citizens Awareness Network's Contention 6.1, relating to dose modeling calculation methodology, (1) finding that the Petitioner adequately supported the contention; (2) reframing a central issue raised in the motion as that of the proper interpretation of the words, "average member," in 10 C.F.R. § 20.1402; (3) analyzing and stating the Board's preliminary conclusion on the issue; and (4) given that the issue had not been previously so defined, permitting parties to file motions on the issue.

REGULATIONS: INTERPRETATION (10 C.F.R. § 20.1402)

The term, "average member," in 10 C.F.R. § 20.1402, is not defined in the regulations, and the parties differ on how it should be interpreted. Therefore, although the Applicant's Motion for Reconsideration characterizes the Petitioner's contention relating to this as an attack on a regulation, the issue is instead that of the proper interpretation of the regulation in question.

REGULATIONS: INTERPRETATION

In the absence of any specific definition in a rule, it is appropriate to look first to the meaning of the language of the provision in question, and to seek further guidance in documents addressing the same subject matter addressed in the rule, especially those to which the Commission refers in its Statement of Considerations (SOC) relating to the rule. Such guidance documents may assist in resolving any ambiguities in a regulation's language, even though they themselves do not carry the binding effect of regulations or prescribe requirements, provided they do not conflict with the plain meaning of the wording used in the regulation.

REGULATIONS: INTERPRETATION (10 C.F.R. § 20.1402)

Because all of the International Commission on Radiological Protection (ICRP) and Environmental Protection Agency (EPA) documents quoted in the Commission's SOC for 10 C.F.R. § 20.1402 either allow for or recommend that (1) averaging calculations, or calculation of an "arithmetic mean," be performed to determine the characteristics of the "average member of the critical group," and (2) the characteristics of children be taken into account in performing such calculations when appropriate, notwithstanding that one sentence from NUREG-1727 is arguably inconsistent with such a reading, and based also upon the Commission's use in section 20.1402 of the more recent ICRP terms "critical group" and "average member of the critical group," rather than the older ICRP term "Reference Man," used by the EPA, it would be reasonable to conclude that the Commission in using these terms intended that they be interpreted in a manner consistent with these more recent recommendations of the ICRP.

MEMORANDUM AND ORDER
(Ruling on Motion of Connecticut Yankee for Reconsideration
(Portions of LBP-01-21))

Applicant Connecticut Yankee Atomic Power Company (CYAPCO) moves, in this proceeding in which Intervenors Citizens Awareness Network (CAN) and Connecticut Department of Public Utility Control (CDPUC) challenge various aspects of CYAPCO's license amendment application seeking approval under 10 C.F.R. § 50.82(a)(9)-(10) of a License Termination Plan (LTP) for its Haddam Neck Plant, that the Licensing Board reconsider a ruling in its July 9, 2001, Memorandum and Order (Ruling on Standing and Contentions), LBP-01-21, 54 NRC 33 (2001) [hereinafter LBP-01-21], admitting CAN's Contention 6.1 in limited form. *See id.* at 93-94. For the reasons set forth below, the Board denies CYAPCO's motion.

BACKGROUND

CYAPCO filed its Motion for Reconsideration on July 18, 2001, originally seeking reconsideration not only of the Board's ruling on CAN Contention 6.1, but also of the ruling on CDPUC's Contention II.A. Motion of Connecticut Yankee for Reconsideration (Portions of LBP-01-21) (July 18, 2001) [hereinafter CYAPCO Motion for Reconsideration]. CDPUC, CAN, and the NRC Staff filed responses on July 26, July 30, and August 2, 2001, respectively. *See* Connecticut Department of Public Utility Control's Response to Connecticut Yankee's Motion for Reconsideration (July 26, 2001) [hereinafter CDPUC Response]; Citizens Awareness Network, Inc. Response to Connecticut Yankee Atomic Power Company's Motion for Reconsideration of a Portion of Prehearing Conference Order (July 30, 2001) [hereinafter CAN Response]; NRC Staff's Response to Motion of Connecticut Yankee for Reconsideration (Portions of LBP-01-21) (Aug. 2, 2001) [hereinafter Staff Response]. CYAPCO subsequently filed documents replying to CDPUC's and CAN's responses and moving, in the same documents, for leave to file them. *See* Reply of Connecticut Yankee to Connecticut Department of Public Utility Control's Response to CY's Motion for Reconsideration (Portions of LBP-01-21) (Aug. 6, 2001) [hereinafter CYAPCO Reply to CDPUC]; Supplementary Filing to Reply of Connecticut Yankee to Connecticut Department of Public Utility Control's Response to CY's Motion for Reconsideration (Portions of LBP-01-21) (Aug. 8, 2001) [hereinafter CYAPCO Supplementary Reply to CDPUC]; Reply of Connecticut Yankee to CAN's Response to CY's Motion for Reconsideration (Aug. 10, 2001) [hereinafter CYAPCO Reply to CAN Response].

On August 29, 2001, CYAPCO counsel notified the Board that CYAPCO and CDPUC were then in negotiations that, if successful, would result in the withdrawal by CDPUC of Contention II.A. Counsel stated that the Board would be notified by September 5, 2001, whether the negotiations had been successful, and requested that no action be taken with regard to CDPUC Contention II.A prior to such notification. On August 29, 2001, an order was entered granting this request and delaying the issuance of a ruling on CYAPCO's Motion for Reconsideration until after September 5, 2001. On September 5, 2001, counsel notified the Board that the negotiations in question had been concluded and that CDPUC would shortly be filing a pleading withdrawing Contention II.A. On September 12, 2001, CDPUC filed a Motion to Withdraw its Contention II.A, dated September 11, Motion to Withdraw DPUC Contention II(A) (Sept. 11, 2001), which motion is hereby granted. As a result, this Order addresses only CYAPCO's motion with regard to CAN Contention 6.1.

PRIOR RULING

In LBP-01-21, the Board admitted CAN Contention 6.1 in part. The contention reads as follows:

Contrary to the requirements of 10 C.F.R. 50.82, the dose modeling calculation methodology CYAPCO employs in the LTP is not adequate to demonstrate that the LTP will assure the protection of the public health and safety.

LBP-01-21, 54 NRC at 92. This contention was based on CYAPCO allegedly not employing the latest version of the RESRAD code (a code developed by Argonne National Laboratory to calculate site-specific residual radiation guidelines and doses to future onsite hypothetical individuals), and on its employing “many non-conservative assumptions,” including (1) choosing an “outdoors” value (for the “resident farmer” scenario for unrestricted use of the site after decommissioning) that is too low based upon how much time actual farmers are asserted to spend outdoors, (2) assuming the yearly amount of water persons drink at too low a level, and (3) not including children as the “average member of the critical group” under 10 C.F.R. § 20.1402. During oral argument, CAN revised its position with regard to children to claim only that children should be included in the averaging to reach the total effective dose equivalent (TEDE) to the “average member of the critical group.” Tr. 521-25.

We limited our admission of this contention to exclude from litigation the issue of the different RESRAD versions, because CAN had not shown any genuine dispute that there would be different results using the more recent version of RESRAD. We admitted for litigation, however, the remainder of the contention, including CAN’s argument that children should be included in the averaging of the TEDE to the average member of the critical group in the resident farmer scenario. We recognized that the position of CYAPCO and the Staff was that CAN’s argument concerning the inclusion of children in calculating the TEDE for the “average member of a critical group” constituted a challenge to a regulation, but found that this argument rested not on any language in a regulation but rather on counsel’s reading of language in the Commission’s Statement of Considerations (SOC) with regard to regulations relating to Radiological Criteria for License Termination (including the regulation in question, section 20.1402). *See* 62 Fed. Reg. 39,058, 39,061 (July 21, 1997). We therefore left the matter open for further argument and litigation, finding that CAN had provided sufficient alleged facts and expert opinion to show a genuine dispute on material issues of fact. *See* LBP-01-21, 54 NRC at 94.

POSITIONS OF PARTIES

CYAPCO

CYAPCO challenges our admission of Contention 6.1, stating that, in its reference to children, the contention is “an unabashed attempt to rewrite the Commission’s promulgated regulation.” CYAPCO Motion for Reconsideration at 4. Disagreeing with CAN’s assertion at oral argument that new, previously unavailable information relating to dose calculations for children warrants consideration in arriving at the TEDE for the “average member of the critical group,” CYAPCO asserts that the Commission’s use in the SOC of the singular to refer to the “average member” being an “individual,” 62 Fed. Reg. 39,068, as well as its reference, *id.* at 39,061, to an EPA Guidance Document, *Radiation Protection Draft Guidance for Exposure of the General Public*, 59 Fed. Reg. 66,414 (Dec. 23, 1994), in which the “reference man” concept is discussed, indicates that it “specifically rejected the notion of computing averages of population member parameters.” CYAPCO Motion for Reconsideration at 6.

CYAPCO goes on to argue that the Commission does not intend “site specific ‘averages’ to be a requirement,” apparently misunderstanding our ruling to find such a requirement. *Id.* at 7. Further, in contrast to its earlier argument that “NMSS Decommissioning Standard Review Plan,” NUREG-1727 [hereinafter NUREG-1727], relied upon by the Petitioners in support of various of their contentions, is irrelevant in this case because it concerns the decommissioning not of reactors but of materials facilities, *see, e.g.*, CYAPCO Response to CAN Contentions at 42 n.35, CYAPCO now itself relies on portions of the same document, asserting in a telephone status conference that, for the purposes for which it refers us to NUREG-1727, the parts it cites are relevant in this case and indeed “ought to be reproduced in [NUREG-]1700 [relating to reactor decommissioning].” Tr. 690. CYAPCO continues, with some emphasis and again apparently misunderstanding our ruling, to note that the Board has “no jurisdiction to decide that the Commission’s existing regulation should be abandoned.” CYAPCO Motion for Reconsideration at 7. Finally, CYAPCO complains that, in admitting CAN Contention 6.1, the Board has “left the parties with utterly no guidance as to what it means,” asking, “What, exactly, is the ‘genuine issue’ for the Board to resolve?” CYAPCO argues that, for the preceding reasons and because the “children” aspect of CAN Contention 6.1 “would result in unacceptable impediments to site release,” we should reconsider its admission, or certify our ruling to the Commission, “inasmuch as this ruling will fundamentally alter the nature of the proceedings and invite extended, extensive and time-consuming litigation in an area entirely devoid of any limiting principles or rules of decision.” *Id.* at 8.

Staff

The Staff supports CYAPCO in its motion, agreeing with the characterization of the portion of Contention 6.1 relating to the exclusion of children from the averaging of the TEDE as constituting “an attack on a Commission rule,” and relying on generally the same arguments and authorities as CYAPCO (including NUREG-1727, “albeit a document concerned with decommissioning at non-reactor sites”). Staff Response at 3-8.

CAN

CAN responds to CYAPCO’s motion by, among other things, pointing out that section 20.1402 contains no reference to the “reference man” relied upon by CYAPCO, and that there are “no definitions in the regulations that set limits on the kind of human beings that are part of the critical group.” CAN Response at 3. Noting that, according to 10 C.F.R. § 20.1003, “*Critical Group* means the group of individuals reasonably expected to receive the greatest exposure to residual radioactivity for any applicable set of circumstances,” CAN further observes that the term “individual,” used in this definition, is itself defined as “any human being,” as distinguished from “a particular type of human being.” CAN Response at 3.

With regard to the EPA’s use of the “reference man,” CAN points out that this use is not exclusive of other considerations including age, quoting a statement in the SOC to the effect that “a detailed consideration of age and sex is not *generally* necessary.” CAN Response at 7 (quoting from 59 Fed. Reg. at 66,423 (emphasis added by CAN)). CAN argues that “post-decommissioning farming is not such a ‘general’ case,” noting that decommissioning does not appear to be among the listed applications for the EPA’s Federal Radiation Protection Guidance for Exposure to the General Public (FRG), given that those listed are shorter-lived, primarily limited to adults, and address exposure patterns that are different from a decommissioning model. CAN Response at 7. CAN describes various facets of resident farming that it asserts CYAPCO has not taken into account. *Id.* at 7-8.

CAN also points out that the SOC for the Rules on Radiological Criteria for License Termination refers to other documents in addition to the EPA guidance document, including ICRP 60 (a publication of the International Commission on Radiological Protection); NCRP 116 (a publication of the National Council on Radiation Protection and Measurements); the “preamble to issuance of 10 CFR Part 20 on May 21, 1991 (56 FR 23360)’”; and the National Academy of Sciences (NAS) Technical Bases for Yucca Mountain Standards (1995), in which “critical groups” are not limited so as to exclude children. CAN Response at 4 (citing 62 Fed. Reg. at 39,061).

CYAPCO Reply

CYAPCO in its Reply to CAN's Response, which we permit and consider in order to assure an appropriate and full evaluation of all relevant factors raised with regard to CYAPCO's motion, repeats its argument that Contention 6.1 constitutes a challenge to the regulation, and asserts that "the Commission expressly rejected" the averaging approach argued by CAN. CYAPCO Reply to CAN Response at 1. Further, CYAPCO asserts that "the differences that CAN alleges exist in the approaches taken by the EPA, the ICRP, and the NSA [*sic*], were not apparent to the Commission when it promulgated 10 C.F.R. § 20.1402," and "the Commission viewed them as supporting the non-averaging methodology that it promulgated in the site release criterion rule." *Id.* at 2-3 (emphasis added). In addition, CYAPCO quotes pertinent language from the SOC (*see below* at p. 185, and makes various other arguments essentially to the effect that section 20.1402 must, and can, be interpreted only in a manner consistent with its own argument on the subject.

ANALYSIS

We note first that we agree that the Board has "no jurisdiction to decide that the Commission's existing regulation should be abandoned." We find, however, that the issue we have to decide is both not so simple as, and at the same time much more straightforward than, CYAPCO's characterization of it. The regulation in question (with the portion at issue emphasized) states:

§ 20.1402 Radiological criteria for unrestricted use.

A site will be considered acceptable for unrestricted use if the residual radioactivity that is distinguishable from background radiation results in a TEDE to an *average member of the critical group* that does not exceed 25 mrem (0.25 mSv) per year, including that from groundwater sources of drinking water, and that the residual radioactivity has been reduced to levels that are as low as reasonably achievable (ALARA). Determination of the levels which are ALARA must take into account consideration of any detriments, such as deaths from transportation accidents, expected to potentially result from decontamination and waste disposal.

The words, "critical group," are defined in 10 C.F.R. § 20.1003 as follows:

Critical Group means the group of individuals reasonably expected to receive the greatest exposure to residual radioactivity for any applicable set of circumstances.

Also, from section 20.1003, "*Individual* means any human being."

The dispute at issue with regard to CYAPCO's Motion for Reconsideration has most specifically to do with the words, "average member," from section

20.1402, which words are *not* defined in the rules. The parties differ on how these words should be interpreted. The issue, therefore, is one of the *interpretation* of a rule, and not at all one of any “attack” on, or abandonment of, a rule, nor of whether the rule should be followed, which, it should go without saying, it must be.

The relevant question for purposes of CYAPCO’s motion would seem to be: whether the words, “average member of the critical group,” can be interpreted only as CYAPCO argues, to mean a single hypothetical individual whose characteristics are defined in the same way the EPA’s “reference man” is defined, *and also* to *exclude* any consideration of children in the definition of such a hypothetical individual; or to the contrary mean a collection of characteristics of a hypothetical “average member” arrived at by taking into account, or “averaging,” the various characteristics of more than one member of the critical group, including children. To resolve this question we look to the words themselves, as well as to any additional indications of the Commission’s intent as to their meaning.

As noted in LBP-01-21, in the absence of any specific definition in a rule, we look first to the meaning of the language of the provision in question. *See* LBP-01-21, 54 NRC at 59; *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988), *review declined*, CLI-88-11, 28 NRC 603 (1988). In this regard, the dictionary defines the word, “average,” as “equaling an arithmetic mean . . . , approximating or resembling an arithmetic mean. . . .” *Webster’s Third New International Dictionary of the English Language* 150 (4th ed. 1976). Given the somewhat general nature of this definition, we find it appropriate to seek further guidance in documents addressing the same subject matter addressed in section 20.1402, especially those to which the Commission refers in its 1997 SOC relating to the rule.

Such guidance documents may assist in resolving any ambiguities in a regulation’s language, even though they themselves do not carry the binding effect of regulations or prescribe requirements, so that nonconformance with them does not equate to noncompliance with regulations. *See International Uranium (USA) Corp.* (Request for Materials License Amendment), CLI-00-1, 51 NRC 9, 19 (2000); *see also Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 98, 100 (1995). Despite this lack of binding effect, these documents may be consulted in interpreting a regulation, provided they do not conflict with the plain meaning of the wording used in the regulation. *Shoreham*, ALAB-900, 28 NRC at 288. As was recognized in the *Shoreham* case,

NUREG[s] and similar documents are akin to “regulatory guides.” That is, they provide guidance for the Staff’s review, but set neither minimum nor maximum regulatory requirements. . . . Where such guidance documents conflict or are inconsistent with a regulation, the latter of course must prevail. On the other hand, guidance consistent with the

regulations and at least implicitly endorsed by the Commission is entitled to correspondingly special weight.

Shoreham, ALAB-900, 28 NRC at 290 (citations omitted).

1997 Statement of Considerations

CYAPCO relies on language in the SOC to assert that the Commission “expressly rejected” the averaging approach argued by CAN. CYAPCO Reply to CAN Response at 1. The language on which CYAPCO relies is that which addresses the definition of the “critical group”:

Section 20.1003 of the proposed rule defined the term “critical group” as the group of individuals reasonably expected to receive the greatest exposure to residual radioactivity for any applicable set of circumstances. For example, if a site were released for unrestricted use, the *critical group would be the group of individuals reasonably expected to be the most highly exposed* considering all reasonable potential future uses of the site. As noted in the preamble to the proposed rule (at 59 FR 43218; August 22, 1994), NUREG/CR-5512 defines the critical group as an individual or relatively homogeneous exposed group expected to receive the highest exposure within the assumptions of a particular scenario and the dosimetric methods of 10 CFR part 20. The *average member* of the critical group is *an individual* who is assumed to represent the most likely exposure scenario based on prudently conservative exposure assumptions and parameter values within model calculations. *For example*, the critical group for the building occupancy scenario can be the group of regular employees working in a building that has been decontaminated. *If a site were converted to residential use, the critical group could be persons whose occupations involve resident farming on the site, not an average of all residents of the site.*

62 Fed. Reg. at 39,067-68 (emphasis added). CYAPCO directs us to the reference to “an *individual* who is assumed to represent the most likely exposure scenario,” and characterizes this as the Commission’s mandated, specific definition of the term, “average member,” in the actual regulation, which is argued to incorporate a methodology “based on the concept of using a ‘Reference Man.’” *Id.* at 4. CYAPCO also asserts that the final sentence of the paragraph “firmly rejects CAN’s notion of computing averages of population member parameters.” *Id.* at 2.

In LBP-01-21, we stated that we did not find the language of the final sentence of the above-quoted language of the SOC — that “[i]f a site were converted to residential use, the critical group *could* be persons whose occupations involve resident farming at the site, not an average of all residents on the site” — to be so unequivocal as CYAPCO argued it to be, and left the matter open for further argument and litigation. LBP-01-21, 54 NRC at 94. In light of CYAPCO’s arguments in support of its motion, and in order to provide some guidance to the

parties in further proceedings in this matter, we find it appropriate at this point to address this subject more thoroughly.

We begin by observing that the use of the word, “could,” in the SOC, italicized in the preceding paragraph, might be interpreted to indicate *either* that the only way the actual definition of “critical group” in section 20.1003 (*see above* at p. 183) may permissibly or can possibly be implemented in a residential use scenario is as “persons whose occupations involve resident farming at the site”; *or* that this is *one example* of a *possible* “critical group.” The SOC’s use of the words, “[f]or example,” in the sentence that immediately precedes the sentence referring to “residential use,” suggests that the latter interpretation is more reasonable, as it fits within a context of providing examples rather than mandating a single model.

With regard to the words, “not an average of all residents on the site,” in the SOC, this phrase might be interpreted as a prohibition against averaging *any* of the residents on the site in determining what sorts of persons constitute the appropriate “critical group” or, as CYAPCO and Staff have in effect argued, in defining the “average member” of such a critical group. On the other hand, the phrase, “not an average of all residents on the site,” might be interpreted as stating that it would be inappropriate to average *all* residents on a site, because all of the residents might not be representative of the “critical group” of “individuals reasonably expected to receive the greatest exposure to residual radioactivity” for the circumstances involved in residential use; but that this would not prohibit the averaging of characteristics of *some* of the residents — namely, those residents who *are* “individuals reasonably expected to receive the greatest exposure” and would therefore reasonably be members of the “critical group” — to arrive at the characteristics of the “average member” of the critical group, “an individual who [would] represent the most likely exposure scenario based on prudently conservative exposure assumptions,” in the words of the SOC.

Thus, the word, “individual,” does not appear to exclude the use of an averaging approach. The following paragraph from the SOC, which appears immediately after the paragraph quoted above, and in which the plural “individuals” is used, would also seem to allow for the approach argued by CAN:

Although the terms “critical group” and “average member” are new terms in NRC regulations, they are consistent with ICRP practice of defining and using a critical group when assessing individual public dose from low levels of radioactivity similar to those expected from a decommissioned site. ICRP recommends that such analyses should consider exposure to *individuals* representative of those expected to receive the highest dose using cautious but reasonable assumptions. This approach has been adopted in the proposed FRG [EPA Guidance Document] and is also consistent with the recommendations of the National Academy of Sciences [NAS] on the Yucca Mountain Standards (August 1995).

62 Fed. Reg. 39,068 (emphasis added).

1995 Technical Bases for Yucca Mountain Standards

We find that the following selection from the 1995 *Technical Bases for Yucca Mountain Standards*, part of which CAN relies upon in its argument, provides a helpful introduction to the principles underlying the terms, “critical group” and “average member of the critical group,” and is particularly relevant in view of the Commission’s reference to it in the SOC. We have emphasized portions of the selection, which, taken together in light of the whole, suggest that the “average member of the critical group” concept envisions some averaging calculations occurring, as argued by CAN. We quote at some length from this document in order to make the context clear:

Who Is Protected?

To determine whether a repository [or, as in the instant case, a site being decommissioned] complies with the standards, it is necessary to calculate the risk to some individual or group of individuals and then to compare that number with the risk limit established in the standard. Therefore, the standard must specify the individual or individuals for whom the risk calculations are to be made. The issue is how to define who is to be protected among the persons having the highest risk of health effects due to releases from a repository [or site], since by definition all other persons face a lower risk.

The choice of those to be protected can obviously have a significant effect on the calculated risk and, therefore, on whether the calculated performance meets the standard. For example, some groups of persons are particularly sensitive to exposure due to factors such as pregnancy, age, or existing health problems. Similarly, it is possible to construct scenarios in which an individual could receive a very high dose of radiation, even though only one or two people might ever receive such doses.

There is an obviously sensitive issue involved here, since the definition of the person or persons to be protected directly affects the outcome of the risk calculation. Although not a purely scientific issue, we believe that a reasonable and practicable objective is to protect the vast majority of members of the public while also ensuring that the decision on the acceptability of a repository [or site] is not prejudiced by the risks imposed on a very small number of individuals with unusual habits or sensitivities. The situation to be avoided, therefore, is an extreme case defined by unreasonable assumptions regarding the factors affecting dose and risk, while meeting the objectives of protecting the vast majority of the public. An approach consistent with this objective that is used extensively elsewhere in the world is to define and protect a *critical group*; we recommend this approach

The *critical group* has been defined by the ICRP . . . as a relatively homogeneous group of people whose location and habits are such that they are representative of those individuals expected to receive the highest doses as a result of the discharges of radionuclides. Therefore, as the ICRP notes, “because the actual doses in the entire population will constitute a distribution for which the critical group represents the extreme, this procedure is intended to ensure that no individual doses are unacceptably high. . . .”

The *critical-group* dose is defined as that dose received by an average member of the critical group. Using the *average member* of the group as the basis for comparison with the limit established by the standard avoids the problem of the outcome being unduly influenced by the habits of a few persons. To ensure that *this calculation* is nevertheless representative of the persons who receive the highest doses, the ICRP definition of the *critical group* requires that:

1. The *persons calculated to receive the highest doses* based on cautious, but reasonable, assumptions *be included in the group*.
2. The group be homogeneous in dose; that is, there should be a relatively small difference between those receiving the highest and lowest doses in the group. . . . In its Publication 43, the ICRP . . . suggests that if the ratio of *the calculated average critical-group dose* to the regulatory limit is less than one-tenth, then the critical group should be considered homogeneous if the distribution of individual doses lies substantially within a total range of a factor of ten, or a factor of three on either side *of the average*. At ratios smaller than one-tenth, homogeneity requires a smaller range.
3. The group be relatively small. The ICRP recommends that it should typically include a few to a few tens of persons. Normally a critical group would not consist of a single individual but rather a few tens of individuals. On the other hand, homogeneity implies that the group should not be too large.

In the context of an individual-risk standard, similar conditions would apply for the same reasons. Based on cautious, but reasonable assumptions, the group would include the persons expected to be at highest risk, would be homogeneous in risk, and would be relatively small. The *critical-group risk* calculated for purposes of comparison with the risk limit established in the standard would be *the mean of the risks of the members of the group*.

Technical Bases for Yucca Mountain Standards (1995), at 51-53 (emphasis added; citations omitted).

ICRP Publications 60 and 43

The SOC also contains the following references:

In addition, the NRC evaluated the proposed Federal Radiation Protection Guidance for Exposure of the General Public (FRG) as published for comment on December 23, 1994 (59 FR 66414), in which the EPA, under its charter, made recommendations to the President of the United States concerning recommended practices for protection of the public and workers from exposure to radiation.

Recent recommendations contained in ICRP 60, NCRP No. 116, and the proposed FRG are essentially similar. Use of these sources for formulating basic radiation protection standards is consistent with NRC's general approach regarding risk decisions and is noted in the preamble to issuance of 10 CFR part 20 on May 21, 1991. (56 FR 23360). The NRC considers it reasonable and appropriate to use the findings of these bodies in developing criteria for license termination to apply to its licensees.

62 Fed. Reg. at 39,061.

CAN has referred us to section 5.5.1 of ICRP 60, which states:

In practice, almost all public exposure is controlled by the procedures of constrained optimisation and the use of prescriptive limits. It is often convenient to class together individuals who form a homogeneous group with respect to their exposures to a single source. When such a group is typical of those most highly exposed by that source, it is known as a *critical group*. The dose constraint should be applied to the *mean dose* in the critical group from the source for which the protection is being optimised. . . .

ICRP Publication 60, *1990 Recommendation of the International Commission on Radiological Protection* § 5.5.1 at 44 (1990) [hereinafter ICRP 60] (emphasis added); see also *id.* ¶S38 at 74. On the subject of “the selection of critical groups,” ICRP 60 refers the reader at section 7.5.3 to ICRP Publication 43. ICRP 60 at 62.

ICRP 43 contains the following language relating to both “mean dose equivalent” and to taking account of characteristics of children:

The Commission believes that it will be reasonable to apply the appropriate dose-equivalent limit for individual members of the public to the *mean dose equivalent in the critical group*. It is recognized that, because of the innate variability within an apparently homogeneous group, some members of the critical group will in fact receive dose equivalents somewhat higher than the mean. However, because of the maximizing assumptions normally used, the dose equivalent actually received will usually be lower than the estimated dose equivalent. The critical group is discussed further in Section 8.

....

“(127) *In the calculation of the dose equivalent incurred by members of the public from intake of radionuclides, account must be taken of differences in organ size of metabolic characteristics of children. . . .*”

ICRP Publication 43, *Principles of Monitoring for the Radiation Protection of the Population* at 4 (1984) (emphasis added).¹

Section 8 of ICRP 43, referenced in the previous quotation from the same document, states in relevant part the following:

67. One of the major aspects in the choice [of the critical group] is the size of the critical group. It is clearly stated by the Commission (see Section 3) that the dose-equivalent limits are intended to apply to *mean dose equivalent* in a reasonably homogeneous group. In an extreme case it may be convenient to define the critical group in terms of a single hypothetical individual, for example when dealing with conditions well in the future which cannot be characterized in detail. Usually, however, the critical group would not consist of one individual nor would it be very large for then homogeneity would be lost. The size of a critical group will usually be up to a few tens of persons. In a few cases, where large populations are uniformly exposed, the critical group may be much larger. This guidance on size has certain implications: for example, in habit surveys it is not necessary to search for the most exposed individual within a critical group in order to base controls on that one person. The results of a habit survey at a particular point in time should be regarded as an indicator of an underlying distribution and the *value adopted for the mean* should not be unduly influenced by the discovery of one or two individuals with extreme habits.

¹We note that, in the paragraph from page 4 of ICRP Publication 43 that begins with “(127) . . .,” the ICRP is referring to and quoting from its recommendation 127 from ICRP Publication 26, *Recommendations of the International Commission on Radiological Protection* (1977), which publication contains revisions of the ICRP’s previous report, Publication 7, *Principles of Environmental Monitoring Related to the Handling of Radioactive Materials* (1966). In the introduction to Publication 43, the ICRP explains the changes from the recommendations found in Publication 7 that resulted in the recommendations in Publication 26. *Id.* at 1, 19 nn.1-2.

68. In calculating dose equivalents to critical groups it is important to select *appropriate mean values* for factors such as food consumption rates or occupancy parameters. However, *metabolic parameters should be chosen to be typical of the age-group (foetal, infant, child or adult) in the normal population* rather than extreme values.

69. It is obvious from the definition that some individuals will receive dose equivalents in excess of the *calculated mean dose equivalent*. Decisions as to the acceptability of the exposure of the critical group will depend not only on the proximity of the *calculated mean dose equivalent* to the dose-equivalent limit but also on the *expected spread of the distribution of actual dose equivalents*. . . .

Id. at 15-16 (emphasis added).

Portions of the above references have been emphasized to illustrate that, like the 1995 *Technical Bases for Yucca Mountain Standards*, the ICRP documents implicitly contemplate that from the critical *group*, a calculation of an *average* or *mean* is performed to arrive at a “mean dose” that would apply to a hypothetical individual, or “average member of the critical group,” which would both represent “the group of individuals reasonably expected to be the most highly exposed considering all reasonable potential future uses of the site,” *see* 62 Fed. Reg. 39,068, and not be “unduly influenced by . . . the discovery of individuals with extreme habits,” *see* ICRP 43 at 15. In addition, portions in which the ICRP recommends including, in some way or ways, consideration of the characteristics of children in arriving at the final “calculated mean dose equivalent,” have been emphasized. *Id.* at 4.

EPA Guidance Document

The EPA’s 1994 Guidance Document that is referred to in the SOC at 62 Fed. Reg. 39,061 as being “essentially similar” to ICRP 60 and NCRP 116,² and discusses the “Reference Man” concept argued by CYAPCO to be the standard for interpreting the term “average member of the critical group” in 10 C.F.R. § 20.1402, provides in relevant part as follows:

These dose conversion factors are appropriate for application to any population adequately characterized by the set of values for physiological parameters developed by the [ICRP] and collectively known as “Reference Man” [Here the EPA document itself cites, in a footnote, “ICRP No. 23, *Report of the Task Group on Reference Man* (1974).”] The actual dose to

²We find no reference to “critical groups,” “average members” thereof, or “Reference Man” in NCRP 116, nor has CYAPCO or CAN referred us to it. We therefore do not quote extensively from it in this Memorandum and Order. We note, however, the following statement from the Introduction to NCRP 116: “*The recommendations and concepts provided in ICRP Publication 60 . . . have been carefully reviewed and in the interest of a uniform international approach to radiation protection have, in general, been incorporated in this Report. Deviation from their recommendations was deemed necessary in a few cases where greater flexibility could be obtained at similar or less risk (e.g., the occupational dose limits) or where increased protection was considered to be warranted (e.g., a monthly exposure limit for the embryo-fetus).*” NCRP Report No. 116, *Limitation of Exposure to Ionizing Radiation* at 2 (1993) (emphasis added). Thus, NCRP 116 would appear to support CAN’s arguments.

a particular individual from a given intake is dependent upon age and sex, as well as other characteristics. As noted earlier, implementing limits for the general public expressed as age and sex dependent quantities would be difficult. (Clearly, it would be impracticable to conduct an annual survey of age and sex at every location of a potential source of public exposure.) More importantly, the variability in dose due to these factors is comparable in magnitude to the uncertainty in our estimates of the risks which provide the basis for our choice of the RPG [Radiation Protection Guide]. For this reason EPA believes that, for the purpose of providing radiation protection under the conditions addressed by these recommendations, the assumptions exemplified by Reference Man adequately characterize the general public, and *a detailed consideration of age and sex is not generally necessary.*

59 Fed. Reg. at 66,423 (emphasis added). CYAPCO argues that this language mandates use of the “reference man” and exclusion of any consideration of children in determining the TEDE for the “average member of the critical group.” CAN on the other hand, as indicated above, highlights the use of the word, “generally,” at the end of the quoted material, as indicating that consideration of age is appropriate in some circumstances.

ICRP 23

Given the EPA document’s citation of ICRP Publication 23 as the basis for its use of the “reference man” concept, it is helpful to look to ICRP 23 for guidance on this concept. The following selections from the Introduction to ICRP 23 (with language of particular relevance to our inquiry herein italicized) serve to illustrate the ICRP’s basic approach to this concept in 1974, as well as its acknowledged limitations:

1. GENERAL PURPOSES FOR THE REFERENCE MAN

Estimation of radiation dose to the human body, whether from external or internal sources, requires a certain amount of data about the exposed individual. In the case of external sources, fairly simple specifications of mass, dimensions, and elemental composition of the organs and tissues concerned are largely sufficient for most situations. However, in order to calculate maximum permissible annual intakes (MPAI) and related secondary standards for radioactive substances, as well as for estimation of dose due to a specified intake, . . . it is necessary to have much more biological information concerning the individual potentially or actually exposed. . . . Finally, *in assessing the exposure of a population, the age dependence of such factors is also necessary.*

Although individuals vary considerably in such respects, it is important to have a well-defined reference individual for estimation of radiation dose. Such a reference individual is convenient for routine cases of estimation of dose when the levels are sufficiently low that individual differences may be ignored. . . .

. . . .

3. PURPOSE OF THE PRESENT REPORT

. . . In particular, it is desired to define Reference Man, in the first instance, as a typical occupational individual, and it is important that some indication of variability of the

occupational group about this norm be indicated. *In addition, differences due to age, sex, or habits should be indicated where possible with particular emphasis on fetuses, infants, and children.*

....

... However important or desirable it may be to have a Reference Man embodying all known characteristics of man, the task of defining such a Reference Man is clearly beyond the scope of the present effort. Thus many known characteristics of man have received little or no attention on the part of the Task Group, because they were not known to be or considered to be closely related to estimation of radiation dose. . . .

... Reference Man is defined as being between 20-30 years of age, weighing 70 kg, is 170 cm in height, and lives in a climate with an average temperature of from 10° to 20°C. He is a Caucasian and is a Western European or North American in habitat and custom.

(c) The Task Group agreed that *it was not feasible to define Reference Man as an ‘average’ or ‘median’ individual of a specified population group and that it was not necessary that he be defined in any such precise statistical sense.* The available data certainly do not represent a random sample of any specified population. Whether the sample is truly representative of a particular population group remains largely a matter of judgment which cannot be supported on the basis of statistical tests of the data since the sampling procedure is suspect. . . .

....

7. SUMMARY

The Task Group realizes that Reference Man as defined here is capable of extensive improvements. Certainly, *the Group has not examined all the data that are available in the literature, and still less can it claim to have found the best data available from various specialists and agencies.* . . . The Task Group expects that discrepancies, inadequacies, and errors will be found. It hopes that Reference Man as defined here will be found to be as useful in meeting the needs of the health physicist now [October 1974] as was the Standard Man of 15 years ago. It is expected that the concept will need revision and, perhaps, extension in the future. The members of the Task Group will appreciate the comments or criticism of all who use the report and who see a means of improving the model either by making it more consistent or more useful.

ICRP Publication 23, *Report of the Task Group on Reference Man* at 1-7 (1974) (emphasis added).

Discussion of Guidance Documents Referred to in SOC

As we consider the guidance to be found in the above documents — all “implicitly endorsed” by the Commission in the SOC for the 1997 rules on Radiological Criteria for License Termination, *see Shoreham*, ALAB-900, 28 NRC at 290, or referenced in documents specifically referred to in the SOC — we observe that there appear some commonalities and some variations in the approaches taken in the various documents. The most obvious variation is between aspects of the “average member of the critical group” concept and the “reference man” concept as discussed by the ICRP. Primarily, in 1974, according to ICRP 23, it was “not feasible to define Reference Man as an ‘average’ or

‘median’ individual,’ as was later envisioned for the “average member of the critical group,” in 1984 in Publication 43, and in 1990 in Publication 60. Second, as the previous sentence illustrates, and as also illustrated in the last quoted paragraph from ICRP 23 as well as in the approach of Publication 43 as discussed in note 1, changes in approach occurred in the ICRP publications over time.

An explanation for such changes over time was provided by the ICRP in Publication 43, where it stated that, “although many of the previous recommendations [were] still relevant [at that time], it was felt necessary to reassess the general principles on which monitoring programs should be based, to make the recommendations consistent with current radiation protection philosophy” ICRP 43 at 1. Such an approach is consistent with the general scientific approach, in which new knowledge brings about changes in philosophy and improvements in practice. Thus, although the 1994 EPA Guidance Document relies on the 1974 ICRP Publication 23 with regard to the “Reference Man,” it does not appear to mandate its use as described in 1974, and notes, in stating that “a detailed consideration of age and sex is not *generally* necessary,” 59 Fed. Reg. at 66,423, that there may be exceptions to the general view that, “for the purpose of providing radiation protection under the conditions addressed by these recommendations, the assumptions exemplified by Reference Man adequately characterize the general public.” *Id.* We recognize, as CYAPCO points out, that the EPA refers to “[t]he most obvious exception [to the use of the Reference Man as being] for large doses delivered in a short period of time,” *id.*, but do not find that this precludes there being other exceptions.

The allowance in the EPA document for such exceptions, taken together with the statements in ICRP Publication 23 that, “in assessing the exposure of a population, the age dependence of such factors is also necessary,” and that “differences due to age, sex, or habits should be indicated where possible with particular emphasis on fetuses, infants, and children,” ICRP 23 at 1, 3, indicate that the Reference Man concept is not as narrowly defined as CYAPCO would argue. We also note the authors’ statements in Publication 23 that, while it was not then feasible to define “Reference Man” as an “average” of a specified population group, they “ha[d] not examined all the data that [were then] available in the literature, [nor] found the best data available from various specialists and agencies.” *Id.* at 7.

We note further that the Commission, in the section of the SOC in which the “Average Member of the Critical Group” is discussed, refers to the EPA FRG Guidance Document only by noting that the ICRP practice of “defining and using a critical group” and “recommend[ing] that such analyses should consider exposure to individuals representative of those expected to receive the highest dose using cautious but reasonable assumptions,” is consistent with the EPA document, and with the Yucca Mountain Standards. 62 Fed. Reg. at 39,067-68. We do not assume, as CYAPCO would have us do, that any differences in the

various documents “were not apparent to the Commission when it promulgated 10 C.F.R. § 20.1402.” Rather, we assume that the Commission, in discussing the desirability of considering exposure to “individuals representative of those expected to receive the highest dose using cautious but reasonable assumptions,” intended that the general approach of the various documents in this regard was to be followed. Finally, we find noteworthy that the Commission, in choosing which words to use in the actual rule, chose the newer terms used in the *Technical Bases for Yucca Mountain Standards* and the more recent ICRP documents, i.e., “critical group” and “average member of the critical group,” rather than the older term, “Reference Man.”

NUREG-1727

On the other hand, as noted by CYAPCO, NUREG-1727, written in response to a July 1998 Commission directive to the Staff to “develop a Standard Review Plan (SRP) that incorporates a risk-informed, iterative approach and provides clear guidance on complying with the As Low As is Reasonably Achievable provisions in the final License Termination Rule,” NUREG-1727 at iii, does contain the statement, “the average member of a critical group should be assumed to be an adult, with the proper habits and characteristics of an adult.” NUREG-1727 at 5.5. To place this quotation in context, we note the following selections from the Introduction to NUREG-1727:

General Approach for Dose Modeling

. . . To perform dose modeling, the licensee will need to use the site information on residual radioactivity expected to be present at the completion of decommissioning, to develop a generalized view of the site’s source term. In developing the source term model, the licensee needs to consider the site measurements, the intended remedial actions, and the needs of the conceptual model.

. . . .

After a source term model has been developed, the question becomes: “How could humans be exposed either directly or indirectly to residual radioactivity?” or “What is the appropriate exposure scenario?” Each exposure scenario must address the following questions:

- (1) How does the residual radioactivity move through the environment?
- (2) Where can humans be exposed to the environmental concentrations?
- (3) What are the exposure group’s habits that will determine exposure? (e.g., what do they eat and where does it come from? How much? Where do they get water and how much? How much time do they spend on various activities? etc.)

In most situations, there are numerous possible scenarios of how future human exposure groups could interact with residual radioactivity. The compliance criteria in 10 CFR Part 20 for decommissioning does not require an investigation of all (or many) possible scenarios; its focus is on the dose to members of the critical group. The critical group is defined (at 10 CFR 20.1003) as “the group of individuals reasonably expected to receive the greatest exposure to residual radioactivity for any applicable set of circumstances.”

. . . .

As required under 10 CFR 20.1302(b), *expected doses are evaluated for the average member of the critical group*, which is not necessarily the same as the maximally exposed individual. This is not a reduction in the level of protection provided to the public, but an attempt to emphasize the uncertainty and assumptions needed in calculating potential future doses, while limiting boundless speculation on possible future exposure scenarios. While it is possible to actually identify with confidence the most exposed member of the public in some operational situations (through monitoring, time-studies, distance from the facility, etc.), identification of the specific individual who will receive the highest dose some time (up to 1000) years in the future is impractical, if not impossible. Speculation on his or her habits, characteristics, age, or metabolism could be endless. *The use of the “average member of the critical group acknowledges that any hypothetical “individual” used in the performance assessment is based, in some manner, on the statistical results from data sets (e.g., the breathing rate is based on the range of possible breathing rates) gathered from groups of individuals.* While bounding assumptions could be used to select values for each of the parameters (i.e., the maximum amount of meat, milk, vegetables, possible exposure time, etc.), the result could be an extremely conservative calculation of an unrealistic scenario and may lead to excessively low allowable residual radioactivity levels.

Calculating the dose to the critical group is intended to bound the individual dose to other possible exposure groups because the critical group is a relatively small group of individuals, due to their habits, actions, and characteristics, who could receive among the highest potential dose at some time in the future. By using the hypothetical critical group as the dose receptor, coupled with prudently conservative models, it is highly unlikely that any individual would actually receive doses in excess of that calculated for the average member of the critical group. *The description of the critical group’s habits, actions, and characteristics should be based on credible assumptions and the information or data ranges used to support the assumptions should be limited in scope to reduce the possibility of adding members of less exposed groups to the critical group.* An analysis of the average member of the critical group’s potential exposure should also include, in most cases, some evaluation of the uncertainty in the parameter values used to represent physical properties of the environment.

When calculating for compliance with the requirements of Subpart E of Part 20, the intake-to-dose conversion factors used to calculate internal exposures can be found in Federal Guidance Report No. 11, which are *based primarily on adults*. As stated in the [EPA] “Federal Radiation Protection Draft Guidance for Exposure of the General public,” . . .

[At this point, the selection quoted above at 17, from the EPA Guidance Document, is quoted in NUREG-1727.]

Since age-based dose conversion factors are not being used, all individuals are assumed to have the same dose conversion factors. Because of this, only in very rare scenarios (generally, single exposure pathway scenarios) will a non-adult individual intake more radionuclides . . . than an adult in a similar exposure scenario. . . . in most situations, especially ones involving multiple pathways, the total intake of the adult is greater than that of a child. Therefore, the average member of the critical group should be assumed to be an adult, with the proper habits and characteristics of an adult.

By integrating the exposure scenario, source term, and knowledge about the applicable environmental transport routes involved in the exposure pathways, a conceptual model of the features and processes at the site can be created. . . .

NUREG-1727 at 5.2-5.5 (emphasis added).

With the possible exception of the sentence, “Therefore, the average member of the critical group should be assumed to be an adult, with the proper habits

and characteristics of an adult,” we do not find NUREG-1727 to be inconsistent with the approach of the other documents quoted above, all of which were either directly or indirectly referred to by the Commission in its SOC. We observe that this sentence, in its use of the word, “should,” rather than the mandatory “shall” or “must,” may also be construed to be consistent with these documents, in allowing for exceptions to the general rule, in the same way the EPA Guidance Document allows for such exceptions. Under *Shoreham*, to the degree NUREG-1727 is inconsistent with the regulation, “the latter of course must prevail.” *Shoreham*, ALAB-900, 28 NRC at 290. Thus, as we note above, what is at issue herein is the interpretation of the rule, on which both parties have offered extensive arguments, especially CYAPCO, whose Reply to CAN we have permitted and fully considered.

Conclusion

In its SOC, the Commission notes that the terms “critical group” and “average member” were “new terms” that were “consistent with ICRP practice of defining and using a critical group when assessing individual public dose from low levels of radioactivity similar to those expected from a decommissioned site.” 62 Fed. Reg. at 39,068. The Commission goes on to observe that the ICRP “recommends that such analyses should consider exposure to individuals representative of those expected to receive the highest dose using cautious but reasonable assumptions,” and that this is the approach adopted by the EPA and is also consistent with the Yucca Mountain Standards document. *Id.* NUREG-1727 had not yet been written. With the possible exception of the one sentence noted above from NUREG-1727 and relied on by CYAPCO, all of the documents quoted and discussed above either allow for *or recommend* that averaging calculations, or calculation of an “arithmetic mean,” be performed to determine the characteristics of the “average member of the critical group,” and that the characteristics of children be taken into account in performing such calculations, when appropriate. And, as indicated above, the Commission chose to use in section 20.1402 the terms “critical group” and “average member of the critical group,” rather than “Reference Man.”

In view of the Commission’s use of these terms in section 20.1402, as well as its implicit endorsement in the SOC of the more recent ICRP approach in using and defining these terms — which approach is not inconsistent with any of the other documents referenced or statements made in the SOC and includes recommendations both with regard to the calculations of averages and to the taking into account of characteristics of children (recommendations on the latter of which are found even in its earlier Publication 23, the origin of the “Reference Man” concept) — we find it would be reasonable to conclude that the Commission, in using the term, “average member,” in section 20.1402, intended that it be

interpreted in a manner consistent with these more recent recommendations of the ICRP.

We observe that the issue in question herein has apparently been one involving some level of ambiguity, uncertainty, and lack of clarity. The position taken by the Staff in this proceeding, for example, is inconsistent with that taken through its counsel in another proceeding involving a license termination of a reactor, to the effect that the calculations of the “average member of the critical group” *would* include “women and children.” See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), Docket No. 50-029-LA-R, ASLBP No. 98-736-01-LA-R, Transcript of Prehearing Conference (Jan. 27, 1999) at 220, 222. This lack of clarity might warrant certification to the Commission, were it not for the Commission’s strong indications of intent, as discussed above, leading to our preliminary conclusion that the term “average member” be interpreted consistent with the more recent statements of the ICRP regarding the term. In these circumstances, we do not find it appropriate to press this issue upon the Commission at this time on an interlocutory basis. Nor do we find the matter at issue herein either to “fundamentally alter the nature of the proceedings” or to be “devoid of any limiting principles or rules of decision,” CYAPCO Motion for Reconsideration at 8, as CYAPCO asserts it to be.

Despite the lack of clarity illustrated above, the various documents that are liberally quoted from herein appear to provide such principles in abundance, which are appropriate for the parties to rely on, consistently with the meaning of section 20.1402 and related rules. The “genuine issue” that we have to decide with regard to CAN Contention 6.1, which we find CAN has adequately supported, including in its argument relating to the inclusion of children in the calculation of the TEDE to the “average member of the critical group,” and which the parties shall address in their presentation of evidence, is:

What are the appropriate factors and considerations relating to the “outdoors value,” yearly intake of water by residents, and the nature of and extent to which the characteristics of children must be taken into account in calculating the TEDE to the “average member of the critical group” in the “resident farmer scenario,” for purposes of the Haddam Neck site License Termination Plan, in order that the LTP can “demonstrate[] that the remainder of decommissioning activities . . . will not be inimical . . . to the health and safety of the public,” as required by 10 C.F.R. § 50.82(a)(10)?

This statement of the issue for decision incorporates all of the bases CAN has asserted for Contention 6.1 that we have admitted, including that relating to the inclusion of children in the calculation of the TEDE. CAN has submitted the statement of Dr. Resnikoff, providing a summary of how he would approach calculating the dose to the “average member of the critical group,” and we expect that CYAPCO’s experts will present their own approach, along with their arguments on why the inclusion of children in the averaging calculations is not

appropriate as a factual matter with regard to the circumstances relating to the Haddam Neck plant site. We do not expect that the litigation of this issue should be particularly time-consuming, if the parties and their experts are well prepared to present their evidence in a concise manner, directed to the issue as stated above.

ORDER

For the reasons stated above, we *deny* CYAPCO's Motion for Reconsideration.

Given that the legal issue of the proper interpretation of the words, "average member," as used in 10 C.F.R. § 20.1402, has not, prior to issuance of this Memorandum and Order, been explicitly so defined as done herein, if either party wishes to file a further motion regarding this issue, the party shall file such a motion *no later than October 16, 2001*. Thereafter, at or after the prehearing status conference scheduled for October 17, 2001, the Board shall set dates for responses to motions or the beginning of discovery on CAN Contention 6.1, as appropriate.

It is so ORDERED.

THE ATOMIC SAFETY AND LICENSING BOARD³

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Thomas D. Murphy
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 17, 2001

³ Copies of this Order were sent this date by Internet e-mail or facsimile transmission, if available, to all participants or counsel for participants.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

September 20, 2001

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), acting pursuant to 10 C.F.R. § 2.749, the Licensing Board grants a PFS request for summary disposition in its favor regarding contention Utah AA, Range of Alternatives, finding that the discussion in the NRC Staff's June 2000 draft environmental impact statement (DEIS) regarding the range of reasonable siting alternatives for the proposed PFS facility moots this contention asserting that such a discussion was missing from the PFS environmental report (ER).

RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PERSUASION; BURDEN OF PROOF)

Under 10 C.F.R. § 2.749(a), (d) summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter

of law.” The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant’s facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

RULES OF PRACTICE: CONTENTIONS (MODES OF FORMULATION)

At a petitioner’s choosing, a contention can take three forms: a challenge to the application’s adequacy based on the validity of the information that is in the application; a challenge to the application’s adequacy based on its alleged omission of relevant information; or some combination of these two challenges. *See* 10 C.F.R. § 2.714(b)(2)(iii).

RULES OF PRACTICE: CONTENTIONS (SCOPE)

In determining which of the three forms is involved in any contention, a presiding officer should look first to the language of the contention. If that proves unavailing, the language of the bases provided to support the contention may be examined to discern the sponsor’s intent relative to the contention’s scope and meaning. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988) (explaining that when “the issue is the scope of a contention, there is no good reason not to construe the contention and its bases together in order to get a sense of what precise issue the party seeks to raise”).

REGULATIONS: INTERPRETATION (10 C.F.R. § 72.102(e))

The only reference in 10 C.F.R. Part 72, Subpart E, to alternative sites is in 10 C.F.R. § 72.102(e) that states “[i]n an evaluation of alternative sites, those which require a minimum of engineered provisions to correct site deficiencies are preferred. Sites with unstable geologic characteristics should be avoided.” In the context of Subpart E, this clearly is not an admonition intended to govern the scope of a NEPA environmental siting alternatives analysis, but rather is intended as a substantive site selection criterion applicable to an ISFSI site actually proposed in an application. *See* 45 Fed. Reg. 74,693, 74,697 (Nov. 12, 1980) (statement

of considerations regarding initial adoption of 10 C.F.R. Part 72, Subpart E, including section 72.66(a)(5) that mirrors language of current section 72.102(e), notes that “[t]he principle of selecting sound sites has been retained in the final rule” in that, for example, “sites that lie within the range of strong nearfield ground motion from earthquakes on larger capable faults should be avoided”).

RULES OF PRACTICE: CONTENTIONS (SCOPE)

NEPA: CONTENTIONS (SCOPE; AMENDMENT)

While a contention initially framed as a challenge to the substance of an applicant’s ER analysis of particular matters would not necessarily require a late-filed revision or substitution to constitute a litigable issue statement relative to the substance of the Staff’s DEIS (or final environmental impact statement) analysis of the same matter, a significant change in the nature of the purported National Environmental Policy Act (NEPA) imperfection, from one focused on a comprehensive information omission to one centered on a deficient analysis of subsequently supplied information, warrants such an issue modification. *See* 10 C.F.R. § 2.714(b)(2)(iii).

MEMORANDUM AND ORDER
(Granting Summary Disposition Motion Regarding
Contention Utah AA)

Pending before the Licensing Board in this proceeding to construct and operate a 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI) on the Skull Valley, Utah reservation of Intervenor Skull Valley Band of Goshute Indians (Skull Valley Band) is a motion by Applicant Private Fuel Storage, L.L.C. (PFS), for summary disposition of Intervenor State of Utah’s (State) contention Utah AA, Range of Alternatives. As admitted, contention Utah AA challenges the PFS environmental report (ER) National Environmental Policy Act (NEPA) analysis of the range of reasonable siting alternatives for its proposed action. PFS asks that summary disposition be granted in its favor on contention Utah AA because that issue is now moot or incorrect as a matter of law, a request that is supported by the NRC Staff and opposed by the State.

For the reasons set forth below, we grant the PFS dispositive motion on this issue.

I. BACKGROUND

In its April 1998 ruling on standing and litigable issues, the Licensing Board admitted contention Utah AA, concerning the sufficiency of the range of siting

alternatives discussed in the ER that accompanied the PFS application for its proposed facility. *See* LBP-98-7, 47 NRC 142, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998). As admitted by the Board, the contention reads:

The Environmental Report fails to comply with the National Environmental Policy Act because it does not adequately evaluate the range of reasonable alternatives to the proposed action.

47 NRC at 256. In admitting the contention, the Board limited the scope of the contention to the adequacy of the PFS alternative site analysis. *See id.* at 203. Additionally, the Board consolidated a similar portion of another contention, Castle Rock 13, Inadequate Consideration of Alternatives, with contention Utah AA. *See id.* at 219. Although the parties sponsoring that contention later withdrew as intervenors to this proceeding, the Board ruled their withdrawal did not affect the viability of contention Utah AA as admitted. *See* LBP-99-6, 49 NRC 114, 118 (1999).

As its basis for contention Utah AA, the State asserted that the ER discussion of siting alternatives was “woefully inadequate,” declaring more specifically that (1) for the second site screening phase, by which PFS reduced its consideration from thirty-eight to three sites, there was “no discussion or tabulation” of the screening results; (2) there was “no mention” of whether the site suitability questionnaire used for the third site screening phase went to all thirty-eight site owners or only to the Skull Valley Band; (3) there was “absolutely no discussion or tabulation” of the responses to the phase three questionnaire; (4) there was no identification of the three sites selected using the third screening phase; (5) there was no discussion of how the two Skull Valley Band reservation sites were selected as a result of the final screening process; (6) whether a particular site was within a “willing jurisdiction” seemed to be an overarching selection criterion; (7) there was no discussion of the application of the 10 C.F.R. Part 72, Subpart E site evaluation factors; (8) there was a “failure to consider” transportation corridors and accident and risk analyses; (9) site selection criteria are unreliable because they were not applied at all screening levels; and (10) screening process information has not been described and tabulated. [State] Contentions on the Construction and Operating License Application by [PFS] for an Independent Spent Fuel Storage Facility (Nov. 23, 1997) at 172-74 [hereinafter State Contentions]. Further, in connection with contention Castle Rock 13, the relevant portion of the basis for the contention asserted that in connection with the Skull Valley Band site and a Wyoming site that were considered as the two final candidate sites, or for the Skull Valley Band site and any other location, there is “no discussion” in the ER on environmental effects and impacts, technical and other costs/benefits of alternatives. Contentions of Petitioners Castle Rock Land & Livestock, L.C., Skull Valley Co., Ltd, and Ensign Ranches of Utah, L.C. on the License Application for the [PFS] Facility (Nov. 21, 1997) at 50-51.

In June 2000, the Staff issued a draft environmental impact statement (DEIS) for the PFS facility. *See* Draft Environmental Impact Statement for the Construction and Operation of an [ISFSI] on the Reservation of the [Skull Valley Band] and the Related Transportation Facility in Tooele County, Utah, NUREG-1714 (June 2000) [hereinafter DEIS]. In the DEIS, the Staff discussed the PFS site selection process and criteria and performed an evaluation of various siting alternatives. *See id.* at 7-1 to -36.

On April 18, 2001, PFS filed the pending motion for summary disposition of contention Utah AA, along with a supporting statement of material facts not in dispute. *See* [PFS] Motion for Summary Disposition of Utah Contention AA — Range of Alternatives (Apr. 18, 2001) [hereinafter PFS Dispositive Motion]; *see also id.* Statement of Material Facts on Which No Genuine Dispute Exists [hereinafter PFS Undisputed Facts]. On May 15, 2001, the State filed a response to the PFS dispositive motion, including a statement of disputed and relevant material facts, in which it opposed the PFS motion. *See* [State] Response to [PFS] Motion for Summary Disposition of Contention Utah AA (May 15, 2001) [hereinafter State Response]; *see also id.* [State] Statement of Disputed and Relevant Material Facts. On that same date, the Staff filed a response in support of the motion, including the supporting declaration of NRC Staff contractor Gregory P. Zimmerman who serves as the Environmental Impact Analysis Program leader at the Oak Ridge National Laboratory Center for Energy and Environmental Analysis. *See* NRC Staff's Response to [PFS] Motion for Summary Disposition of Utah Contention AA — Range of Alternatives (May 15, 2001) [hereinafter Staff Response]; *see also id.* Affidavit of Gregory P. Zimmerman at 18-20 (May 15, 2001) [hereinafter Zimmerman Declaration]. The Staff's pleading engendered a May 25, 2001 State reply opposing the Staff's support for the PFS contention Utah AA summary disposition request. *See* [State] Reply to Staff's Response to [PFS] Motion for Summary Disposition of Utah Contention AA — Range of Alternatives (May 25, 2001) [hereinafter State Reply].

II. ANALYSIS

A. Summary Disposition Standards

We have articulated the standard governing consideration of a motion for summary disposition several times in this proceeding in ruling on previous PFS motions. We will rely on the same standard noted below in ruling on the pending PFS summary disposition motion:

“Under 10 C.F.R. § 2.749(a), (d) summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows that there is “no genuine issue as to any material fact and that

the moving party is entitled to a decision as a matter of law.” The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant’s facts will be deemed admitted. *See Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).*”

LBP-01-19, 53 NRC 416, 421-22 (2001) (quoting cited cases from this proceeding).

With these general principles as the backdrop, we now turn to the PFS summary disposition motion regarding contention Utah AA.

B. Application to Contention Utah AA

1. PFS Position

PFS provides eighteen assertedly undisputed material facts in support of its argument that the State’s concerns with respect to the ER analysis of the range of siting alternatives, as articulated in contention Utah AA and as admitted by the Board, have been rendered moot by the subsequent Staff DEIS or, in the alternative, are incorrect as a matter of law. According to PFS, the State’s entire basis for contention Utah AA relates solely to purported omissions of certain discussions from the PFS ER. *See PFS Dispositive Motion at 2.* PFS suggests a literal reading of the State’s contention, pointing to language in the supporting basis statement that declares that the ER discussion of siting alternatives is “woefully inadequate” since there is “no discussion” of screening results, “no mention” of site selection questionnaire recipients, and “absolutely no discussion” of the recipient’s responses. *Id.* (quoting State Contentions at 172-73). PFS asserts that these supposed omissions, whether or not the cause for legitimate concern, have now been dealt with in the DEIS and so no longer provide the grounds for a challenge to the PFS licensing request. Referencing DEIS section 7.1, relative to these State “no discussion” concerns, PFS declares that the site selection process and the corresponding site selection criteria were clearly identified, including a discussion of the PFS phase two site selection information gathering/tabulation/evaluation process that resulted in the identification of four and then, with one candidate jurisdiction’s withdrawal, three potential sites; an outline of the site selection questionnaire distribution process to the three site owners or promoters; and a discussion of the tabulation/evaluation process that was used for the phase three selection process. *See PFS Dispositive Motion at 11-15; see also PFS Undisputed Facts at 2-3.* Furthermore, PFS asserts that the DEIS discussion of alternative sites satisfies NEPA in that, contrary to the

State's claim, an applicant and the Staff need not go into a detailed discussion and analysis of the site selection process, but rather need only provide a brief description of the process that outlines how alternate sites were identified/ruled out that is adequate to demonstrate no "obviously superior" site was overlooked. Given that the State has not identified such a site, PFS declares, the DEIS as written satisfies NEPA as a matter of law. *Id.* at 16-18. Finally, PFS declares that the asserted need for consideration of Subpart E site evaluation factors is legally incorrect because Subpart E, by its terms, applies only to a "proposed" site, i.e., the Skull Valley Band site actually put forth by PFS in its application. *See* PFS Dispositive Motion at 18-19; *see also* PFS Undisputed Facts at 3.

Although noting agency case law that contentions challenging an ER are considered as contesting a subsequently prepared DEIS, *see* PFS Dispositive Motion at 8 (citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 84 (1998)), PFS concludes that, to the extent the State's concerns were legally cognizable, the DEIS siting alternatives discussion has addressed the omissions outlined in contention Utah AA so as to entitle PFS to summary disposition on that issue statement. Moreover, according to PFS, the State is now foreclosed from raising the challenges to the substance of the DEIS discussion that it sets forth in its summary disposition response because the State failed to submit a timely revision of contention Utah AA following issuance of the DEIS. *See id.* at 8-10.

2. Staff Position

The Staff agrees with PFS that there no longer exists any genuine dispute of material fact with respect to contention Utah AA. According to the Staff, DEIS coverage of the siting alternatives to the proposed action nullifies the State challenges outlined in contention Utah AA. In this regard, the Staff seeks to demonstrate in a point-by-point analysis that the DEIS covers each of the matters the State claims were allegedly neglected in the PFS ER. *See* Staff Response at 10-16; *see also* Zimmerman Declaration at 2-3. Like PFS, the Staff argues that the scope of contention Utah AA (including the admitted portion of Castle Rock 13) is limited to the matters asserted not to have been addressed in the ER, which the Staff maintains were addressed in its DEIS siting alternatives discussion. *See* Staff Response at 10, 16. Moreover, according to the Staff, although the DEIS now provides a detailed discussion of the siting alternatives to the proposed action, the State took no steps to amend its contention or file a new contention to challenge the adequacy of the DEIS analysis. *See id.* at 9-10 & n.11. Under the circumstances, the Staff concludes that PFS has met its burden of showing that there are no material facts in dispute regarding contention Utah AA and so should have summary disposition entered in its favor.

3. *State Position*

The State seeks to establish the existence of a material factual dispute with regard to PFS material facts four, eight, ten, and twelve, declaring that the State's challenge should not be construed in the limited terms advocated by PFS.¹ Rather, the State asserts that its contention should be viewed as a broad challenge to the reasonableness of the PFS site selection process and its adequacy in meeting the requirements of NEPA. *See* State Disputed Facts at 2; State Reply at 5-7. Additionally, the State contends that the DEIS for the PFS facility erroneously relies upon the results of the site selection process in the ER and, therefore, does not contain a legally adequate analysis of alternatives. *See* State Response at 7-8; State Reply at 1-3. The State argues in this regard that PFS winnowed down its site list by applying objectives and criteria (such as selecting sites from a business rather than an environmental perspective) that are not acceptable for use by the Staff relative to the elimination of alternative sites under NEPA. *See* State Response at 10-11. Further, the State contends that the Staff's discussion of the PFS site selection process makes it clear that it did not understand fully the PFS process or did not have enough information to determine that only appropriate criteria were used, evidencing a Staff failure to carry out its responsibility to make a knowledgeable, independent determination about which alternative sites are reasonable to analyze under NEPA. *See id.* at 12; State Reply at 4-5.

In advocating this position, the State asserts that its contention has not been mooted by issuance of the Staff's DEIS. The State objects to what it believes is the PFS attempt to redefine the State's purpose "in an unreasonably narrow way" thereby "ignor[ing] the plain language of the contention itself." State Response at 14; State Reply at 5. Instead, the State asserts that contention Utah AA is a broad challenge to the adequacy of site alternatives under NEPA, and not simply a challenge to the mere exclusion of relevant subject matter from the PFS ER. *See* State Response at 14. As a result, the State argues that it has established a material factual dispute relative to the adequacy of the DEIS site selection alternatives analysis such that summary disposition of contention Utah AA is not appropriate.

¹ PFS material fact four asserts that contention Utah AA is limited by its own language to challenging only whether certain issues were discussed in the ER and does not function as a broad challenge to the merits of the analysis. *See* PFS Undisputed Facts at 1. Material fact eight states that the PFS site selection process is described and the selection criteria identified in DEIS section 7.1. *Id.* at 2. Material fact ten pertains to DEIS coverage of the basis upon which the PFS Board of Managers narrowed down the list of candidate sites in phase two of the site selection process. *Id.* Finally, material fact twelve states that the DEIS describes how the site selection process resulted in four sites being selected for further evaluation, a list that was later trimmed to three sites when one such site opted not to participate further in the process. *Id.*

4. Board Ruling

As is apparent from the parties' arguments relative to the PFS dispositive motion regarding contention Utah AA, the question of the scope of this contention once again is of critical concern. As we noted recently in addressing such a "scope" issue in the context of another summary disposition ruling in this proceeding:

[A]t the petitioner's choosing, [contentions] can take three forms: a challenge to the application's adequacy based on the validity of the information that is in the application; a challenge to the application's adequacy based on its alleged omission of relevant information; or some combination of these two challenges. *See* 10 C.F.R. § 2.714(b)(2)(iii). Further, it is apparent that in determining which of these three forms is involved in any contention, we look first to the language of the contention. Yet, if that proves unavailing, the language of the bases provided to support the contention may be examined to discern the sponsor's intent relative to the contention's scope and meaning. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988) (explaining that when "the issue is the scope of a contention, there is no good reason not to construe the contention and its bases together in order to get a sense of what precise issue the party seeks to raise").

LBP-01-23, 54 NRC 163, 171 (2001). As before, we consider the language in this one-sentence contention, which declares that the PFS ER does not "adequately evaluate" the range of alternatives. Since on its face this language is sufficiently imprecise to encompass either a purported "analysis" or "omission" deficiency, further examination of the State's basis statement is merited to discern the contention's scope.

As the basis synopsis set forth above indicates, *see supra* p. 202, the thrust of this contention is an "omission" challenge to the ER and, concomitantly, to the DEIS. Contention Utah AA basis items one through five, seven, eight, and ten and the basis for consolidated contention Castle Rock 13 make note of certain purported information deficiencies, including lack of discussion and/or tabulation of information and results, particularly for the second and third screening phases; lack of discussion of the distribution process used for the third screening phase questionnaire; failure to identify the three sites culled out by the third phase screening; failure to discuss how the two Skull Valley Band reservation sites were selected pursuant to the final screening process; and lack of consideration of transportation corridors and accident and risk analyses.² As is clear from the

²As to the other two basis matters, although they arguably do not fall strictly within the "omission" category, they nonetheless fail to embody a material factual dispute so as to merit further consideration in an evidentiary hearing. Relative to item six — PFS overreliance on "willing jurisdiction" as a phase one selection criterion — the State's response, in which it indicates that utilizing such a factor was appropriate for PFS, *see* State Response at 10, essentially renders this matter moot as well. Moreover, relative to item nine — the purported failure to apply the same criteria during all screening phases — as the Staff points out without contradiction by the State, *see* Staff Response at 15; *see* State Reply at 1-7, this concern does not recognize the practical reality of the site selection

(Continued)

alternative site discussion in the DEIS, with one exception, those matters have now been addressed so as to render these State concerns moot and thus subject to summary disposition in favor of PFS.³ *See* PFS Motion at 10-15; Staff Response at 10-16. The only State-identified “omission” item that is not discussed in the DEIS — item seven regarding the application of 10 C.F.R. Part 72, Subpart E — likewise fails to provide the requisite material factual dispute because those provisions apply to a “proposed” site put forth by an applicant as the site for a licensed facility, not a site that is simply being evaluated to determine whether it should be chosen as the “proposed” site for an ISFSI facility.⁴

Given the curative treatment afforded by the DEIS regarding the information the State previously asserted was missing from the application, not unexpectedly the current focus of the State’s concern is the Staff analysis provided in connection with this information now furnished in the DEIS. Nonetheless, with the issuance of the Staff DEIS that includes the information previously alleged to have been lacking, we are presented with a substantial difference in the nature of the purported NEPA deficiency. While a contention initially framed as a challenge to the substance of an applicant’s ER analysis of particular matters would not necessarily require a late-filed revision or substitution to constitute a litigable issue statement relative to the substance of the Staff’s DEIS (or final environmental impact statement) analysis of the same matter, a significant change in the nature of the purported NEPA imperfection, from one focused on a comprehensive information omission to one centered on a deficient analysis of subsequently supplied information, warrants such an issue modification. *See* 10 C.F.R. § 2.714(b)(2)(iii).

In this instance, relative to the matters about which the State previously expressed any particularized concern in formulating contention Utah AA, there has been a significant change by reason of the Staff’s DEIS such that the State should have channeled its concerns pertaining to the Staff’s discussion of siting

process. It is not apparent how applying the same criteria at each level of the selection process will narrow the pool of candidate sites. Instead, different criteria are necessary as the pool of candidate sites becomes smaller in order to fine-tune the site suitability process.

³The ultimate issue of the validity or adequacy of the DEIS coverage of the range of alternatives to the proposed action is not now before us. We thus do not express a view on the “correctness” of the Staff’s revised DEIS analysis. We also need not address PFS’s alternative argument relating to the level of detail needed in an inquiry into an applicant’s site selection process under NEPA. Instead, we consider the Staff’s acknowledgment of the factors highlighted in contention Utah AA facially sufficient to support the PFS “mootness” argument.

⁴As the Staff points out, *see* Staff Response at 14 n.16, the only reference in Subpart E to alternative sites is 10 C.F.R. § 72.102(e), which states that “[i]n an evaluation of alternative sites, those which require a minimum of engineered provisions to correct site deficiencies are preferred. Sites with unstable geologic characteristics should be avoided.” In the context of Subpart E, however, this clearly is not an admonition intended to govern the scope of a NEPA environmental siting alternatives analysis, but rather is intended as a substantive site selection criterion applicable to an ISFSI site actually proposed in an application. *See* 45 Fed. Reg. 74,693, 74,697 (Nov. 12, 1980) (statement of considerations regarding initial adoption of 10 C.F.R. Part 72, Subpart E, including section 72.66(a)(5) that mirrors language of current section 72.102(e), notes that “[t]he principle of selecting sound sites has been retained in the final rule” in that, for example, “sites that lie within the range of strong nearfield ground motion from earthquakes on larger capable faults should be avoided”).

alternatives into a new or amended contention to challenge the adequacy of the information and related analysis included in the DEIS. The State did not do so and the time for introducing such matters into this proceeding appears to have long since passed.⁵ These arguments, not having been presented in a timely fashion, cannot now provide the basis for a material factual dispute that supports a denial of summary disposition for contention Utah AA.

III. CONCLUSION

In connection with contention Utah AA, Range of Alternatives, in light of the discussion put forth by the Staff in its June 2000 DEIS regarding the range of reasonable siting alternatives for the proposed PFS facility, we conclude that PFS has met its burden of establishing there are no material factual issues remaining in dispute regarding contention Utah AA so as to entitle it to a judgment in its favor in that, as a matter of law, contention Utah AA is now moot.

For the foregoing reasons, it is, this twentieth day of September 2001, ORDERED that the April 18, 2001 motion for summary disposition of PFS regarding contention Utah AA is *granted* and, for the reasons given in this

⁵ See Licensing Board Memorandum and Order (General Scheduling for Proceeding and Associated Guidance) (June 29, 1998) at 5 (contentions based on the PFS facility DEIS "should be submitted no later than thirty days" after the DEIS is made publically available) (unpublished).

Memorandum and Order, a decision regarding contention Utah AA is rendered in favor of PFS on the ground that the issue is now moot.

THE ATOMIC SAFETY AND
LICENSING BOARD⁶

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 20, 2001

⁶Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) Intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket Nos. 50-369
50-370
50-413
50-414

DUKE ENERGY CORPORATION
(McGuire Nuclear Station, Units 1 and 2;
Catawba Nuclear Station, Units 1
and 2)

October 4, 2001

In this Order, the Commission refers to the Atomic Safety and Licensing Board Panel, for assignment of a Licensing Board to rule on, two separate petitions to intervene and requests for a hearing filed in the matter of the Licensee's application for renewal of its operating licenses for McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2. The Commission provides the Licensing Board with guidance for the conduct of the proceeding if a hearing is granted, and a suggested schedule for any proceeding.

RULES OF PRACTICE: SCOPE OF PROCEEDING

OPERATING LICENSE RENEWAL

The scope of a proceeding on an operating license renewal is limited to a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures, and components that are subject to an evaluation of time-limited aging analyses. *See* 10 C.F.R. §§ 54.21(a) and (c), 54.4. In addition, review of environmental

issues in a licensing renewal proceeding is limited in accordance with 10 C.F.R. §§ 51.71(d) and 51.95(c).

ORDER
**(Referring Petitions for Intervention and Requests for Hearing
to the Atomic Safety and Licensing Board Panel)**

I. INTRODUCTION

On June 13, 2001, Duke Energy Corporation (“the Applicant”) submitted an application to renew the operating licenses for its McGuire Nuclear Station, Units 1 and 2, and the Catawba Nuclear Station, Units 1 and 2. Both the McGuire and Catawba facilities are located near Charlotte, North Carolina. The notice of receipt of application was published in the *Federal Register* on July 16, 2001. *See* 66 Fed. Reg. 37,072 (2001). On August 15, 2001, the Staff of the Nuclear Regulatory Commission (“the Staff”) issued a Notice of Acceptance for Docketing of the Application and Notice of Opportunity for a Hearing. *See* 65 Fed. Reg. 60,693 (2001).

Two organizations, the Nuclear Information and Resource Service (“NIRS”) and the Blue Ridge Environmental Defense League (“BREDL”), have filed petitions to intervene and requests for hearing in accordance with 10 C.F.R. § 2.714. This Order refers those petitions to intervene and requests for hearing to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for assignment of an Atomic Safety and Licensing Board to rule on these and any additional requests for hearing and petitions for leave to intervene and, if a hearing is granted, to conduct the proceeding. The Order also provides the Licensing Board with guidance for the conduct of any proceeding if a hearing is granted, and a suggested schedule for any such proceeding.

II. COMMISSION GUIDANCE

A. Scope of Proceeding

The scope of this proceeding is limited to discrete safety and environmental issues. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 6-13 (2001). This encompasses a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant’s systems, structures, and components that are subject to an evaluation of time-limited aging analyses. *See* 10 C.F.R. §§ 54.21(a) and (c), 54.4; Nuclear Power Plant License Renewal:

Revisions, Final Rule, 60 Fed. Reg. 22,461 (1995). In addition, review of environmental issues is limited in accordance with 10 C.F.R. §§ 51.71(d) and 51.95(c). See NUREG-1437, “Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants”; Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, Final Rule, 61 Fed. Reg. 28,467 (1996), amended by 61 Fed. Reg. 66,537 (1996). The Licensing Board shall be guided by these regulations in determining whether proffered contentions meet the standard in 10 C.F.R. § 2.714(b)(2)(iii). It is the responsibility of the petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions and to demonstrate that a genuine dispute exists within the scope of this proceeding. If rulings on the admission of contentions or the admitted contentions themselves raise novel legal or policy questions, the Licensing Board should refer or certify such rulings or questions to the Commission on an interlocutory basis. The Commission itself is amenable to such early involvement and will evaluate any matter put before it to ensure that substantive interlocutory review is warranted.

The Commission expects that matters within the scope of this proceeding but not put into controversy will be considered by the Licensing Board only where the Licensing Board finds that a serious safety, environmental, or common defense and security matter exists. Such consideration should be exercised only in extraordinary circumstances. If the Licensing Board decides to raise a matter on its own initiative, a copy of its ruling, setting forth in general terms its reasons, must be transmitted to the Commission. The Licensing Board should not proceed to consider such *sua sponte* issues unless the Commission approves the Licensing Board’s proposal to do so.

B. Discovery Management

Similar to the practice under current Rule 26 of the Federal Rules of Civil Procedure, if a hearing is granted, the Licensing Board should order the parties to provide certain information to the other parties without waiting for discovery requests. This information will include the names and addresses of individuals likely to have discoverable information relevant to the admitted contentions, the names of individuals likely to be witnesses in this proceeding, the identification of documents that will likely contain discoverable information, the production of such documents (if not already publicly available), and any other information relevant to the admitted contentions that the Licensing Board may require in its discretion.

Within 30 days of any Licensing Board order granting a request for a hearing, the Staff shall file in the docket, present to the Licensing Board, and make available a case file to the Applicant and any other party to the proceeding. The Staff will have a continuing obligation to keep the case file up to date, as

documents become available. The case file will consist of the application and any amendments thereto, the Final Environmental Impact Statement (in the form of a plant-specific supplement to the GEIS), any Staff safety evaluation reports relevant to the application, and any correspondence between the Applicant and the NRC that is relevant to the application. Formal discovery against the Staff, pursuant to 10 C.F.R. §§ 2.720(h), 2.740, 2.742, and 2.744, regarding the Staff's safety and environmental review documents will be suspended until after issuance of the final Safety Evaluation Report (SER) — i.e., the Supplemental SER — and the Final Supplemental Environmental Impact Statement (FES),¹ unless the Licensing Board in its discretion finds that starting discovery against the Staff on safety issues before the final SER is issued will expedite the hearing without adversely impacting the Staff's ability to complete its evaluations in a timely manner.

The Licensing Board, consistent with fairness to all parties, should narrow the issues requiring discovery and limit discovery to no more than one round each for original and late-filed contentions.

C. Proposed Schedule

The Commission directs the Licensing Board to set a schedule for any hearing granted in this proceeding that establishes as a goal the issuance of a Commission decision on the pending application in about 2½ years from the date that the application was received. In addition, if the Licensing Board grants a hearing, once the Licensing Board has ruled on any petition for intervention and request for a hearing, formal discovery against the Staff shall be suspended until after the Staff completes its final SER and FES, subject to the discretion discussed above of the Licensing Board to proceed with discovery against the Staff on safety issues prior to the issuance of the final SER, or to proceed with discovery against the Staff on either the FES or final SER (*see* note 1, *supra*). The evidentiary hearing should not commence until after completion of the final SER and FES, unless the Licensing Board in its discretion finds that starting the hearing with respect to safety issues prior to issuance of the final SER will expedite the proceeding without adversely impacting the Staff's ability to complete its evaluations in a timely manner.

The Commission believes that, in the appropriate circumstances, allowing discovery or an evidentiary hearing with respect to safety-related issues to proceed

¹This direction is based on the Staff's review schedule for the Duke Energy application, which indicates that the final SER and FES will be issued fairly close in time. If this is not the case, the Board, in its discretion, may commence discovery against the Staff on safety issues if the final SER is issued before the FES or on environmental issues if the FES is issued before the final SER. In addition, as discussed *infra*, the Board has the discretion in the appropriate circumstances to permit discovery to begin against the Staff with respect to safety issues before the issuance of the final SER.

before the final SER is issued will serve to further the Commission's objective, as reflected in the *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21, 24 (1998), to ensure a fair, prompt, and efficient resolution of contested issues.² The Commission also believes that the goal of issuing a decision on the pending application in about 2 1/2 years may be reasonably achieved under the current rules of practice and the enhancements directed by this Order and by our understanding of the Staff's current schedule for review of the application. We do not expect the Licensing Board to sacrifice fairness and sound decisionmaking to expedite any hearing granted on this application. We do expect, however, the Licensing Board to use the techniques specified in this Order and in the Commission's policy statement on the conduct of adjudicatory proceedings (*id.*) to ensure prompt and efficient resolution of contested issues. *See also Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981).

If the Licensing Board grants a hearing request, the Board should adopt the following milestones, in developing a schedule, for conclusion of significant steps in the adjudicatory proceeding:

- Within 90 days of this Order: Decision on intervention petitions and contentions. Start of discovery on admitted contentions, except against the Staff.
- Within 30 days of the issuance of final SER and FES: Completion of discovery against the Staff on admitted contentions. Late-filed contentions to be filed.
- Within 40 days of the issuance of final SER and FES: Responses to late-filed contentions to be filed.
- Within 50 days of the issuance of final SER and FES: ASLB decision on late-filed contentions.
- Within 80 days of the issuance of final SER and FES: Completion of discovery on late-filed contentions.
- Within 90 days of the issuance of final SER and FES: Prefiled testimony to be submitted.

²For example, it may be appropriate for the Licensing Board to permit discovery against the Staff and/or the commencement of an evidentiary hearing with respect to safety issues prior to the issuance of the final SER in cases where the Applicant has responded to the Staff's "open items" and there is an appreciable lag time until the issuance of the final SER, or in cases where the initial SER identifies only a few open items.

- Within *125 days* of the issuance of final SER and FES: Completion of evidentiary hearing.
- Within *220 days* of the issuance of final SER and FES: ASLB initial decision on application.

To meet these milestones, the Licensing Board should direct the participants to serve all filings by electronic mail (in order to be considered timely, such filings must be received by the Licensing Board and parties no later than midnight Eastern Time on the date due, unless otherwise designated by the Licensing Board), followed by conforming hard copies that may be sent by regular mail. If participants do not have access to electronic mail, the Licensing Board should adopt other expedited methods of service, such as express mail, which would ensure receipt on the due date (“in-hand”). If pleadings are filed by electronic mail, or other expedited methods of service that would ensure receipt on the due date, the additional period provided in our regulations for responding to filings served by first-class mail or express delivery shall not be applicable. *See* 10 C.F.R. § 2.710.

In addition, to avoid unnecessary delays in the proceeding, the Licensing Board should not grant requests for extensions of time absent unavoidable and extreme circumstances. The Licensing Board shall not entertain motions for summary disposition under 10 C.F.R. § 2.749, unless the Licensing Board finds that such motions are likely to expedite the proceeding. Unless otherwise justified, the Licensing Board shall provide for the simultaneous filing of answers to proposed contentions, responsive pleadings, proposed findings of fact, and other similar submittals.

Furthermore, parties are obligated in their filings before the Licensing Board and the Commission to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citation to the record. Failure to do so may result in material being stricken from the record or, in extreme circumstances, in a party being dismissed from the proceeding.

If a hearing is granted on this application, the Commission directs the Licensing Board to inform the Commission promptly, in writing, if the Licensing Board determines that any single milestone could be missed by more than 30 days. The Licensing Board should include an explanation of why the milestone cannot be met and the measures the Licensing Board will take to mitigate the failure to achieve the milestone and restore the proceeding to the overall schedule.

III. CONCLUSION

The Commission directs the Licensing Board to conduct this proceeding in accordance with the guidance specified in this Order. As in any proceeding, the Commission retains its inherent supervisory authority over the proceeding to provide additional guidance to the Licensing Board and participants and to resolve any matter in controversy itself.

It is so ORDERED.

For the Commission³

ANNETTE VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 4th day of October 2001.

³ Commissioner Dicus was not present for the affirmation of this Order. If she had been present, she would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Thomas D. Murphy
Dr. Thomas S. Elleman

In the Matter of

Docket No. 50-309-OLA
(ASLBP No. 00-780-03-OLA)

MAINE YANKEE ATOMIC POWER
COMPANY
(Maine Yankee Atomic Power
Station)

October 2, 2001

ORDER

(Approving Settlement Agreement and Terminating Proceeding)

On August 31, 2001, Maine Yankee Atomic Power Company (Maine Yankee), the State of Maine, and Friends of the Coast Opposing Nuclear Pollution filed with the Licensing Board a notice of settlement, a copy of the settlement agreement, and a joint motion to terminate this license amendment proceeding involving Maine Yankee's License Termination Plan. The joint motion states that the NRC Staff has no objection to the termination of the proceeding. The Commission looks with favor upon the settlement of licensing proceedings. *See, e.g., Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 455 (1981). Here, the Board finds that the settlement agreement attached to the joint motion is fair and reasonable and comports with the public interest. Accordingly, the Board incorporates the settlement agreement into this Order and terminates this license amendment proceeding.

The Board would like to commend the participants for their diligence in pursuing settlement and their willingness to compromise to reach agreement. The Board thanks the participants for their efforts. Indeed, even though the settlement process took much longer than initially anticipated and thus necessarily precluded reaching any notional deadlines for conducting and concluding this proceeding, the efforts of the participants should serve as a model for future license termination plan license amendment proceedings.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD¹

Thomas S. Moore
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 2, 2001

¹ Copies of this Order were sent this date by Internet e-mail or facsimile transmission, if available, to all participants or counsel for participants.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judge:

Ann Marshall Young, Presiding Officer

In the Matter of

**Docket Nos. 50-003-LT
50-247-LT
(consolidated)
(ASLBP No. 01-792-03-LT)**

**CONSOLIDATED EDISON COMPANY
OF NEW YORK and
ENERGY NUCLEAR INDIAN
POINT 2 LLC, and
ENERGY NUCLEAR OPERATIONS, INC.
(Indian Point, Units 1 and 2)**

October 4, 2001

**ORDER
(Terminating Proceeding)**

On September 18, 2001, an Order was issued in this proceeding, notifying the parties that, unless the Presiding Officer received by October 3, 2001, notification of good cause not to terminate the proceeding, an Order would be entered thereafter, terminating the proceeding and canceling the previously scheduled October 29, 2001, hearing. The proceeding involves an application to transfer ownership interest in and operating/maintenance responsibility for the Indian Point Nuclear Generating Unit Nos. 1 and 2 from Consolidated Edison Company of New York to Entergy Nuclear Indian Point 2 LLC and Entergy Nuclear Operations, Inc. The September 18, 2001, Order was based upon receipt of documents filed by the parties on September 7, 2001, indicating circumstances that appeared to warrant the termination of this proceeding — namely, notification

that the Entergy Companies, and the Town of Cortlandt and the Hendrick Hudson School District (collectively, “Cortlandt”), had reached a settlement pursuant to which Cortlandt would be filing a Notice of Withdrawal, and a letter from the Citizens Awareness Network stating that it declined to participate in a hearing on the license transfer at issue. Since issuance of the September 18, 2001, Order, Cortlandt’s Notice of Withdrawal was docketed with the Office of the Secretary of the Commission, on September 24, 2001, and no other documents have been filed, nor any other notifications received.

No good cause having been asserted not to terminate the proceeding, the proceeding before this Presiding Officer is hereby *terminated*, and the October 29, 2001, hearing is hereby *cancelled*.

IT IS SO ORDERED.¹

Ann Marshall Young, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 4, 2001

¹ Copies of this Order were sent this date by Internet e-mail or facsimile transmission, if available, to all participants or counsel for participants.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Richard F. Cole
Dr. Charles N. Kelber

In the Matter of

Docket No. 50-423-LA-3
(ASLBP No. 00-771-01-LA-R)
(Facility Operating
License NPF-49)

DOMINION NUCLEAR
CONNECTICUT, INC.
(Millstone Nuclear Power Station,
Unit 3)

October 5, 2001

The Atomic Safety and Licensing Board grants in part and denies in part the NRC Staff's Motion To Continue To Hold Proceeding in Abeyance. Specifically, the Board continued the deferral pending distribution by the Staff of a report prepared by NRC's Office of Investigations (OI) and an additional report and analysis prepared for the Licensee, but declined to defer pending the NRC Staff's review of the Licensee's report and analysis.

RULES OF PRACTICE: STAY OF PROCEEDINGS

In accordance with policies set forth in the Commission's Statement of Policy: Investigations, Inspections, and Adjudicatory Proceedings (Sept. 7, 1984), 49 Fed. Reg. 36,032, 36,033 (Sept. 13, 1984) (Policy Statement), it is appropriate to defer adjudicatory proceedings (particularly prehearing activities such as discovery) pending completion of an OI investigation on a matter closely related to a matter

under consideration in the proceeding. Such deferral is designed either (1) to avoid compromising an ongoing investigation or inspection, or (2) to protect confidential sources. As further set forth in the Policy Statement, however, such deferral is to be strictly limited in both scope and duration to the minimum necessary to achieve the purposes of the deferral. *See also Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-9, 41 NRC 404, 405 (1995).

RULES OF PRACTICE: STAY OF PROCEEDINGS

Although the Policy Statement does not make clear whether, to accommodate either of the OI interests there specified, deferral should extend only to the completion of OI's field investigation or (alternatively) to the completion of OI's report, the Licensing Board construed the Policy Statement as sanctioning deferral until preparation and distribution of the OI report.

RULES OF PRACTICE: STAY OF PROCEEDINGS

The Staff's request for deferral of the proceeding to permit it to analyze certain Licensee reports stands on a different footing from its request for deferral pending completion of an OI report. It is not encompassed within the Policy Statement. The Staff's analysis of the Licensee reports amounts to a form of trial preparation, and deferral during such review period, while at the same time precluding other parties from undertaking their own trial preparation, could be inequitable. Thus, this request by the Staff for further deferral is denied.

RULES OF PRACTICE: STAFF AUTHORITY

A Licensing Board has no authority to direct the Staff in the performance of its nonadjudicatory functions. *See, e.g., Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516 (1980).

MEMORANDUM AND ORDER
(Staff Motion To Continue To Hold Proceeding in Abeyance)

The NRC Staff, on September 4, 2001, filed a "Motion To Continue To Hold Proceeding in Abeyance" (Motion). On October 2, 2001, the Atomic Safety and Licensing Board conducted a telephone conference with regard to this motion (Tr.

604-643). For reasons set forth below, and confirming rulings announced during the conference, we are granting in part and denying in part this motion.

I. BACKGROUND

By our Memorandum and Order (Telephone Conference, 5/24/01), dated June 21, 2001 (unpublished) (June 21 M&O), we granted (in part) the request of the NRC Staff to place further prehearing activities in this proceeding (e.g., discovery) in abeyance pending completion of an investigation by the NRC's Office of Investigations (OI). The investigation concerned an allegation bearing upon a former Licensee's (Northeast Nuclear Energy Company or NNECO) reporting to NRC of missing fuel pins at the Millstone Unit 1 Spent Fuel Pool (SFP). The deferral was to extend either to September 4, 2001, or the completion of the investigation, if earlier.

For its part, the Licensee (Dominion Nuclear Connecticut, Inc., or DNC) had also sought to defer activities in this proceeding pending completion of its own investigation into the disappearance of the fuel pins or rods. DNC had initially projected June 30, 2001, as a target date for completion of its investigation (denominated as its Fuel Rod Accountability Project (FRAP report)), with an analysis ("Root Cause Analysis" or RCA) due several weeks later, but acknowledged that its target dates could slip. Indeed, by letter to the Licensing Board and parties dated July 26, 2001, the Licensee acknowledged that its FRAP investigation and report would not be completed until late September 2001, with the RCA to be completed in the same time frame "or shortly thereafter."

II. STAFF MOTION

On September 4, 2001, the NRC Staff filed its motion. Supported by affidavits of Barry R. Letts, Region I Field Office Director, OI, and Dr. Ronald L. Bellamy, Chief, Decommissioning and Laboratory Branch, NMSS, in Region I,¹ the motion states, *inter alia*, that OI completed its field work and began preparation of its report of the investigation in August 2001, and expected that copies of the report will be available to the Board and parties by October 31, 2001, barring unanticipated delays.

The motion goes on to request further deferral of this proceeding until the OI report becomes available and, additionally, until the Staff has had an opportunity to analyze the Licensee's FRAP report and RCA. The Staff advises that its inspection of the FRAP report is currently scheduled to begin on October 9, 2001

¹Copies of signed and executed affidavits were provided to the Licensing Board and parties by letter dated September 21, 2001.

(based on availability of the FRAP report by the end of September 2001, as set forth by DNC) and that the Staff analysis is expected to be completed “by the end of November.”

III. OTHER PARTIES' POSITIONS

By response dated September 14, 2001, the Licensee supports the Staff motion, with some qualifications. It opines that the FRAP report and RCA are the critical pacing items in this proceeding. It reiterates that the FRAP report would be completed by the end of September 2001, but adds that release of the FRAP report to the Board and parties would not occur until a few days later, in early October, with the RCA due several weeks later. DNC regards the scheduled October 31 release of the OI report as generally consistent with its dates for release of the FRAP report and RCA. Therefore, DNC does not oppose the Staff's requested deferral until October 31, 2001, although expressing some doubt as to the OI report's relevance to the issue currently pending before the Board. As for the Staff's request to defer until the end of November to allow it time to analyze the FRAP report and RCA, DNC regards this request as premature and takes no position with respect to it. DNC suggests a prehearing discussion for mid to late October, to cover issues of discovery and other prehearing activities in this proceeding.

Intervenors Connecticut Coalition Against Millstone and Long Island Citizens Against Millstone (collectively, CCAM/CAM) filed their response to the Staff's motion on September 26, 2001.² Noting that they had opposed deferral when initially requested by the Staff and Licensee, they oppose further deferral on the basis that the Staff motion fails to provide any information that would warrant further deferral. CCAM/CAM also points out that, since the issuance of the June 21 M&O, the Staff had failed, with one exception, to provide “periodic reports as to the status of the OI investigation, together with inspection reports on this matter,” as directed by the Board. CCAM/CAM further notes that release of the FRAP report and RCA had been delayed 100 days beyond the June 30, 2001 target date, without any explanation. On this basis, CCAM/CAM requested

² At the Licensing Board's request, the Chief Counsel for the Atomic Safety and Licensing Board Panel (ASLBP), on September 24 and 25, 2001, attempted to contact by telephone counsel for CCAM/CAM, and left messages to inquire whether CCAM/CAM had received the Staff's motion and had any views with respect thereto. CCAM/CAM counsel responded to the ASLBP Chief Counsel on September 25, 2001, and noted that their response (which should have been filed by September 20, 2001) would be filed shortly. The September 26 response noted and apologized for CCAM/CAM's delay in filing “occasioned by scheduling disruptions brought about by the terrorism events of September 11, 2001.” The Intervenors expressed their belief that neither the Staff nor Licensee would be prejudiced if the Licensing Board takes due consideration of their response. Although we could decline to consider CCAM/CAM's response for untimeliness, in view of the events of September 11, 2001, and in the absence of a showing of substantial prejudice to other parties, we will consider their response here. We have thus considered the Intervenors' filing and, indeed, scheduled the October 2, 2001 telephone conference as a result.

a telephone conference to discuss the reasons for further deferral. As indicated earlier, such conference was held on October 2, 2001.³

IV. LICENSING BOARD RULING

Proceedings subject to 10 C.F.R. Part 2, Subpart K (such as this one) are expected to be conducted with a view toward expedited completion. *See Statement of Considerations*, 10 C.F.R. Part 2, Subpart K, 50 Fed. Reg. 41,662 (Oct. 15, 1985); *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998); 63 Fed. Reg. 41,872 (Aug. 5, 1998). Deferral of these proceedings, as requested by the Staff, inherently compromises this goal and thus should be founded upon significant public interest reasons before being adopted. We thus analyze the Staff's motion with these general considerations as a backdrop.

A. As indicated in our June 21, 2001 M&O (which reflected rulings made as a result of the May 24, 2001 telephone conference), the genesis of our deferral of prehearing activities in this proceeding (particularly discovery) was primarily the presence of an ongoing OI investigation, which was the basis upon which the Staff sought deferral. Although not aware of the explicit information being investigated by OI, we nevertheless accepted the Staff's conclusion (supported by affidavits) that prehearing activities in this proceeding could compromise the OI investigation, and we ruled that further prehearing activities should be deferred during the pendency of the OI investigation. The rationale, of course, was the desire to protect investigative material from premature public disclosure, as sanctioned in the Commission's *Statement of Policy: Investigations, Inspections, and Adjudicatory Proceedings* (Sept. 7, 1984) (published at 49 Fed. Reg. 36,032 (Sept. 13, 1984)).

As there set forth, the protection from public disclosure is designed either (1) to avoid compromising an ongoing investigation or inspection, or (2) to protect confidential sources. Such lack of full disclosure, however, is to be strictly limited:

[T]he Commission [notes] that as a general rule it favors full disclosure to the boards and parties, that information should be protected only when necessary, and that any limits on disclosure to the parties should be limited in both scope and duration to the minimum necessary to achieve the purposes of the non-disclosure policy.

³Participating in the call, in addition to the three Board members, were David Repka, Esq., and Lillian Cuoco, Esq., for DNC; Nancy Burton, Esq., for CCAM/CAM; Ann Hodgdon, Esq., accompanied by Victor Nerses, Project Manager, and David Cummings, Esq., for the NRC Staff; and Michelle McKown, Esq., counsel to the ASLBP. Several other observers also were present.

49 Fed. Reg. at 36,033, *see also Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-9, 41 NRC 404, 405 (1995).

It is not clear from the 1984 Policy Statement whether, to accommodate either of OI's interests specified above, deferral should extend only to the completion of OI's field investigation (which here occurred in August) or (alternatively) to the completion of OI's report, scheduled for no later than October 31, 2001. Upon inquiry during the October 2 telephone conference, parties were not able to reach agreement on this question. In addition, during the telephone conference, we inquired why it would take OI from the end of August (when it finished its investigation) to October 31, 2001, to prepare and release its report. The Staff explained the reasons for this delay, including multiple required approvals at both the Region I level and at NRC Headquarters. Although we are not entirely satisfied that the OI report could not have been prepared and circulated more expeditiously, we are aware that we have no authority to direct the Staff in the performance of its nonadjudicatory functions. *See, e.g., Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516 (1980).

Based on the foregoing, however, we are prepared to construe the 1984 Policy Statement as sanctioning deferral until preparation and distribution of the OI report. We thus extend the deferral to October 31, 2001, or to the date of distribution of the OI Report, whichever comes earlier.⁴

B. The Licensing Board's June 21, 2001 M&O also dealt with a motion by DNC to defer further activities in this proceeding pending completion of the FRAP report and the RCA. At the time, the target date for completion of the report was June 30, 2001, with the RCA scheduled shortly thereafter. Based on the circumstance that the deferral sought by DNC was shorter in duration than that sought by the Staff, which we had granted, we also granted the Licensee's deferral motion.

As noted earlier, the Licensee, by letter dated July 26, 2001, advised that it had not met its target date of June 30, 2001, for the FRAP report and RCA. It estimated that the FRAP report would be completed by late September 2001, with the RCA shortly thereafter. During the telephone conference, DNC confirmed that the FRAP report had been completed and was in the process of acceptance review by DNC. It is anticipated that the FRAP report will be distributed to the Board and parties next week, and that the RCA will be completed in several weeks, presumably by mid to late October. The Staff, in its current deferral

⁴If the Staff believes that deferral to accommodate either of the OI interests specified above need extend beyond October 31, 2001, we direct the Staff to notify the Board and parties (by e-mail as well as through a paper filing) no later than Wednesday, October 24, 2001. The Board will then hold an *in camera* hearing session, as set forth in the Sept. 7, 1984 Policy Statement (involving only the Board, the Staff, and OI) to ascertain the relationship between information being investigated by OI and information that may be relevant to this proceeding and to determine whether discovery in this proceeding would compromise either of the two OI interests outlined above.

motion, seeks to defer further activities pending completion by DNC of its FRAP report and RCA and, additionally, until it has completed its own analysis of the FRAP report and RCA, estimated for the end of November 2001.

The current schedule for distribution of the FRAP report and RCA is within the deferral period we are granting to accommodate the OI report. Accordingly, we are also granting the Staff's request for deferral pending receipt of the FRAP report and RCA.

The Staff's additional request for deferral until the end of November to permit it to analyze and review the FRAP report and RCA stands, however, on a different footing. The Licensee deems this request to be premature. Clearly, it is. But, beyond that, an analysis of the FRAP report and RCA, as sought by the Staff, may in effect be equated to trial preparation. During the telephone conference, the Staff indicated that it could not develop its views on these matters until it had an adequate opportunity to review the FRAP report and RCA, and thus could not respond to discovery until after such review. Nonetheless, such review would still amount to a form of trial preparation, and to grant the Staff's request for deferral during this period, while at the same time precluding other parties from undertaking a significant part of their own trial preparation (e.g., discovery), could be inequitable. Indeed, other parties' trial preparation may involve matters differing from an analysis of the FRAP report and RCA but nonetheless requiring pretrial activities such as discovery. For these reasons, we are denying the Staff's request insofar as it seeks deferral pending its scheduled analysis of the FRAP report and RCA.⁵

Both in their response to the motion and during the telephone conference, CCAM/CAM asserted that the Staff had failed to fulfill its responsibilities to provide copies to the Board and parties of inspection reports and status reports as to the OI investigation. The Staff indicated that it had provided certain inspection reports (by letter dated June 28, 2001) and that no OI status reports had been prepared. The Staff acknowledged that an inspection report would be prepared and distributed within the next week or so. It denied that any further reports were available. The Board accepted this response.

V. OTHER MATTERS

Earlier in this proceeding, at the May 24, 2001 prehearing teleconference (Tr. 573-574), the Licensing Board discussed with the Staff and other parties items from a letter from Commission Chairman Richard A. Meserve to Congressman Edward J. Markey, dated February 1, 2001, responding to the Congressman's inquiries concerning the missing fuel rods and the requirements governing the

⁵ Prior to the end of the deferral period, any party may, of course, request further deferral, for good cause shown.

storage of spent fuel at nuclear plants.⁶ During the October 2, 2001 teleconference, the Board inquired whether the response to Congressman Markey had been updated. The Staff advised that an update was about to be provided by Chairman Meserve within a relatively short time period and that, after transmission to Congressman Markey, the Staff would provide a copy to the Licensing Board and parties. The Licensing Board appreciates the Staff's assistance in this regard.

VI. ORDER

For the reasons stated, it is, this 5th day of October 2001, ORDERED:

1. The Staff's motion to extend the deferral of this proceeding to October 31, 2001 (the date when its OI report is scheduled to be released) is hereby *granted*.

2. The Staff's motion to extend the deferral period to the date of release and distribution of the FRAP report and RCA, currently scheduled for mid-October 2001, seeks relief comprehended by the OI deferral set forth above and, accordingly, is also hereby *granted*, until no later than October 31, 2001.

3. The Staff's additional request for further deferral to the end of November 2001 to permit it to analyze the FRAP report and RCA, is hereby *denied*.

In addition, the parties are advised that a telephone prehearing conference will be held in late October 2001, at a time to be announced, to prescribe discovery schedules, schedules for filing prepared statements, and other dates relative to the 10 C.F.R. Part 2, Subpart K oral argument.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 5, 2001

[Copies of this Memorandum and Order have been served this date by e-mail on representatives of each of the parties.]

⁶ Copies of this letter were furnished to the Licensing Board and parties through the Staff's February 20, 2001 filing in this proceeding.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

October 30, 2001

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), acting pursuant to 10 C.F.R. § 2.749, the Licensing Board grants in part and denies in part a PFS request for summary disposition in its favor regarding contention Utah DD, Range of Alternatives, finding that material factual disputes existed with Intervenor State of Utah (State) concerning the adequacy of the discussion in the PFS environmental report (ER) and the NRC Staff's June 2001 draft environmental impact statement (DEIS) relative to impacts of the proposed PFS facility upon a local peregrine falcon nest, but determining that no such disputes existed regarding the adequacy of the ER/DEIS discussion concerning facility impacts on the pocket gopher, Pohl's milkvetch, and spring parsley, and area private domestic livestock and produce.

RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PERSUASION; BURDEN OF PROOF)

Consistent with Federal Rule of Civil Procedure 56, the moving party bears the initial burden of showing that no genuine issue as to any material fact

exists, which the party must do by a required statement of material facts and any supporting documentation submitted with the requisite motion. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-32, 50 NRC 155, 158 (1999). The opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting documentation, or the facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993). When responding, the opposing party may not rely upon mere allegations or denials but must submit ‘‘specific facts showing that there is a genuine issue of fact.’’ 10 C.F.R. § 2.749(b).

RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PERSUASION; BURDEN OF PROOF)

Even if an opposing party fails to respond to a dispositive motion, the movant must still have established that no genuine issue of material fact exists so that it is entitled to a ruling in its favor. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977).

**MEMORANDUM AND ORDER
(Granting in Part and Denying in Part Summary Disposition Motion
Regarding Contention Utah DD)**

Pursuant to 10 C.F.R. § 2.749, Applicant Private Fuel Storage, L.L.C. (PFS), has requested that summary disposition be entered in its favor regarding Intervenor State of Utah’s (State) contention Utah DD, Ecology and Species. As admitted, contention Utah DD asserts that PFS failed adequately to address in the environmental report (ER) provisions of its application to construct and operate a 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI), the potential impact of construction, operation, and decommissioning of the proposed facility, as well as the effects of transportation of spent fuel to that facility, on the ecology and species in the region surrounding its proposed Skull Valley, Utah site. The NRC Staff supports the PFS summary disposition request, while the State, responding to only a portion of the PFS statement of material facts not in dispute submitted in support of its dispositive motion, opposes only the part of the request relating to the impact on the habitat of the peregrine falcon.

For the reasons set forth below, the Licensing Board grants the PFS request for summary disposition except insofar as it relates to the peregrine falcon.

I. BACKGROUND

In June 1997, PFS filed a license application for its proposed ISFSI, which included an ER that addressed the environmental impacts of the proposed facility. In response to this application, the State filed a number of contentions challenging, among other things, the impact the proposed facility would have upon the surrounding region. Included among these was contention Utah DD, which reads:

The Applicant has failed to adequately assess the potential impacts and effects from the construction, operation and decommissioning of the ISFSI and the transportation of spent fuel on the ecology and species in the region as required by 10 C.F.R. §§ 72.100(b) and 72.108 and [the National Environmental Policy Act of 1969 (NEPA)] in that the License Application has not estimated potential impacts to ecosystems and “important species” as follows:

1. The License Application fails to address all possible impacts on federally endangered or threatened species, specifically the peregrine falcon nest in the Timpie Springs Waterfowl Management Area.
2. The License Application fails to include information on pocket gopher mounds which may be impacted by the proposal.
3. The License Application has not adequately identified plant species that are adversely impacted or adequately assessed the impact on those identified, specifically the impact on two “high interest” plants, Pohl’s milkvetch and spring parsley.
4. The License Application does not identify, nor assess the adverse impacts on, the private domestic animal (livestock) or the domestic plant (farm produce) species in the area.

LBP-98-7, 47 NRC 142, 256-57, *aff’d on other grounds*, CLI-98-13, 48 NRC 26 (1998).¹ Subsequent to its admission, the Board noted in response to a PFS request for clarification that the scope of contention Utah DD relative to paragraphs one and three was limited to the specific species identified. *See* LBP-98-10, 47 NRC 288, 296-97 (1998).

In June 2000, the Staff issued its draft environmental impact statement (DEIS) regarding the proposed PFS facility. *See* Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, NUREG-1714 (June 2000) [hereinafter DEIS]. As relevant to this motion, the DEIS contained discussion assessing the ecological impact of construction, decommissioning, and

¹ Although the Board initially consolidated a similar portion of contention Castle Rock 16, Impacts on Flora, Fauna, and Existing Land Uses, with contention Utah DD, *see* LBP-98-7, 47 NRC at 206, 221, when the parties sponsoring Castle Rock 16 subsequently withdrew, the Board ruled that their withdrawal did not affect the viability of contention Utah DD as admitted. *See* LBP-99-6, 49 NRC 114, 118 (1999).

operation of the proposed ISFSI on the vegetation and wildlife of the surrounding region. *See id.* §§ 3.4, 4.4, 5.4.

Relying principally on the DEIS information, PFS filed the instant motion, supported by a statement of material facts not in dispute, claiming a genuine issue of material fact does not exist with respect to the concerns raised by the State in contention Utah DD. PFS alleges that because each paragraph of contention Utah DD has been adequately addressed by either the ER or the DEIS, the State's claims "have been rendered moot by the DEIS." [PFS] Motion for Summary Disposition of Utah Contention DD — Ecology and Species (June 29, 2001) at 2 [hereinafter PFS Motion]. With its motion, PFS also included declarations from four experts asserting that the impacts the State claims have not been assessed adequately by either the ER or the DEIS are in fact "negligible or non-existent."² *Id.* at 2.

On July 19, 2001, in response to the PFS summary disposition motion, the Staff declared its support for the PFS request. In its response, the Staff agrees with the statement of material facts submitted by PFS (subject to slight modification by Staff experts) and asserts that the DEIS has adequately addressed all of the State's concerns voiced in contention Utah DD. *See* NRC Staff's Response to [PFS] Motion for Summary Disposition of Utah Contention DD — Ecology and Species (July 19, 2001) [hereinafter Staff Response]; *id.* Attach. A (Joint Affidavit of Martha S. Salk and Clay E. Easterly Concerning Utah Contention DD). The Staff submits that the issues raised by contention Utah DD have been adequately addressed in the DEIS so that contention Utah DD no longer presents a genuine dispute of material fact that requires further consideration in an evidentiary proceeding.³

In its response,⁴ although opposing the PFS motion, the State challenges the material facts submitted by PFS only with respect to paragraph one of contention Utah DD. *See* State of Utah's Opposition to Applicant's Motion for Summary Disposition of Contention Utah DD— Ecology and Species (July 19, 2001) at 3-5 [hereinafter State Response]. With respect to paragraphs two through four, the State has decided, after reviewing the relevant material, not to respond to those portions of the PFS motion and the corresponding statement of material facts not in dispute. *See id.* at 2. In support of its response relevant to paragraph one, however, the State includes a statement of disputed and relevant material facts and the affidavit of Dr. Frank P. Howe, the nongame avian program coordinator

²There have been no objections by PFS, the Staff, or the State to the qualifications or expertise of the various affiants whose statements are relied upon to provide support for other parties' assertions regarding whether any material factual matters are at issue in connection with contention Utah DD.

³In its response, the Staff notes that PFS has included "certain information" that was not available to the Staff when they prepared the DEIS; however, the Staff believes that after reviewing the information, the Staff's findings in the DEIS remain unchanged. Staff Response at 7 n.10.

⁴Although able to do so, *see* 10 C.F.R. § 2.749(a), the State did not file a reply to the Staff's response supporting the PFS summary disposition motion regarding contention Utah DD.

for the Utah Division of Wildlife Resources, Department of Natural Resources. *See id.* [State] Statement of Disputed and Relevant Material Facts; *id.* Exh. 1 (Declaration of Frank P. Howe, PHD) [hereinafter Howe Declaration].

II. DISCUSSION

A. Legal Standard for Summary Disposition

In an NRC proceeding, a party is entitled to summary disposition if the presiding officer determines that there exists “no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.” 10 C.F.R. § 2.749(d). When reviewing a motion for summary disposition, the Commission has used standards similar to those used by the federal courts when ruling on motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

Consistent with Rule 56, the moving party bears the initial burden of showing that no genuine issue as to any material fact exists, which the party must do by a required statement of material facts and any supporting documentation submitted with the requisite motion. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-32, 50 NRC 155, 158 (1999). The opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting documentation, or the facts will be deemed admitted. *See* CLI-93-22, 38 NRC at 102-03. When responding, the opposing party may not rely upon mere allegations or denials but must submit “specific facts showing that there is a genuine issue of fact.”⁵ 10 C.F.R. § 2.749(b).

With this precedent in mind, the Board addresses the PFS summary disposition motion regarding contention Utah DD, in which the Applicant has addressed each of the four paragraphs separately. We adopt this construct below in reviewing the PFS assertions regarding the propriety of granting its summary disposition request.

B. Board Ruling

1. Paragraph One

PFS responds to the State’s claim that it has failed adequately to assess all possible impacts of the proposed site on the peregrine falcon nest in the Timpie

⁵ Even if an opposing party fails to respond to a dispositive motion, the movant must still have established that no genuine issue of material fact exists so that it is entitled to a ruling in its favor. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753-54 (1977).

Springs Waterfowl Management area by stating that the ER and subsequent DEIS address all of the legitimate concerns raised and substantiated by the State. In particular, PFS states that the areas of potential impacts raised by the State during discovery were adequately addressed in the DEIS and were deemed insignificant.⁶ Furthermore, PFS contends that the State's expert witness offered only speculative statements and was unable factually to demonstrate how the ISFSI would have an adverse impact upon the peregrine falcon nest. *See* PFS Motion at 7.

Focusing on the impact of the increased traffic flow caused by the operation of the proposed facility, PFS notes that the potential increased traffic is addressed in the DEIS, which finds that the increased traffic will not cause a significant increase in the probability of direct falcon vehicular fatalities. PFS also contends that the evidence provided by the State's expert on vehicle-falcon and vehicle-falcon prey species collisions was unsubstantiated speculation. *See id.* at 9. In contrast, PFS relies upon the affidavit of its own expert, Dr. Clayton M. White, who points out that vehicle-caused fatalities would be unlikely and the likelihood would not increase due to the PFS traffic. *See id.* Attach. A at 12 (Declaration of Clayton M. White) [hereinafter White Declaration]. Thus, PFS believes the minimal increase in traffic caused by the new ISFSI plant will not have a negative effect upon the falcons. *See* PFS Motion at 9.

Finally, PFS asserts that the construction and operation of the proposed facility will not affect the habitat of peregrine falcon prey species. According to PFS, the DEIS adequately addresses the potential loss of foraging area and the effect this loss might have upon raptors in general and peregrine falcons in particular. *See* PFS Motion at 11 (citing DEIS §§ 4.4.3.2, 5.4.1.2, 5.4.2.2). In addition, Dr. White states that the prey habitat potentially affected by the site represents a small portion of likely foraging area for the falcons, who prefer the nearby wetlands with its higher prey density. *See* White Declaration at 16-17, 19.

In its response to the PFS motion, the Staff fully supports the conclusions drawn by PFS and its experts. The Staff asserts that regardless of State's assessment of the license application, the Staff's DEIS fully addresses the concerns of the State in paragraph one of contention Utah DD, therefore "rendering moot any alleged deficiency in PFS's license application." Staff Response at 8.

In its response to the PFS motion, the State acknowledges that PFS in its motion "does improve the record" by introducing new information about the proposed site's impact upon the neighboring peregrine falcons. State Response at 3. However, the State asserts that PFS and the DEIS still fail to assess fully two important factors that the State believes may have a significant impact upon

⁶In its motion, PFS lists four potential impacts it asserts the State believes PFS did not adequately address in its ER: the impact of increased traffic upon the falcons; the impact of such traffic on falcon prey species; the impact of a loss of habitat on the falcon's prey species; and the impact of radiation exposure on the falcon's prey species. *See* PFS Motion at 7.

the peregrine's nest site. First, neither PFS nor the DEIS consider the possible increase or decrease in the water level of the Great Salt Lake (GSL) and the effect such a change in condition will have upon the falcon's wetland prey species. *See id.* at 3-5. In this regard, the State contends that a rise in the GSL water level could force the falcon's wetland prey species inland to search for food, which may force the falcon to shift its foraging patterns closer to nearby Interstate 80. The State asserts that such a shift may increase the risk of vehicle collisions, an increase that both the DEIS and PFS expert Dr. White fail to address. Also, according to the State, the increased PFS activity could lead to wildfires destroying inland bird habitat that, in turn, could affect the peregrine falcon if a GSL level shift causes the falcon to rely upon inland birds as prey. *See id.* at 5.

In addition, State's expert Dr. Howe in a supporting affidavit contends that for PFS to characterize the Timpie Springs Wildlife Management Area nest site as successful is too optimistic. *See id.*; *id.* Howe Declaration at 3-4. Dr. Howe contends that the Timpie Springs falcon's nesting site has a significantly higher rate of failure than other nesting sites in the GSL area, which he attributes to disruptions from the nearby salt processing plant.⁷ *See* Howe Declaration at 4. The State believes any additional activity caused by the PFS site could have a significant impact upon the falcon as well, a notion the State claims is not addressed by either PFS or the DEIS. *See* State Response at 5.

After reviewing the submissions of each party, the Licensing Board concludes there still remains a genuine dispute about some material factual matters regarding the peregrine falcon in connection with paragraph one of contention Utah DD. As articulated by PFS, the published DEIS for its proposed ISFSI has assessed a substantial portion of the State's initial concerns; nonetheless, the State's response, as supported by the declaration of Dr. Howe, has adequately identified two areas of concern that remain unresolved. The first involves the impact of facility-related disturbances on the breeding success of the peregrine falcons at the Timpie Springs nesting tower, an important consideration underlying arguments made by both PFS and the State. Additionally, there is a factual dispute relative to the impact a change in the water level of the GSL may have upon the falcon and its prey species relative to increased risk of vehicle collisions. Specifically, still unresolved is the effect of a possible GSL water level change upon falcon traffic fatalities as a result of a change in falcon feeding patterns along Interstate 80.⁸

⁷ In his affidavit, Dr. Howe notes that the falcons have not bred at the Timpie Springs site in 4 out of the last 13 years or roughly 30% of the time. Dr. Howe contrasts that with neighboring sites that have a 100% success rate, a difference Dr. Howe believes may be caused by the nearby salt processing plant. *See* Howe Declaration at 4.

⁸ Although PFS has labeled as "speculative" certain deposition statements by State affiant Dr. Howe regarding the potential impact of the proposed PFS facility upon the peregrine falcons in the area, *see* PFS Motion at 7, 9, its motion does not address the degree to which the asserted GSL level-related habitat changes could be considered "remote and speculative" under NEPA during the proposed facility's potential operational term.

Because the State has shown a genuine dispute of material fact relative to these two matters, PFS has not met the burden required to entitle it to summary disposition in its favor regarding paragraph one of contention Utah DD, thereby making these items an appropriate subject for further evidentiary presentations.⁹

2. *Paragraph Two*

In response to the State's paragraph two assertion that PFS has failed adequately to address the impact the proposed ISFSI site will have upon the surrounding pocket gopher population, PFS declares that sections 4.4.1.2, 4.4.5.2, 5.4.1.5, and 5.4.4.2 of the DEIS specifically address this concern and establish that the potential impact will be insignificant. *See* PFS Motion at 12. PFS, in fact, maintains that its proposed revegetation plan may provide a more suitable habitat for the pocket gophers. PFS also contends that the operational effect of the ISFSI upon the pocket gopher population, particularly the increase of traffic flow through their habitat, has been adequately addressed by the DEIS. PFS claims that the increased traffic flow will not have a significant impact upon the gopher population because pocket gophers reside in underground burrows and rarely venture to the surface, making it unlikely they will experience an increase in fatalities due to a traffic flow increase. *See id.* Attach. B at 11-12 (Declaration of Clyde Pritchett) [hereinafter Pritchett Declaration].

Going beyond what appears in the DEIS, PFS expert Pritchett, an associate professor of zoology at Brigham Young University, has conducted a survey of the areas that will be affected by the proposed ISFSI construction and found eleven active gopher mounds. *See* PFS Motion at 12. Pritchett concludes that due to the large population of pocket gophers in Skull Valley, even if any burrow damage was not mitigated as proposed by PFS, the destruction of those eleven burrows would not have a significant impact upon the overall Skull Valley pocket gopher population. *See* Pritchett Declaration at 11.

Because neither the construction nor the operation of the proposed site will have a significant impact upon the pocket gopher population, PFS contends, no environmental impacts will be sustained on that basis. Thus, PFS maintains that paragraph two of contention Utah DD is moot. This assertion is supported by the Staff and not refuted by the State. *See* Staff Response at 9; State Response at 2.

As was noted earlier, the State has not responded to these PFS claims or sought to demonstrate the existence of material facts in dispute. Our own review of the PFS submissions leads us to conclude that PFS has met its burden of proving that

⁹ Although the State also sought to establish a material factual dispute regarding the impacts of a GSL level change in conjunction with facility-related wildfires, *see* State Response at 5, its only apparent support for the assertion that such facility-related (as opposed to naturally occurring) wildfires will take place was Dr. Howe's assertion/assumption to that effect. That subject matter, however, clearly is outside his area of expertise.

no genuine issue of material fact exists and so is entitled to summary disposition relative to paragraph two of contention Utah DD.

3. Paragraph Three

With respect to paragraph three of contention Utah DD, which states that PFS failed to address adequately the impact of the proposed project upon two plant species — Pohl’s milkvetch and small spring parsley — PFS asserts there is no material factual dispute because subsequent evidence demonstrates that the construction and operation of the proposed facility will have no adverse impact upon these two plant species. According to PFS, three surveys conducted by PFS expert Dr. Ronald Kass failed to locate either Pohl’s milkvetch or small spring parsley in the areas designated for the ISFSI project. *See* PFS Motion, Attach. C at 8-9 (Declaration of Ronald J. Kass) [hereinafter Kass Declaration]. Kass also stated that no suitable habitat for the small spring parsley existed anywhere in the proposed site and the habitat found suitable for the Pohl’s milkvetch was “overgrown with invasive annuals, whose presence inhibits the establishment of species such as the Pohl’s milkvetch.” PFS Motion at 13. In addition, if any subsequent populations of either plant species are found, PFS proposes to minimize the damage caused by its proposed facility through a mitigation plan outlined in the DEIS. *See* PFS Motion at 14 (citing DEIS §§ 4.4.3.1, 4.4.5.1, 9.4.2).

The Staff again supports this PFS conclusion and declares that the DEIS adequately addresses the concerns raised by the State in paragraph three of contention Utah DD. *See* Staff Response at 10. The State has not come forward to challenge the PFS statement of material facts concerning these two plant species. *See* State Response at 2.

Based upon our review of the unrefuted statement of facts submitted in support of the PFS motion, PFS has met its burden of demonstrating that no material facts are at issue and is entitled to summary disposition regarding paragraph three of contention Utah DD.

4. Paragraph Four

PFS argues in its motion that it has adequately addressed the possible radiological impacts of the proposed ISFSI on domestic animal and plant species, making the State’s assertion that it failed to address this issue in its ER moot. In this regard, PFS states that the ER and DEIS contain a radiological analysis of the proposed facility and document dose rates for exposure of wildlife at various points inside and outside of the facility. According to PFS, as the DEIS now outlines, the maximum potential dose rates for humans or animals at any of these

various points is within acceptable limitations established by the NRC. *See* PFS Motion at 14-15 (citing DEIS § 4.4.2.2). Furthermore, PFS declares that the insignificant radiological impact of its facility is demonstrated by the existence of many places worldwide where humans and animals are exposed to significantly higher background radiation without detectable adverse effects. *See id.* Attach. D at 7 (Declaration of Robert J. Hoffman) [hereinafter Hoffman Declaration].

For its part, the Staff supports the PFS motion in this regard and contends that the DEIS adequately addresses the issues raised by the State in paragraph four of contention Utah DD. *See* Staff Response at 11. The State does not refute the PFS statements of material fact not in dispute. *See* State Response at 2.

Once again, based on our review of the unrefuted submission of PFS, the Licensing Board concludes that PFS has met its burden of proving there is no genuine issue of material fact and so is entitled to summary disposition regarding paragraph four of contention Utah DD.

III. CONCLUSION

Because the State has established the existence of a material factual dispute relative to those aspects of paragraph one of State NEPA-related contention Utah DD, Ecology and Species, regarding the impact of (1) PFS facility-related disturbances on the breeding success of the peregrine falcons at the Timpie Springs nesting tower; and (2) a change in the water level of the GSL upon the falcon and its prey species relative to any increased risk of vehicle collisions with falcons along Interstate 80, we deny these aspects of the PFS request for summary disposition regarding that contention. In all other respects, however, we conclude that there are no material factual issues in dispute pertaining to contention Utah DD and that, as a matter of law, the other portions of contention Utah DD are resolved in favor of PFS.

For the foregoing reasons, it is this thirtieth day of October 2001, ORDERED, that as is outlined in section II above, the June 29, 2001 PFS motion for summary disposition of contention Utah DD is *granted in part and denied in part*.

THE ATOMIC SAFETY AND
LICENSING BOARD¹⁰

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 30, 2001

¹⁰ Copies of this Memorandum and Order were sent this date by Internet e-mail or facsimile transmission to (1) Applicant PFS; (2) Intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

**Ann Marshall Young, Chair
Dr. Charles N. Kelber
Lester S. Rubenstein**

In the Matter of

**Docket Nos. 50-369-LR
50-370-LR
50-413-LR
50-414-LR
(ASLBP No. 02-794-01-LR)**

**DUKE ENERGY CORPORATION
(McGuire Nuclear Station, Units 1 and 2;
Catawba Nuclear Station, Units 1
and 2)**

October 31, 2001

In this license renewal application proceeding, the Licensing Board granted a Petitioner's Motion To Extend the time for filing amended and supplemented petitions, based upon the Board's finding that the basis for the motion, the unavailability of the NRC public Web site and various documents formerly available there, fit the "unavoidable and extreme circumstances" guideline stated by the Commission in its referral order.

**RULES OF PRACTICE: EXTENSIONS OF TIME (FILING
AMENDED AND SUPPLEMENTED PETITIONS)**

The unavailability of documents formerly available on the NRC public Web site, stemming from the terrorist acts of September 11, 2001, constitutes sufficient "unavoidable and extreme circumstances" for extending the time period for filing

amended and supplemented petitions, under the standard set by the Commission in its referral order, CLI-01-20, 54 NRC 211, 215-16 (2001); and its *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21 (1998).

RULES OF PRACTICE: EXTENSIONS OF TIME (FILING AMENDED AND SUPPLEMENTED PETITIONS)

Granting an extension based on the unavailability of documents that were previously available to utilize in preparing and supporting contentions and bases is not equivalent to granting discovery of the documents, nor does a discovery standard apply in this instance; the situation is more comparable to that of having a research library closed based on unexpected, unavoidable, and extreme circumstances, to an unpredictable extent, thereby seriously handicapping a petitioner's ability to do research using a broad array of materials as necessary to draft and support contentions under the heightened requirements of 10 C.F.R. § 2.714(b)(2), (d)(2).

**MEMORANDUM AND ORDER
(Granting Motion To Extend Time and Resetting Deadlines and
Schedule for Proceedings)**

1. This proceeding involves the application of Duke Energy Corporation (Duke) to renew the operating licenses for its McGuire Nuclear Station, Units 1 and 2, and Catawba Nuclear Station, Units 1 and 2, for additional 20-year periods commencing in 2021, 2023, 2024, and 2026, respectively. Petitions to intervene and requests for hearing have been filed by Nuclear Information and Resource Service (NIRS) and the Blue Ridge Environmental Defense League (BREDL). Petitioner NIRS filed, on October 29, 2001, a Motion To Extend Time for filing its amended and supplemented petition and contentions, based upon the recent unavailability of the NRC public Web site. On October 30, 2001, a telephone conference was held¹ to address NIRS' motion and hear responses to the motion

¹The October 30, 2001, telephone conference was scheduled in a Memorandum and Order issued October 25, 2001, after the Board's receipt of NIRS' notification of that same date that it intended to file its motion on October 29, and of a copy of BREDL's October 23, 2001, Petition To Dismiss Licensing Proceeding or, in the Alternative, Hold it in Abeyance, relating to this proceeding. Memorandum and Order (Regarding Filing of Documents with Licensing Board, and Telephone Conference on Motion for Extension) (Oct. 25, 2001) (unpublished). We note that BREDL's petition also refers to the NRC public Web site unavailability, but we do not address this petition, given that it was filed with and is directed to the Commission. As indicated in paragraph 1 of this Memorandum and Order, BREDL did not appear at the October 30 conference (after receiving notice of it via e-mail of the October 25 Memorandum and Order), but, as further indicated herein, BREDL and all participants in this proceeding will be held to the deadlines set forth herein, absent the granting of BREDL's Petition by the Commission.

on an expedited basis, in order to ensure compliance with the Commission's guidance on the schedule for this proceeding as stated in its Order Referring Petitions for Intervention and Requests for Hearing to the Atomic Safety and Licensing Board Panel. *See Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211, 214-16 (2001) [hereinafter McGuire]*. Present for the conference in addition to the Board were Mary Olson on behalf of NIRS; Duke counsel David Repka, Ann Cottingham, and Lisa Vaughn, along with Bob Gill and Bill Miller of Duke; and Susan Uttal and Antonio Fernandez, counsel for the NRC Staff. BREDL did not appear at the conference.

2. After hearing the arguments of counsel and/or representatives for all participants who were present, and based upon circumstances summarized below, the Board granted the Motion To Extend Time to the following extent:

- A. The deadline for both Petitioners to file their amended and supplemented petitions is extended 3 weeks, from November 6 to *no later than November 27, 2001*.
- B. The deadline for the Applicant and Staff to file their responses to the Petitioners' amended and supplemented petitions is extended 3 weeks, from November 20 to *no later than December 11, 2001*.
- C. The prehearing conference to hear oral argument on standing and the contentions filed by the Petitioners is rescheduled from the week of November 26, three weeks forward, to *December 18 and 19, 2001*, to be held in the vicinity of the Applicant's facilities. At a later date, all participants will be notified of the exact location of this conference, along with a more specific schedule for the conference and appropriate time limits for argument, as necessary.
- D. The deadline for issuance of the Board's decision on standing and contentions is also extended 3 weeks from the original deadline of 90 days from the Commission's October 4, 2001, referral order (i.e., January 2, 2002) to *January 23, 2002*.
- E. Another telephone conference (contact information to be provided via e-mail on November 6), for the purpose of discussing the status of the case and of efforts to obtain and/or provide access to documents needed to prepare contentions and bases, will be held on *Wednesday, November 7, 2001, at 9:30 a.m. Eastern Time*. Prior to this conference, the participants shall continue to work together in a good faith effort to see that all documents are made available insofar as possible, and shall be prepared at the conference to address appropriate ways of resolving any remaining disputes that may exist between the Petitioners, Duke, and the Staff, with regard to any documents.

3. We grant the Motion To Extend Time based upon the following circumstances: First, we find the basis for the motion, the unavailability to the public, including NIRS, of the NRC Web site and various documents formerly available there, to fit the “unavoidable and extreme circumstances” guideline stated by the Commission in its referral order. *See McGuire*, CLI-01-20, 54 NRC at 215-16; *see also Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 21 (1998). The unavailability of the NRC Web site and/or portions thereof stems from the terrorist acts of September 11, 2001, and the need thereafter to ensure that no information on the NRC public Web site contains security-sensitive information. This necessarily resulted in restricting public access to documents formerly found on or through the Web site, and we find this situation — which commenced when the Web site was taken down on October 11, 2001, after the Commission issued its October 4 referral order — to be a clearly extreme and unavoidable circumstance for all persons concerned, including Petitioner NIRS.

4. We note Duke’s opposition to the motion, based largely on the prior availability of various of the documents to which NIRS wishes to have access, as well as on the asserted lack of relevance of certain of the documents in question. We note also, however, the Staff’s agreement that an extension of 3 weeks, which is approximately equivalent to the time period during which the Generic Environmental Impact Statement on License Renewal (GEIS-LR) was unavailable to Petitioner NIRS, would be appropriate in light of such lack of access. We note as well the circumstance, as discussed in the October 30 conference, that downloading and/or printing various documents, including the GEIS-LR, in anticipation that the NRC public Web site would be taken down, was not reasonable in this instance. Moreover, the prior availability on the Web site of various historical and indexed information helpful to the sort of research needed to prepare contentions and bases therefor, the current absence of which was pointed out by Ms. Olson, coupled with the apparent unavailability to the public until recently of access to the Agencywide Document Access and Management System (ADAMS) and/or many documents found in ADAMS, supports a conclusion that some relief is warranted in this instance.

5. Granting this extension of time, based on the unavailability for various periods of time of documents that were previously available to Petitioner NIRS to utilize in preparing and supporting contentions and bases, is not, as Duke in effect argues, equivalent to granting NIRS discovery of particular documents, nor does a discovery standard apply in this instance. We find, rather, the situation here to be comparable to that of having a research library closed based on unexpected, unavoidable, and extreme circumstances, to an unpredictable extent, thereby seriously handicapping the Petitioner’s ability to do research using a broad array of materials as necessary to draft and support contentions under the heightened requirements of 10 C.F.R. § 2.714(b)(2), (d)(2). As indicated above,

it appears the participants are making an effort to work cooperatively to ensure that Petitioner NIRS has access, as much as possible, to all information it would otherwise have had prior to the closing of the "library" of the NRC public Web site. We commend all participants on this, and urge such cooperation as well with regard to BREDL's preparation of its supplemented and amended petition and contentions. In this connection, we note that neither Duke nor the Staff object to including BREDL in the new, extended deadline for the filing of supplemented and amended petitions and contentions, or that for responses thereto, in the interest of facilitating the expeditious handling of this case by the Board and all participants in the simplest possible manner.

6. To the degree any security concerns may become a matter of significance after efforts to find alternatives to any security-sensitive information (for example, monitoring reports to state agencies and licensee event reports, as alternatives to daily event reports that may not be returned to the Web site for security reasons), as well as the possible need for protective orders, have been explored and exhausted, this may at an appropriate time become an appropriate question for certification to the Commission, as directed in the Commission's referral order regarding novel legal or policy questions that arise in making rulings on contentions. CLI-01-20, 54 NRC at 213. Finally, should any information currently unavailable later become available, it may be appropriate at such time to consider late-filed contentions, under the criteria set forth at 10 C.F.R. § 2.714(a), (b).

7. In conclusion, we find the circumstances summarized in the previous paragraphs to constitute sufficient unavoidable and extreme circumstances to grant an extension of 3 weeks for the filing of both Petitioners' supplemented and amended petitions and contentions, with additional 3-week periods added, as noted above, to relevant deadlines and dates following thereafter.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD²

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 31, 2001

²Copies of this Order were sent this date by Internet e-mail or facsimile transmission, if available, to all participants or counsel for participants.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan
Jeffrey S. Merrifield

In the Matter of

Docket No. 40-8681-MLA-9

**INTERNATIONAL URANIUM (USA)
CORPORATION
(White Mesa Uranium Mill)**

November 14, 2001

The Commission denies Intervenor's appeal of a Licensing Board decision (LBP-01-15, 53 NRC 344 (2001)) that denied its request for a hearing in this materials license amendment proceeding.

**RULES OF PRACTICE: STANDING TO INTERVENE; MATERIALS
LICENSE AMENDMENTS**

To demonstrate standing in a Subpart L materials licensing case, a petitioner must meet the "judicial standards for standing." 10 C.F.R. § 2.1205(h). The concept of judicial standing requires a showing of "(1) an actual or threatened, concrete and particularized injury, that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the Atomic Energy Act . . . , and (4) is likely to be redressed by a favorable decision." *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001), *citing Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998).

RULES OF PRACTICE: STANDING (REPRESENTATIONAL)

For an organization to represent the interests of one of its members (i.e., to demonstrate representational standing), the organization must show how at least one of its members may be affected by the licensing action, must identify the member, and must show that the organization is authorized to represent that member. *See Power Authority of the State of New York* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 293 (2000).

RULES OF PRACTICE: MATERIALS LICENSE AMENDMENTS; STANDING TO INTERVENE

Since a license amendment involves a facility with ongoing operations, a petitioner's challenge must show that the amendment will cause a "'distinct new harm or threat' apart from the activities already licensed." *See International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27 (2001); *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 192 (1999).

RULES OF PRACTICE: INTERVENTION PETITION (PLEADING REQUIREMENTS)

Conclusory allegations about potential radiological harm from the facility in general, which are not tied to the specific amendment at issue, are insufficient to establish standing. *See Zion*, 49 NRC at 192.

RULES OF PRACTICE: STANDING TO INTERVENE; APPELLATE REVIEW (DEFERENCE TO PRESIDING OFFICER)

Absent an error of law or an abuse of discretion, the Commission generally defers to the Presiding Officer's determinations regarding standing. *See International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 118 (1998); *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995).

RULES OF PRACTICE: INTERVENTION PETITION (PLEADING REQUIREMENTS); STANDING TO INTERVENE (INJURY IN FACT); STANDING (REPRESENTATIONAL)

The Presiding Officer reasonably found that the Group did not show in enough detail how the proposed license amendment would affect it. Specifically, the Group showed no discrete institutional injury to itself, other than general

environmental and policy interests of the sort we repeatedly have found insufficient for organizational standing. *See, e.g., Transnuclear, Inc.* (Export of 93.15% Enriched Uranium), CLI-94-1, 39 NRC 1, 5 (1994); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 59-61 (1992).

RULES OF PRACTICE: APPELLATE REVIEW (ABANDONMENT OF ISSUE); ISSUES ON APPEAL

Before the Presiding Officer the Group pointed to the potential for an accident involving the trucks hauling materials to be dumped, stored, and processed at the White Mesa Mill. But the Group's appellate brief does not reiterate or explain its accident theory. Hence, we deem it abandoned. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 322 & n.62 (1991).

RULES OF PRACTICE: STANDING TO INTERVENE

Speculation about accidents along feed material's transport routes does not establish standing under our case law. *See White Mesa*, CLI-01-18, 54 NRC at 31-32.

RULES OF PRACTICE: STANDING TO INTERVENE

Judicial standing jurisprudence, and our own, requires "a realistic threat . . . of direct injury." *See Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 74 (1994). *Accord Central and South West Services, Inc. v. EPA*, 220 F.3d 683, 700-01 (5th Cir. 2000) (collecting cases). Here, the Group's claims rest "on nothing more than unfounded conjecture." *See LBP-01-15*, 53 NRC at 351.

MEMORANDUM AND ORDER

Petitioner, the Glen Canyon Group of the Sierra Club (the "Group"), has appealed the Presiding Officer's decision denying its request for a hearing in this license amendment proceeding. *See LBP-01-15*, 53 NRC 344 (2001). We affirm the Presiding Officer's decision that the Group has not demonstrated standing.

I. BACKGROUND

International Uranium (USA) Corporation (“IUSA”) seeks to amend its source material license to receive and process up to 17,750 tons of alternate feed material at its White Mesa Uranium Mill near Blanding, Utah. The alternate feed material, from the Molycorp site at Mountain Pass, California, is a result of extraction of lanthanides and other rare earth metals from bastnasite ores. *See* “International Uranium (USA) Corporation; Notice of Receipt of Request to Process Alternate Feed,” 66 Fed. Reg. 1,702 (Jan. 9, 2001). The material, which is currently being stored in ponds as lead sulfide sludge, has a uranium content of approximately 0.15% or greater. *See id.* IUSA proposes to process the material for its uranium content and dispose of the byproduct material in the mill’s tailings cells. *See id.* Approximately sixty to seventy trucks per week will be shipped for a period of 60 to 90 days. *See id.* The trucks will be lined, covered, aluminum end-dump trailers. *See id.* The proposed transportation route for the material will follow routes I-15 and I-70 to Crescent Junction, Utah, and then south on U.S. Highway 191 to the mill. *See id.*

In its petition for a hearing in this matter, the Group asserted that it has standing to participate and described areas of concern.¹ The Presiding Officer permitted the Group to respond to IUSA’s reply to the hearing request, and conducted a telephone conference with the parties on April 11, 2001. The Presiding Officer concluded that the hearing request did not establish Petitioner’s standing to maintain this action. *See* LBP-01-15, 53 NRC at 351.

II. DISCUSSION

To demonstrate standing in a Subpart L materials licensing case, a petitioner must meet the “judicial standards for standing.” 10 C.F.R. § 2.1205(h). The concept of judicial standing requires a showing of “(1) an actual or threatened, concrete and particularized injury, that (2) is fairly traceable to the challenged action, (3) falls among the general interests protected by the Atomic Energy Act . . . , and (4) is likely to be redressed by a favorable decision.” *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001), *citing Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998). For an organization to represent the interests of one of its members (i.e., to demonstrate representational standing), the organization must show how at least one of its members may be affected by the licensing action, must identify the member, and must show that the organization is authorized to represent that member. *See Power Authority of the State of New York*

¹ Pursuant to 10 C.F.R. § 2.1213, the NRC Staff did not participate as a party to this proceeding.

(James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 293 (2000).

Since a license amendment involves a facility with ongoing operations, a petitioner's challenge must show that the amendment will cause a "'distinct new harm or threat' apart from the activities already licensed." See *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27 (2001); *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 192 (1999). Conclusory allegations about potential radiological harm from the facility in general, which are not tied to the specific amendment at issue, are insufficient to establish standing. See *Zion*, 49 NRC at 192.

The Group focuses on two portions of the proposed activity: (1) transportation of the Molycorp material to the mill; and (2) storage, after processing, of the material in the mill's tailings cells. Transportation allegedly will generate harmful dust, as will the material's storage and processing at the site. In addition, the material allegedly will contaminate groundwater near the site.

In support of standing, the Group states that it has an interest in state and federal environmental laws and in the land, water, air, wildlife, and other natural resources that would be affected by the license amendment. Further, the Group has members who live in the communities allegedly affected by the license amendment and who engage in work or recreational activities in the vicinity of the White Mesa Mill. See "Sierra Club Request for a Hearing and Petition for Leave to Intervene" at 3 (Feb. 7, 2001).

With its petition to intervene, the Group submitted a sworn declaration of a member, Herb McHarg, and an affidavit by an hydrology expert, Loren Morton. Mr. McHarg says that he resides "just off" Highway 191 approximately 25 miles from the Mill, that his employment requires him to drive Highway 191 on a daily basis, frequently past the White Mesa Mill, and that he bikes and walks frequently on Highway 191 near the White Mesa Mill. See "Declaration of W. Herbert McHarg," ¶¶ 2-4 (Feb. 7, 2001). He states that, in the past, dust from transport trucks and dust plumes coming from the White Mesa site have blown into the windows of his vehicle, onto his face and body, and into his eyes, nose, and mouth. See *id.* ¶ 3. Such materials injure him, he says, as they have cracked his windshield, and the dust immediately irritates his skin, eyes, and nose. See *id.* Mr. McHarg believes that the dust is harmful to his health and the environment in the long term. See *id.* Mr. McHarg also states that he drinks from waters that he believes may be affected by the materials subject to this amendment. See *id.* ¶ 4. The Group's hydrology expert concludes that "there is a significant potential for undetected seepage discharge from the IUSA tailings cells to groundwater." See "Affidavit of Loren Morton," ¶ 11 (Aug. 18, 1998). The Group maintains that Mr. McHarg's statement that he would be injured by the Molycorp feed material

is reasonable considering the hazardous nature of the material — lead sulfide sludge — and its potential migration off the site.

The Presiding Officer concluded that the license amendment, if granted, would not “break entirely new ground.” See LBP-01-15, 53 NRC at 350. Of “pivotal significance,” in his view, was the Group’s failure to show that currently licensed activities at the mill have caused seepage into the groundwater in the past or that activities to be authorized by the instant license amendment would create a greater likelihood of such contamination in the future. See *id.* As for the Group’s “dust” claims, the Presiding Officer stressed that lead sulfide sludge will be wet and thus less likely to generate dust than previously licensed alternate feed materials. See *id.* He deemed the Group’s claim that the proposed license amendment might cause incremental harm to rest on “unfounded conjecture.” See *id.* at 351. Accordingly, he denied standing to the Group.

The Presiding Officer noted disagreement between the parties on numerous merits-based issues, such as an allegation that the material may contain “listed” hazardous waste,² the Group’s request that an environmental impact statement be prepared to satisfy the National Environmental Policy Act of 1969 (“NEPA”), and the Group’s allegation of sham processing of the Molycorp alternate feed material. See *id.* at 348. He declined to address these questions because he found no threat of injury-in-fact. See *id.*

Absent an error of law or an abuse of discretion, the Commission generally defers to the Presiding Officer’s determinations regarding standing. See *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 118 (1998); *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995). Here, the Presiding Officer reasonably found that the Group did not show in enough detail how the proposed license amendment would affect it. See LBP-01-15, 53 NRC at 348. Specifically, the Group showed no discrete institutional injury to itself, other than general environmental and policy interests of the sort we repeatedly have found insufficient for organizational standing. See, e.g., *Transnuclear, Inc.* (Export of 93.15% Enriched Uranium), CLI-94-1, 39 NRC 1, 5 (1994); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 59-61 (1992).

The Group fares no better insofar as it seeks “representational” standing on behalf of its members. The Group did submit a sworn declaration by a member, Mr. McHarg, who claims possible injury from contaminated groundwater or from blowing dust, and an affidavit from an expert, Mr. Morton, concerning “undetected seepage” into groundwater. But neither Mr. McHarg nor Mr. Morton outlines a pathway or mechanism for leachate from the tailings piles to

²Hazardous wastes are identified and “listed” in 40 C.F.R. Part 261 pursuant to authority delegated to the Administrator of the Environmental Protection Agency in 42 U.S.C. § 6921.

contaminate water Mr. McHarg or other Group members drink. Any groundwater impact from the Molycorp feed material is unlikely since the material will be placed on a concrete pad that will be bermed to contain moisture. In addition, because the Molycorp material will serve as feed for only a short duration, its contribution to any leachate from the tailings piles will be slight. Moreover, as the Presiding Officer held, the *wet* sludge nature of the Molycorp material renders the Group's "dust" concerns implausible.³ Judicial standing jurisprudence, and our own, requires "a realistic threat . . . of direct injury."⁴ Here, the Group's claims rest "on nothing more than unfounded conjecture." See LBP-01-15, 53 NRC at 351.

Before the Presiding Officer the Group pointed to the potential for an accident involving the trucks hauling materials to be dumped, stored and processed at the White Mesa Mill. See "Declaration of W. Herbert McHarg," ¶3 (Feb. 7, 2001). But the Group's appellate brief does not reiterate or explain its accident theory. Hence, we deem it abandoned. See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-947, 33 NRC 299, 322 & n.62 (1991). In any event, speculation about accidents along feed material's transport routes does not establish standing under our case law. See *White Mesa*, CLI-01-18, 54 NRC at 31-32.

Contrary to the Group's view, its allegations do not resemble those the United States Supreme Court found sufficient for standing in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000). In that case, it was "undisputed that . . . unlawful conduct — discharging pollutants in excess of permit limits — was occurring at the time the complaint was filed" and nearby residents reasonably "curtailed" their use of the affected waterway. *Id.* at 184-85. Here, the Group has made no allegations with similar substance and level of detail.

For the foregoing reasons, we *affirm* LBP-01-15.

³The Group does not explain why it or its members reasonably might be expected to suffer injury from dust from the Molycorp material, given IUSA's numerous protective measures during the material's truck transport and during its onsite storage at White Mesa Mill. These measures include covering the material while in transport and keeping it wet and giving it priority processing while in onsite storage.

Similarly, the Group's various references to listed "hazardous wastes" do not substantiate its standing because: (1) the Applicant has stated that it will not accept feed material containing listed hazardous waste; (2) Molycorp has certified that the material contains no such wastes; and (3) the application contains a detailed protocol, established by IUSA and acceptable to the State of Utah in a similar context involving other alternate feed material, for screening the feed material for listed hazardous wastes. See 66 Fed. Reg. at 1702; "Amendment Request to Process an Alternate Feed Material from Molycorp at White Mesa Uranium Mill, Source Material License No. SUA-1358," Attachments 3 and 4 (Dec. 19, 2000); LBP-00-11, 51 NRC at 180. The Group offers no explanation why the Molycorp material nonetheless poses a meaningful risk to its members.

⁴See *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 74 (1994). *Accord Central and South West Services, Inc. v. EPA*, 220 F.3d 683, 700-01 (5th Cir. 2000) (collecting cases).

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of November 2001.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 72-22-ISFSI

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

November 14, 2001

**DESIGN BASIS: INDEPENDENT SPENT FUEL STORAGE
INSTALLATIONS**

The threshold probability for design basis accidents at an Independent Spent Fuel Storage Installation (ISFSI) is one in a million (1×10^{-6}). Events having a less than a one in one million probability of occurring are not “credible events” and do not have to be taken into account in designing an ISFSI.

DESIGN BASIS: CREDIBLE EVENTS

A facility need not be designed to withstand every conceivable accident, but only those found to be “credible.” *See, e.g., Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 2), ALAB-692, 16 NRC 921 (1982).

**DESIGN BASIS: INDEPENDENT SPENT FUEL STORAGE
INSTALLATIONS**

“The public health and safety risks posed by ISFSI storage . . . are very different from the risks posed by the safe irradiation of the fuel assemblies in a

commercial nuclear reactor, which requires the adequate protection of the public . . . in the conditions of high temperatures and pressures under which the reactor operates.” See Final Rule, Interim Storage of Spent Fuel in an Independent Spent Fuel Storage Installation at a Reactor Site; Site-Specific License to a Qualified Applicant, 60 Fed. Reg. 20,879, 20,883 (April 28, 1995) (response to public comments). This is because the danger presented by irradiated fuel is largely determined by the presence of a driving force behind dispersion, such as heat and pressure, neither of which is present in an ISFSI. Moreover, the radiological source term is lower at an ISFSI than at a reactor both because the spent fuel has decayed over time prior to placement in an ISFSI and because there are fewer fuel assemblies in an individual cask than in a reactor.

REGULATORY GUIDES: APPLICATION

NUREGs, such as the Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants, like all guidance documents, are not legally binding regulations. See, e.g., *International Uranium (USA) Corp.* (Request for Materials License Amendment), CLI-00-1, 51 NRC 9, 19 (2000); *Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 149 (1995).

REGULATORY GUIDES: APPLICATION

Where the NRC develops a guidance document to assist in compliance with applicable regulations, it is entitled to special weight. See, e.g., *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290 (1988); *Consumers Power Co.* (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562, 568 (1983).

REGULATORY GUIDES: APPLICATION

Where a Staff guidance document was not drafted for use in evaluating applications of the type under consideration, then the guidance is persuasive only insofar as it may bear on distinct questions. Here, for example, the NRC Staff has appropriately considered the formulas in the Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants for calculating air crash probability, for that methodology pertains regardless of the type of facility at issue. But the Staff was right to refuse to use the Standard Review Plan’s overall one in ten million (1×10^{-7}) threshold probability for design basis accidents — which the NRC developed for reactors, not for facilities like ISFSIs whose failure would not pose nearly the same radioactive consequences as a reactor failure.

MEMORANDUM AND ORDER

In a May 31, 2001 order, the Atomic Safety and Licensing Board referred to the Commission its ruling on the design standard for accidental aircraft crash hazards at the proposed independent spent fuel storage installation (ISFSI) site at issue in this proceeding.¹ In that ruling, the Board found that the facility need not be designed to withstand aircraft crashes having less than one-in-one-million (1×10^{-6}) annual probability of occurring. The Commission must determine, as a matter of law and policy, how probable an accidental aircraft crash would have to be to qualify as a “credible event” which the ISFSI must be designed to withstand without releasing dangerous levels of radiation.²

We note that the issue we consider today is only the threshold probability for accidental events and has no bearing on the issue of whether or to what extent intentional acts must be considered in designing the facility.³

We find the Board’s 10^{-6} standard consistent with our own view, and hence affirm the Board’s decision.

I. BACKGROUND

The Applicant, Private Fuel Storage, L.L.C., seeks a license to operate an ISFSI on the Skull Valley Goshute Indian Reservation in Utah. Contention Utah K/Confederated Tribes B claims the Applicant has not adequately considered credible external accidents that could affect the proposed facility. As admitted, the contention’s principal concern was that aircraft, jettisoned ordnance from military aircraft, or land-launched missiles could crash into the proposed spent fuel storage facility. Through earlier summary disposition, the issues were narrowed to only hazards associated with the Salt Lake City International Airport; hazards from conventional ground weapons fired from Dugway Proving Ground; military aircraft crash hazards from Dugway Proving Ground, Hill Air Force

¹ See LBP-01-19, 53 NRC 416 (2001).

² As this question has a potential impact on all Part 72 facilities, the Nuclear Energy Institute, a trade group representing the nuclear energy industry, has filed a motion for permission to file an amicus brief. The Commission by this Order grants the motion and has considered NEI’s brief in reaching its decision.

³ In light of the September 11, 2001 terrorist attacks on the Pentagon and World Trade Center, the Staff has been directed to review its regulations to determine whether additional steps should be taken to design and defend regulated facilities against potential terrorism. The State of Utah has also filed a late-filed contention concerning the threat of terrorist acts, such as the intentional crash of a large plane into the facility. See State of Utah’s Request for Admission of Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage), Oct. 10, 2001. In addition, Utah has asked the Commission to halt the proceedings until it has determined whether the regulations concerning ISFSIs should be revised. See State of Utah’s Petition for Immediate Relief Suspending Licensing Proceedings, Oct. 10, 2001. Today’s decision has no effect on the Staff’s review of the regulations or the terrorist-threat-related petitions pending before the Board and Commission.

Base, and the Utah Test and Training Range (UTTR); and hazards from cruise missile testing.⁴

In December 2000, PFS filed a Motion for Summary Disposition of these remaining portions of this contention, claiming that there was no longer any issue of material fact as to whether any of these hazards could credibly threaten to cause a release of radioactive material from the proposed ISFSI. In order to show no credible threat, PFS presented evidence that safety controls made various accident scenarios extremely unlikely, and in some cases that even if the posited accident did occur, no radioactive materials would be released.⁵ As part of its claim that aircraft pose no credible threat, PFS argued that any event having a less than one chance in a million of occurring should be deemed not credible.

The Board agreed that one in a million is the appropriate “threshold probability,” beneath which a posited accident can be ignored in the facility’s design. The Board certified that portion of its ruling to the Commission. The Board also found that there remained issues of fact with respect to the likelihood of either an F-16 or jettisoned ordnance from an F-16 crashing into the facility; similar crashes resulting from air-to-air combat training activities conducted on the Utah Test and Training Range; the probability of an aircraft using the Moser Recovery Route crashing; the crash impact hazard from flights out of Michael Army Airfield; and the cumulative air crash hazard. Last, the Board granted summary disposition in PFS’s favor with respect to various other issues, including the threat posed by cruise missiles, and air-to-ground and air refueling activities at the UTTR. Only the question of the proper threshold probability is under review here.

II. DISCUSSION

A. Design Basis

As is the case for other NRC-regulated facilities, the site of a proposed ISFSI must be evaluated to identify and assess the likelihood of possible accidents, both natural and manmade, that could affect the facility.⁶ These natural and man-induced events are made part of the ISFSI’s design basis, ensuring that each component will continue to perform its designated functions under normal and

⁴ LBP-99-35, 50 NRC 180, 200-01 (1999).

⁵ See Applicant’s Motion for Summary Disposition of Utah Contention K and Confederated Tribes Contention B, dated Dec. 30, 2000, Attachment D, Declaration of Jeffrey R. Johns, dated Dec. 27, 2000.

⁶ See 10 C.F.R. Part 72, Subpart E; § 72.90(c) (“Design basis external events must be determined for each combination of proposed site and proposed ISFSI or MRS design”); § 72.92, “Design basis external natural events”; § 72.94, “Design basis external man-induced events.”

extreme conditions.⁷ General design criteria require an ISFSI to be designed to “accommodate the effects of, and to be compatible with, site characteristics and environmental conditions . . . and to withstand postulated accidents.”⁸ Applicable NRC regulations do not expressly address aircraft impact hazards, but related hazards such as fires and explosions are specifically addressed as hazards that the facility must weather without jeopardizing public safety.⁹

A facility need not be designed to withstand every conceivable accident, but only those found to be “credible.”¹⁰ Credible accidents are therefore generally called “design basis events” or “design basis accidents,” and events too improbable to be considered credible are called “beyond design basis” events. If an event does not exceed the design basis, engineered controls will keep any radiation exposure to the public within prescribed limits.¹¹ If the proposed facility cannot be designed to withstand credible accidents without releasing excessive radiation, the site is unsuitable and NRC will deny the application.¹²

B. Threshold Probabilities for Design Basis

The Commission must decide the threshold probability for a design basis event at an ISFSI. Part 72 does not address this question directly, and no agency guidance explicitly applicable to Part 72 facilities answers this question. At other NRC-regulated facilities, the agency uses different threshold probabilities: one in ten million for nuclear power plants and one in a million for geologic repository operations areas (GROA).¹³ Because no agency guidance or regulation applies,

⁷ “Design bases” is defined in 10 C.F.R. Part 72 as:

that information that identifies the specific functions to be performed by a structure, system, or component of a facility or of a spent fuel storage cask and the specific values or ranges of values chosen for controlling parameters as reference bounds for design. These values may be restraints derived from generally accepted state-of-the-art practices for achieving functional goals or requirements derived from analysis (based on calculation or experiments) of the effects of a postulated event under which a structure, system, or component must meet its functional goals. The values for controlling parameters for external events include—

. . . .

(2) Estimates of severe external man-induced events to be used for deriving design bases that will be based on analysis of human activity in the region, taking into account the site characteristics and the risks associated with the event.

¹⁰ C.F.R. § 72.3.

⁸ 10 C.F.R. § 72.122(b)(1).

⁹ 10 C.F.R. § 72.122(c).

¹⁰ See, e.g., *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 2), ALAB-692, 16 NRC 921 (1982). There, calculations showed a greater than one-in-ten-million chance that Three Mile Island Unit 2 (located 2.7 miles from Harrisburg International Airport) could be hit by a 200,000-pound aircraft traveling at 200 knots. Therefore, the impact from an aircraft of that size and speed was determined to be a design basis accident and the reactor was designed to withstand it. Although heavier aircraft sometimes used the airport, the probability of one of them hitting TMI2 was determined to be so low that such a crash was not considered a design basis event.

¹¹ See 10 C.F.R. § 72.106(b).

¹² 10 C.F.R. § 72.90(d).

¹³ This one-in-a-million threshold probability for design basis events at a GROA also includes consideration of the probabilities and component failures. See discussion *infra*.

the most reasonable basis for the Commission to reach a decision here would be to examine the risks associated with these two kinds of facilities to determine which is most comparable to the proposed ISFSI.

1. Standard Review Plan for Nuclear Power Reactors

With respect to power reactors, the NRC long ago determined that events having at least a one-in-ten-million (1×10^{-7}) probability generally should be taken into consideration in facility design, an approach reflected in the Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants.¹⁴ The Standard Review Plan also provides formulas for calculating, with a conservative margin, the probability of various hazards. The subchapter dealing specifically with aircraft hazards provides a formula that takes into consideration factors like the distance from the proposed facility to the airfield and the number of flights into and out of the airfield.¹⁵

Estimating the probability of extremely unlikely events involves considerable uncertainty when sufficient data are not available to plug into the formula. Therefore, the Standard Review Plan for reactors deems a threshold probability of one in a million (1×10^{-6}) to be acceptable where, “when combined with reasonable qualitative arguments, the realistic probability can be shown to be lower.”¹⁶ That is, where a conservative estimate shows an event has no greater than a one-in-a-million probability, that event may be ignored in facility design if reasonable estimates result in a lower probability when conservative margins are not factored in. To illustrate, in *Consumers Power Co. (Big Rock Point Plant)*,¹⁷ a conservative estimate assumed that any navigational errors made by B-52s training near the Big Rock site would send the aircraft over the plant. The Board noted that a navigational error would in fact be just as likely to send an aircraft away from Big Rock as toward it, so the “realistic” probability of a B-52 overflight was lower than the conservative estimate showed.¹⁸ Similarly, a conservative estimate assumed that 1500 aircraft would fly in and out of a nearby military base, whereas the realistic estimate, based on actual data from a recent year, showed only ninety-nine flights.¹⁹ Because the conservative estimate of the cumulative aircraft hazards was approximately one in a million, and there were

¹⁴Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants, NUREG-0800 (Rev. 2, July 1981), §§ 2.2.1-2.2.2, “Identification of Potential Hazards in Site Vicinity”; and § 3.5.1.6, “Aircraft Hazards.”

¹⁵*Id.* § 3.5.1.6.

¹⁶*Id.* § 2.2.3(II), “Evaluation of Potential Accidents.”

¹⁷LBP-84-32, 20 NRC 601, 639-52 (1984).

¹⁸*Id.* at 642.

¹⁹*Id.* at 648.

reasonable arguments that the realistic probability of a crash was lower, the Board in *Big Rock* found no need to redesign the plant to withstand an airplane crash.²⁰

2. *Geologic Repository Operations Area*

In 1996, the NRC published revised regulations concerning design basis events at a GROA — the surface operations of a geologic repository — before permanent closure.²¹ The statement of considerations published along with the revised regulations noted that:

Assuming bounding repository event consequences of roughly 0.2 Sv (20 rem), a lifetime risk to individuals in the general population of 0.05 fatal cancers per Sv of exposure, and a lower bound of 1×10^{-6} per year for the probability of occurrence of Category 2 design basis events, the estimated risk of cancer fatality from these low probability events would be 1×10^{-8} per year. Events which result in risks at or below this level do not contribute significantly to repository risk to an individual and, as such, can be neglected in the overall risk assessment.²²

Thus, in considering *bounding* event consequences in which the initiating event probability is considered rather than the event sequence probability, the Commission determined that event probabilities of less than 1×10^{-6} would not significantly contribute to risk and could be screened from further consideration.

C. Parties' Positions

1. *Staff's Safety Evaluation Report*

The NRC Staff agreed with PFS and the Board that one in a million is the proper threshold probability for air crash hazards at an ISFSI. In its Safety Evaluation Report for the PFS facility, the NRC Staff used the formula found in the Standard Review Plan for reactors to assess the probability of an aircraft crash.²³ These calculations resulted in a cumulative hazard from various civilian and military aircraft accident scenarios of approximately 7.4×10^{-7} .²⁴

Rather than use the one-in-ten-million threshold probability that the Standard Review Plan prescribes for power reactors, the NRC Staff determined that the

²⁰ *Id.* at 651.

²¹ See Final Rule, "Disposal of High-Level Radioactive Wastes in Geologic Repositories; Design Basis Events," 61 Fed. Reg. 64,257 (Dec. 4, 1996). For the GROA, "design basis events" refers to the probability of the "event sequence" which includes an initiating event (e.g., an earthquake) and the associated combinations of repository system or component failures that can potentially lead to exposure of the public to radiation. *Id.* at 64,263. Here, however, we are only considering the appropriate threshold probability of the initiating event without consideration of the probability of system or component failures.

²² *Id.* at 64,265.

²³ See Safety Evaluation Report (SER), Ch. 15, § 15.1.2.11, at 15-41-15-81.

²⁴ *Id.* at 15-79.

appropriate threshold probability for a design basis accident at the PFS ISFSI was one in a million. The Staff reasoned that a potential crash into the ISFSI would not have as dire consequences as a possible crash into a power reactor:

Compared to a nuclear reactor facility, an ISFSI is a relatively passive system that does not have complex control requirements and that has contents with relatively low thermal energy. Therefore, potential fuel damage and the associated radioactive source terms from a potential accident are significantly less than that expected from a potential accident at a nuclear reactor facility. As a result, the estimated consequences from a potential accident at an ISFSI are less severe than from a potential accident at a nuclear reactor facility. Therefore, the staff concludes that a threshold probability of 1×10^{-6} crashes per year is an acceptable value for evaluating aircraft crash hazards at the PFS facility.²⁵

In short, the Staff found that the less severe consequences of a crash at the ISFSI reduced the overall risk and justified using a one-in-a-million rather than one-in-ten-million threshold probability. As it was not using the Standard Review Plan's reasoning for determining the threshold probability, the Staff did not use "qualitative arguments" to show that the "realistic probability" of a crash was actually lower than the probability formula would indicate.

2. Applicant's Argument

In its Motion for Summary Disposition, PFS argued that the Board should choose a threshold probability of one in a million because this is the standard used for the surface operations and storage area at a geologic repository. PFS contended that an ISFSI is more similar, in design and function, to the surface operations at the GROA than to a nuclear power plant. It pointed to the Commission's statement of considerations for the GROA design basis rule which showed that the Commission intended that the design standards for a GROA and Part 72 facilities be comparable: "Because operations at the repository are expected to be similar to operations at other facilities licensed by the Commission (e.g., 10 C.F.R. part 72 facilities), the Commission believes that it is appropriate that their design bases be comparable."²⁶

PFS also argued that the one-in-a-million standard is appropriate because the consequences of a potential accident at an ISFSI, in terms of how much radiation could be released, would be much less severe than at a nuclear power plant. Because risk is the product of the probability of occurrence multiplied by the consequences, PFS contended that the overall risk associated with a potential crash at an ISFSI is lower than at a nuclear power plant.²⁷ This reasoning is similar

²⁵ *Id.* at 17-77.

²⁶ 61 Fed. Reg. at 64,262.

²⁷ See PFS Motion for Summary Disposition at 10.

to that which the Commission used in its statement of considerations for the 1996 amendments to 10 C.F.R. Part 60 setting the one-in-a-million lower bound for a design basis event at the surface areas of a geologic repository.²⁸

In addition, PFS's motion for summary disposition provided arguments that the realistic probability is actually less than the conservative estimates resulting from the formulas found in the Standard Review Plan.²⁹

3. Utah's Argument

Utah now argues that summary disposition was premature. First, Utah claims that NRC should apply section 3.5.1.6 of the Standard Review Plan — that is, the reactor standard — because that section deals specifically with aircraft crash hazards.³⁰ Utah points out that Standard Review Plan § 3.5.1.6 provides for a threshold probability of 1×10^{-7} , and does not speak of using a higher probability where the “realistic” probability is lower. The section of the Standard Review Plan that deems a higher probability to be acceptable, where “realistic” probabilities are lower, is the general accident analysis section, § 2.2.3.

This approach, however, would have the Commission apply one portion of NUREG-0800 that speaks specifically to airplane crash hazards, while ignoring another section that deals specifically with evaluation of hazards and with risk tolerance.³¹

Utah further claims that even if the “realistic probability” approach set out in Standard Review Plan § 2.2.3 were applicable, PFS has not provided reasonable qualitative arguments to show that its estimate is conservative and that an airplane crash's realistic probability is closer to one in ten million. Utah maintains that whether the calculations are conservative, and what the “realistic” figure is, are material factual issues that preclude summary disposition.³²

D. Commission Analysis

As no law or regulation establishes the threshold probability for design basis accidents at an ISFSI, the Commission must select a standard it finds sufficiently protective. For the reasons set forth below and in LBP-01-19, we conclude that the 10^{-6} standard is workable and appropriate for the PFS facility.

Before reaching the substance of this policy question, we first turn to Utah's procedural argument that summary disposition was premature. We disagree. The

²⁸ See 61 Fed. Reg. at 64,259.

²⁹ PFS Motion for Summary Disposition at 28-29.

³⁰ State of Utah's Brief on the Question Certified in LBP-01-19, July 13, 2001, at 13.

³¹ NUREG-0800, § 2.2.3, “Evaluation of Potential Accidents.”

³² State of Utah's Brief at 13-14.

applicable probability is not a question of fact, but a question of law and policy. Factual issues concerning conservativeness and realistic probabilities would only be material if the hazard analysis acceptance criteria found in Standard Review Plan § 2.2.3 were applicable. That is, if Utah were correct that NUREG-0800 is directly applicable to evaluating an ISFSI, then questions would remain concerning the estimate's conservativeness that would preclude the Board from finding that the threshold probability is one in a million. Therefore, if the Board had based its conclusion about the threshold probability on the Standard Review Plan, then the conclusion itself would be premature. But it did not.

Rather, the Board agreed with PFS's argument that the Commission had already indicated its intention that the design bases for Part 72 facilities and the surface operations of a geologic repository be "comparable."³³ The Commission's statement of considerations in the design basis amendments to Part 60 suggested that the design bases for Part 72 facilities and the surface operations at the GROA should be the same.³⁴ In that statement, the Commission also articulated more generally its intention to "harmonize" Part 60 with Part 72.³⁵ Furthermore, throughout the statement of considerations in amending Part 60, the Commission referred to conforming various sections of Part 60 to their counterpart sections of Part 72.³⁶ Therefore, affirming the Board's decision is consistent with our past views on this subject.

Moreover, we find little basis to choose the threshold probability used in the Standard Review Plan for reactors. The proposed facility is not, of course, a reactor. Furthermore, NUREGs, such as the Standard Review Plan, like all guidance documents, are not legally binding regulations.³⁷ Where the NRC develops a guidance document to assist in compliance with applicable regulations, it is entitled to special weight.³⁸ But where a Staff guidance document was not even drafted for use in evaluating applications of the type under consideration, then the guidance is persuasive only insofar as it may bear on distinct questions. Here, for example, the NRC Staff has appropriately considered the formulas in the Standard Review Plan for calculating air crash probability, for that methodology pertains regardless of the type of facility at issue. But the Staff rightly refused to use the Standard Review Plan's overall 10^{-7} design basis standard — which the

³³ LBP-01-19, 53 NRC at 430-31, *citing* 61 Fed. Reg. at 64,262.

³⁴ 61 Fed. Reg. at 64,262.

³⁵ *Id.* at 64,265.

³⁶ *See, e.g., id.* at 64,264, considering section 60.130: "changes also provide consistency with the corresponding 'minimum' design criteria for an MRS, in part 72"; *id.* (regarding section 60.136: "The Commission adopts the basic [dose] provision of part 72 — namely a 0.05 Sv (5 rem) dose limit on or beyond the preclosure controlled area boundary"); *id.* at 64,265 ("The only other noteworthy deviation from Part 72" is that Part 60 refers to "Category 2 design basis events" while the corresponding section in Part 72 refers to "design basis accidents").

³⁷ *See, e.g., International Uranium (USA) Corp.* (Request for Materials License Amendment), CLI-00-1, 51 NRC 9, 19 (2000); *Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 149 (1995).

³⁸ *See, e.g., Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290 (1988); *Consumers Power Co.* (Big Rock Point Nuclear Plant), ALAB-725, 17 NRC 562, 568 (1983).

NRC developed for reactors, not for facilities like ISFSIs whose failure would not pose nearly the same radioactive consequences as a reactor failure.

Because the hazards associated with temporary storage of spent fuel differs significantly from the hazards associated with operating nuclear power plants and permanent geologic storage, the Commission has said that it will “not automatically apply all regulatory requirements to ISFSIs that it applies to other regulated activities.”³⁹ The Commission has previously recognized that the “public health and safety risks posed by ISFSI storage . . . are very different from the risks posed by the safe irradiation of the fuel assemblies in a commercial nuclear reactor, which requires the adequate protection of the public . . . in the conditions of high temperatures and pressures under which the reactor operates.”⁴⁰ This is because the danger presented by irradiated fuel “is largely determined by the presence of a driving force behind dispersion,” such as heat and pressure, neither of which is present in an ISFSI.⁴¹ Moreover, the radiological source term is lower at an ISFSI than at a reactor both because the spent fuel has decayed over time prior to placement in an ISFSI and because there are fewer fuel assemblies in an individual cask than in a reactor.⁴² Thus, the Board reasonably refused to employ the 10^{-7} reactor design standard, and instead set the standard at 10^{-6} .

III. CONCLUSION

On the basis of the foregoing, we conclude that the threshold probability for design basis events should be set at one in a million (1×10^{-6}). The Board’s ruling in LBP-01-19 is, therefore, affirmed. The hearing should proceed on the remaining factual issues the Board found in that order.

Commissioner Dicus did not join in this opinion. She would have sent the matter back to the Board for a factual determination whether the consequences of a potential accident at an ISFSI are more similar to those of an accident at a

³⁹ See Final Rule, Interim Storage of Spent Fuel in an Independent Spent Fuel Storage Installation at a Reactor Site; Site-Specific License to a Qualified Applicant, 60 Fed. Reg. 20,879, 20,883 (April 28, 1995) (response to public comments).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² We recognize that Utah has submitted a declaration in which it is claimed that a worst-case scenario resulting from an aircraft crash could result in doses that are significantly larger than those estimated in the bounding consequences analysis for Category 2 design basis events at a GROA. Compare 61 Fed. Reg. at 64,265 with Declaration of Dr. Marvin Resnikoff Regarding Material Facts in Dispute with Respect to Contention K, dated January 31, 2001, ¶ 16. However, the affidavit does not explain the input assumptions used to determine the dose, nor does it discuss the physical differences between a reactor and the GROA. Because any dose analysis is highly dependent on input assumptions and because the physical nature of the facilities suggests that the consequences of an accident at an ISFSI are far more similar to those that might result from an accident at a GROA than one at a reactor, the affidavit is not sufficiently probative. Therefore, Utah’s conclusions, without more, fail to raise a genuine issue of material fact. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (summary judgment is appropriate when evidence is “merely colorable” or is “not sufficiently probative”); *Advanced Medical Systems, Inc.*, CLI-93-22, 38 NRC 98, 102 & n.13 (1993).

GROA or those of an accident at a nuclear power reactor as a basis for setting the threshold probability.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of November 2001.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 70-7001
(Certificate GDP-1)

U.S. ENRICHMENT CORPORATION
(Paducah, Kentucky Gaseous
Diffusion Plant)

November 14, 2001

RULES OF PRACTICE: PETITION FOR REVIEW UNDER PART 76

Because paragraphs 76.45(d) and (e) of 10 C.F.R. both limit eligibility for review as of right of a certificate amendment to those persons “whose interest may be affected,” standing is a threshold issue.

RULES OF PRACTICE: PETITION FOR REVIEW UNDER PART 76

Petitioners under 10 C.F.R. § 76.45(d) bear the burden to allege facts sufficient to establish standing.

RULES OF PRACTICE: STANDING

To meet the Commission’s standing requirements, a person must show that the agency action at issue will cause the person injury in fact, and that the injury complained of is within the zone of interests protected by the statutes governing the proceeding.

RULES OF PRACTICE: STANDING

To establish injury in fact, a person must allege a concrete and particularized injury that is fairly traceable to the challenged agency action. A generalized grievance shared by a large class of citizens is not an injury in fact sufficient to support standing.

RULES OF PRACTICE: PETITION FOR REVIEW UNDER PART 76

The fact that a person submits comments on a proposed agency action and NRC Staff states it will consider those comments does not by itself mean that such persons have “an interest that may be affected” within the meaning of 10 C.F.R. § 76.45.

RULES OF PRACTICE: STANDING; ZONE OF INTERESTS PROTECTED BY AEA § 193(f)

The interest to be protected by AEA § 193(f) is a broad public interest in the maintenance of access to reliable and economical domestic enrichment services. It does not include the interest in continued employment of gaseous diffusion plant employees.

RULES OF PRACTICE: STANDING

Because the closure of the Portsmouth gaseous diffusion plant was not the consequence of any NRC regulatory requirement or direction, but was instead the consequence of a business judgment by USEC, Petitioners cannot show that agency action caused their injury and therefore lack standing.

REGULATIONS: INTERPRETATION OF 10 C.F.R. PART 76

The term “interest” as used in the Commission’s standing regulations does not encompass the economic interest of employees.

ATOMIC ENERGY ACT: INTERPRETATION OF SECTION 193(f)

According to the plain wording and legislative history of AEA § 193(f), reviews are not required at the time of recertification for a gaseous diffusion plant or in connection with other events that do not involve a change in control, such as upgrade amendments.

ATOMIC ENERGY ACT: INTERPRETATION OF SECTION 1701(c)

Section 1701(c)(4) does not charge NRC with a recurring obligation to consider whether USEC will continue to maintain a reliable and economical source of domestic enrichment services; rather, section 1701 requires periodic reviews of USEC operations with a focus on health, safety, and common defense and security.

ATOMIC ENERGY ACT: INTERPRETATION OF SECTION 193(f)

AEA § 193(f) provides for two related tests: (1) Is the certificate holder to be owned, controlled, or dominated by a foreign entity; and (2) if the certificate holder is not to be owned, controlled, or dominated by a foreign entity, is the certificate holder likely to be subject to influence by an entity, principally a foreign entity, that would be inimical to (a) the common defense and security, or (b) maintaining a domestic enrichment capability?

RULES OF PRACTICE: PRECEDENTIAL EFFECT OF NRC GUIDANCE DOCUMENTS

Positions taken in NRC guidance documents are not binding upon the Commission.

MEMORANDUM AND ORDER

I. INTRODUCTION

In this Decision we review, pursuant to 10 C.F.R. § 76.45(e), the June 14, 2001, Director's Decision issued by the Director, Office of Nuclear Materials Safety and Safeguards (Director's Decision, DD-01-3, 54 NRC 305 (2001)), denying the April 17, 2001, "Request for Director's Review of Staff Decision Certificate Amendment to U.S. Enrichment Corporation Paducah GDP" (Petition), filed pursuant to 10 C.F.R. § 76.45(d), on behalf of Daniel J. Minter, President of PACE Local 5-689 and members of PACE 5-689 (PACE or Petitioners). On July 16, 2001, the Petitioners, pursuant to 10 C.F.R. § 76.45(e), submitted an "Appeal to the Commission of Director's Decision" (Appeal) requesting the Commission's review of the Director's Decision. On July 31, 2001, the U.S. Enrichment Corporation (USEC) submitted, as permitted by 10 C.F.R. § 76.45(e)(2), its reply to PACE's request for a Commission review.

Following the submittal of USEC's reply, Petitioners on August 10, 2001, submitted a "Motion for Leave to Reply, Supplement, or in the Alternative, Discovery" (Motion). USEC responded to this motion on August 20, 2001. While the Commission's rules in 10 C.F.R. § 76.45 do not provide for filing the subject motion, the Commission has accepted and considered it, along with USEC's reply, in this proceeding.

II. BACKGROUND

This proceeding arises out of an amendment the NRC issued on March 19, 2001, to the Paducah Gaseous Diffusion Plant Certificate which provided the authority for USEC to increase the enrichment capacity of the Paducah Gaseous Diffusion Plant (GDP).¹ The Petitioners in their April petition requested that the amendment issued on March 19, 2001, be reconsidered and that the NRC conduct (1) the "reliable and economical" review asserted to be required by section 193(f) of the Atomic Energy Act of 1954, as amended (AEA),² the Commission's rules in 10 C.F.R. Part 76, and the public interest; and (2) make public the results of that review and seek comment on appropriate conditions that may be employed to bring USEC into compliance with the Atomic Energy Act (AEA).

In denying the petition, the Director noted that the Petitioners had made no attempt to explain why their interests were affected by the issuance of the amendment.³ There has been no showing that the Petitioners, who are members of the union at the Portsmouth GDP located in Piketon, Ohio, reside in the proximity of the Paducah plant located in Paducah, Kentucky, several hundreds of miles away from Piketon. Nonetheless, the Director considered several potential standing arguments that the Petitioners might have raised.

Petitioners might have asserted a general interest in maintaining reliable and economical domestic enrichment services. But the Director found that the Petitioners' interest would be a generalized grievance of broad public concern that would not be sufficient to confer standing under the Commission's adjudicatory

¹ Letter from Eric J. Leeds, Chief, Special Projects Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Materials Safety and Safeguards, to Morris Brown, Vice President Operations, USEC, entitled Paducah Gaseous Diffusion Plant Certificate Amendment Request: Higher Assay Upgrade Project (TAC No. L32415).

² Section 193(f) of the AEA provides

LIMITATION.—No license or certificate of compliance may be issued to the United States Enrichment Corporation or its successor under this section or sections 53, 63, or 1701, if the Commission determines that—

(1) the Corporation is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government; or

(2) the issuance of such a license or certificate of compliance would be inimical to—

(A) the common defense and security of the United States; or

(B) the maintenance of a reliable and economical domestic source of enrichment services.

³ Director's Decision, DD-01-3, 54 NRC at 309.

decisions.⁴ The Director also considered the Petitioners' interest in protecting employment positions at USEC's Portsmouth plant based on the Petitioners' assertion that there is a direct relationship between granting the amendment allowing higher enrichment at the Paducah plant and the decision to close the Portsmouth plant.⁵ However, the Director concluded that maintaining employment in the face of a plant closing is an economic interest that is not within the zone of interests protected by the AEA, and, apart from the zone-of-interests test, the NRC has not interpreted the term "interest" to encompass the economic interest of employees. Consequently, the Director denied the petition based on the Petitioners' failure to establish that they have the requisite interest to seek the Director's review under 10 C.F.R. § 76.45(d).⁶

While the Director denied the petition based on a lack of standing, the Director nonetheless proceeded to address the Petitioners' basic arguments, which are found in an analysis of section 193(f) of the AEA and the Commission's regulations in 10 C.F.R. Part 76. The Director concluded that

in making determinations required by section 193(f)(2)(B), [the NRC] should focus on the issue of entities, principally foreign entities, gaining control and undermining U.S. domestic enrichment capabilities, which would be inimical to the interest of the United States, and that this review need only be conducted at the time of a proposed certification of a new owner or other transfer of control meeting the threshold of 10 C.F.R. § 76.65. Such a review is not required and is not appropriate for an enrichment assay upgrade amendment to the Paducah certificate.⁷

The Petitioners in their Appeal stated that the Commission is obliged to conduct a "reliable and economical" review in consideration of the certificate amendment requested by USEC in this proceeding, to make the results of that review public, and to seek comment on appropriate conditions that may be employed to bring USEC into compliance with the law. In support of their position the Petitioners raised two basic issues: first, that the Petitioners have standing to participate in this proceeding; and second, that the failure to perform the "reliable and economical" review stated in section 193(f) of the AEA is unlawful.

III. ANALYSIS

A. Standing

Pursuant to 10 C.F.R. § 76.45(d), USEC or "any person whose interest may be affected," may file a petition requesting the Director of the Office of Nuclear

⁴ *Id.* at 308-09.

⁵ *Id.* at 309-10.

⁶ *Id.* at 310.

⁷ *Id.* at 324.

Materials Safety and Safeguards (NMSS) to review an NRC Staff determination on an amendment application. Similarly, 10 C.F.R. § 76.45(e) provides that USEC or “any person whose interest may be affected and who filed a petition for review or filed a response to a petition for review under § 76.45(d), may file a petition requesting the Commission’s review of a Director’s decision.” Thus, both paragraphs 76.45(d) and (e) limit eligibility for review as of right of a certificate amendment to those persons “whose interest may be affected.” Thus, Petitioners’ standing is a threshold issue.

The Commission has previously addressed the issue of standing in a Part 76 matter, indicating that for Part 76 proceedings petitioners should look to the Commission’s adjudicatory decisions on standing. *U.S. Enrichment Corp.* (Paducah, Kentucky, and Piketon, Ohio), CLI-96-12, 44 NRC 231, 236 (1996), citing *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115-17 (1995). In that case, which involved a request for review of a Director’s decision on issuance of a certificate as permitted by 10 C.F.R. § 76.62(c),⁸ the Commission accepted the petitioners as “interested persons” despite a failure to meet the “obligation to explain their ‘interested person’ status.” The Commission took this position because petitioners were appearing *pro se* and this was the first instance the Commission had considered petitions filed under Part 76. *Id.* However, the Commission cautioned “that in future Part 76 certification decisions, it will expect Petitioners more specifically to explain their ‘interested person’ status.” *Id.*

In order to fulfill this obligation, “[p]etitioners bear the burden to allege facts sufficient to establish standing.”⁹ To meet the Commission’s standing requirements, a person must show that “(a) the action will cause ‘injury in fact,’ and (b) the injury is arguably within the ‘zone of interests’ protected by the statutes governing the proceeding.” *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). The person “must allege a concrete and particularized injury that is fairly traceable to the challenged action” *Georgia Tech*, CLI-95-12, 42 NRC at 115. A “‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens will not result in a distinct and palpable harm sufficient to support standing.” *Three Mile Island*, CLI-83-12, 18 NRC at 333; *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-27, 50 NRC 257, 263 n.5 (1999). *See also Warth v. Seldin*, 422 U.S. 490, 508 (1975). In order to assess whether an interest is within the “zone of interests” of a statute, it is necessary to “first discern the interests ‘arguably . . . to be protected’ by the statutory provision at

⁸The current petition is based on 10 C.F.R. § 76.45. However, the Commission’s interpretation of section 76.62(c) is directly applicable as its language is identical to section 76.45(d) and (e) in that it also limits eligibility for review to those persons “whose interest may be affected.”

⁹*Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000).

issue,” and “then inquire whether the plaintiff’s interests affected by the agency action are among them.” *National Credit Union Administration v. First National Bank*, 522 U.S. 479, 492 (1998).

The Petitioners contend that the Commission has already granted them standing because PACE provided comments to the Staff on the proposed amendment and the Staff stated that it would consider PACE’s comments in its review. The Staff routinely considers information from a variety of sources in making a decision and frequently acknowledges such comments. However, the fact that a person submits comments that the Staff stated that it would consider does not by itself mean that such persons have “an interest that may be affected” within the meaning of section 76.45. Such comments could reflect merely a “generalized interest” that is not a “concrete and particularized injury” within the zone of interests of the AEA.

The Petitioners, on appeal, contend that there are multiple and substantial bases for their participation in this matter.¹⁰ Specifically, Petitioners argue that their interest is within the zone of interests of the AEA because:

- 1) the statutory condition that the GDPs continue to operate was, as recognized by the Administration, USEC, and by contractual commitment between USEC and the United States, one to which PACE members are a beneficiary;
- 2) USEC’s closing of the Portsmouth Plant, to which the Paducah upgrade is allegedly linked, is violative of rights and interests that flow to PACE and its members under the Privatization Act, and the contractual and further commitments thereunder;
- 3) Section 3161 of the FY 1993 Defense Authorization Act, as embodied in section 3110 of the 1996 Privatization Act, further recognizes the linked interests of PACE members and the Nation in the weapons complex experience and expertise of Cold War Veterans.

Appeal at 12. In light of these interests, Petitioners contend that the Director was wrong in applying past precedents to conclude that the employment interests of PACE’s members associated with the closing of the Portsmouth plant were outside the zone of interests of the AEA.

In discerning the interests arguably to be protected by section 193(f), we have looked to the words of the statute and its legislative history. As we understand our statutory mandate, NRC is to be concerned with ownership and control of the GDPs. Section 193(f) in its broadest reading is to provide for domestic enrichment services and addresses findings that the Commission shall make in issuing certificates. NRC’s role in this area is to provide assurance that the certificates are not being issued or transferred to an entity that will undermine “the maintenance of a reliable and economical source of domestic enrichment

¹⁰ Appeal at 5-13.

services.” The legislative history for section 193(f),¹¹ as well as the Privatization Act as whole,¹² makes it clear that the interest in reliable and economical domestic enrichment services is a broad public interest. Providing for a domestic source of enrichment services protects the public interest by providing consumers of enrichment services access to domestic enrichment. In our view, that is the interest intended to be protected by section 193(f).

Thus, while PACE may have suffered an injury because of the actions of USEC, the question for standing purposes is whether the agency action caused an injury to PACE arguably to be protected by section 193(f) of the AEA. The Commission accepts for purposes of resolving the standing question — specifically, of determining whether the Petitioners’ interests are within the zone of interests to be protected by the AEA — that there are provisions in the Privatization Act that address the interests of PACE,¹³ that USEC made commitments to continue the operation of the GDPs,¹⁴ and that Congress intended that the privatization process would provide for maintaining a reliable and economical domestic source of enrichment services.¹⁵ Nor does the Commission dispute that the upgrade amendment facilitated the ability of USEC to expand the operations of the Paducah plant, that issuance of the amendment provided USEC with the flexibility to make a decision to close the Portsmouth plant, and that such action may have impacted PACE. However, the closure of the Portsmouth plant was not a decision made by the NRC, nor was it a required outcome of the issuance of the amendment for Paducah. In fact, there was nothing in the amendment or NRC requirements that would have prohibited USEC from operating both GDPs following the amendment. The decision to close the Portsmouth plant was made by USEC as a business judgment; the closure was not the consequence of any NRC regulatory requirement or direction. In fact, NRC does not have authority over the business judgments that USEC made concerning the Portsmouth plant: the closure of a GDP is a matter that is not governed by statutes that the Commission

¹¹ The legislative history explains that section 193(f) was to address the potential of foreign control to the detriment of a domestic industry. S. Rep. No. 104-173, at 20 (1995). It states that the Commission can deny a certificate if issuing a certificate would be

Inimical to the maintenance of a *reliable and economical domestic source of enrichment services* due to the nature and extent of the ownership, control or domination of the Corporation by a foreign corporation or a foreign government or any other relevant factors or circumstances. This provision was added to guard against the possibility of a foreign uranium enrichment company acquiring the Corporation with the intent of operating it in a manner inconsistent with its maintenance as an ongoing uranium enrichment concern. [Emphasis in original.]

¹² Section 3103 of the Privatization Act, 42 U.S.C. § 2297h-1, among other things, required the privatization to provide for the “protection of the *public interest* in maintaining a reliable and economical domestic source of uranium . . . enrichment . . . services” (Emphasis added.)

¹³ See, e.g., section 3110 (Employee Protections), 42 U.S.C. § 2297h-8.

¹⁴ Agreement Regarding Post-Closing Conduct, signed July 14, 1998. However, contrary to Petitioners’ statements in their appeal, section 1(c) of this agreement provides for circumstances when the plant can cease operation prior to the end of 2004. See also section 3110(a)(5), 42 U.S.C. § 2297h-8(a)(5) (contemplating plant closing).

¹⁵ Sections 3103(a) and 3104(b), 42 U.S.C. § 2297h-1 and -2.

is charged with implementing.¹⁶ Thus, any injury suffered by PACE was not a direct result of the Commission's actions.

The Petitioners also argue that the privatization provisions in the statutes and contractual agreements referenced by them, which are in their view intended to protect the interests of PACE's members, demonstrate that the interests protected by the statute include the employment interests of PACE. However, these provisions are implemented by executive agencies other than the Commission. The privatization provisions are too distant from and do not relate to the Commission responsibilities under section 193(f).

Air Courier Conference v. Postal Workers, 498 U.S. 517 (1991), illustrates the nexus that must be demonstrated between the Petitioners' interests and the statutory provisions at issue. In *Air Courier* the Supreme Court rejected the standing arguments that the employment interests of Postal Service employees were arguably within the zone of interests protected by a statute whose purpose was to increase the revenues of the Post Office and to ensure that postal services were provided in a manner consistent with the public interest. In that case, the Court recognized that portions of the Postal Reorganization Act (PRA) protected employment opportunities of postal workers, but that the provision of the PRA at issue in the case was not designed to protect postal employment or future job opportunities; rather, they were intended to serve the nation as a whole. *Id.* at 528. The Court concluded that "it stretched the zone-of-interest test too far" to say that because a person was protected under one portion of the PRA, the person can challenge any other portion of it. *Id.* at 530.

Like the provisions that protected the employment interest of the postal workers in *Air Courier Conference*, the privatization provisions cited by Petitioners do not expand the zone of interests to be protected by section 193(f) to include the employment interests of the Petitioners. To the extent that the Petitioners' interests would be protected by a section 193(f) decision, they would be "incidental beneficiaries" of the decisionmaking. *National Credit Union* at 494 n.7.¹⁷

While aspects of the Privatization Act may benefit the Petitioners, their interest in decisions under section 193(f) is a generalized interest to preserve domestic

¹⁶ Unlike the provisions in section 108 of the AEA concerning facilities licensed under sections 103 and 104, the NRC does not have the authority to require USEC to continue to operate a GDP. Similarly, NRC does not have the authority to prevent USEC from choosing to cease operation. Thus, it is unnecessary for the Commission to resolve the differences in views concerning the circumstances that gave rise to the shutdown of the Portsmouth plant raised in the affidavits filed by USEC and the Petitioners in this proceeding. Declaration of J. Morris Brown and Declaration of Daniel J. Minter, and the August 1, 2001 Motion and USEC's reply to it. The appropriateness of the business judgments of USEC concerning the closure of the Portsmouth plant is not a matter within the Commission's jurisdiction.

¹⁷ Even if the Petitioners are more than merely incidental beneficiaries of the statute, that fact does not mean that the zone-of-interests test is satisfied. *American Federation of Government Employees, Local 2119 v. Cohen*, 171 F.3d 460 (7th Cir. 1999); *TAP Pharmaceuticals v. HHS*, 163 F.3d 199, 206 (4th Cir. 1998). In *TAP* the court held that TAP's interests in selling pharmaceuticals were outside the zone of interests of a statute that was intended to provide reasonable and necessary medical services even though TAP's revenues would be affected by the government's actions. *TAP*, 171 F.3d at 208.

capability shared in substantially equal measure by all or a large class of citizens.¹⁸ A generalized grievance of broad public concern is not a sufficient interest to confer standing under the Commission's adjudicatory decisions. *See Three Mile Island*, CLI-83-25, 18 NRC at 333.

Thus, the Petitioners have not provided a sufficient basis for the Commission to change its long-held view that maintaining employment in the face of a plant closing is an economic interest that is not within the zone of interests protected by provisions of the AEA, which the Commission is charged with implementing.¹⁹ Similarly, we are unpersuaded that we should change the view that the term "interest" as used in the Commission's standing regulations does not encompass the economic interests of employees.²⁰ The Commission affirms the Director's finding that the Petitioners have not demonstrated the requisite interest to seek review under 10 C.F.R. § 76.45(d). Consequently, the Commission concludes that the Petitioners have not demonstrated the requisite interest to seek review under 10 C.F.R. § 76.45(e).²¹

Accordingly, the Commission dismisses this appeal on the basis that the Petitioners have not met the standing requirements under 10 C.F.R. § 76.45(e). However, in light of the issues raised by the Petitioners concerning the Director's interpretation of section 193(f) of the AEA, the Commission will address PACE's principal assertions regarding the application of section 193(f) of the AEA.

B. Application of Section 193(f) of the Atomic Energy Act

The Petitioners make two main arguments. The Petitioners claim that the Director's Decision is:

¹⁸ In addressing standing, the Director noted that the Petitioners were members of the union at the Portsmouth plant and the amendment involved only the Paducah plant. The Petitioners argue that if the Commission focused on the company as a whole, and if the Commission were to agree with the Petitioners' reading of section 193(f), they would have standing. The Commission disagrees. The central issue is the interest to be protected by the statutory provision. As set out above, that interest is not the economic interest of the union, but the public interest in a domestic source of enrichment. Thus, the Petitioners' interest is a general one shared by members of the public at large.

¹⁹ The Commission in the past has found both the economic interests of a competitor and of employees in preserving employment to be outside the statutes governing the NRC. *Cf. Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 8-17 (1998), *aff'd*, *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999) (holding that an entity's competitive interests do not bring it within the zone of interests of either the AEA or the National Environmental Policy Act (NEPA) for the purpose of policing a competitor's compliance with licensing requirements); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992) (holding that the loss of employment does not fall within the zone of interests protected by NEPA).

²⁰ *Envirocare of Utah v. NRC*, 194 F.3d 72 (D.C. Cir. 1999).

²¹ The Commission notes that PACE has participated in Freedom of Information Act litigation involving the GDPs. *Oil, Chemical & Atomic Workers v. DOE*, 141 F. Supp.2d 1 (D.D.C. 2001). In that case the Court stated that PACE's participation served the public interest. However, such participation in one proceeding does not automatically grant standing in another proceeding based on a different statute. Thus, the extent of participation of USEC in that litigation, which was addressed in the August 1, 2001 motion of the Petitioners and responded to by USEC on August 17, 2001, is not relevant to this proceeding.

- (1) at odds with the plain meaning of section 193(f)(2)(B) of the AEA and its legislative intent, and
- (2) contradicts contemporaneous interpretations of section 193(f)(2)(B).

These issues were previously resolved by the Director on the basis of a detailed analysis of section 193(f)(2)(B) and its legislative history.²² The Director reasoned that the plain words of the statute addressed issuance of certificates and did not consider amendments. The Director stated

that in making determinations required by section 193(f)(2)(B), [the Staff] should focus on the issue of entities, principally foreign entities, gaining control and undermining U.S. domestic enrichment capabilities, which would be inimical to the interest of the United States, and that this review need only be conducted at the time of a proposed certification of a new owner or other transfer of control meeting the threshold of 10 C.F.R. § 76.65. Such a review is not required and is not appropriate for an enrichment assay upgrade amendment to the Paducah certificate.²³

The Commission is unpersuaded by the various arguments that the Petitioners have made to challenge this finding. For the most part, the Petitioners have repeated the same arguments that were raised before the Director and addressed in his Decision and, thus, the Commission need not address them in any detail here. Nevertheless, we comment on several points raised by the Petitioners.

1. Section 193(f) Is Not Applied to the Issuance of an Amendment

The Director concluded that the review required by section 193(f) does not apply to the issuance of an amendment in the absence of a change in ownership or control (which would require issuance of a new certificate) and does not create a recurring obligation. The Petitioners disagree, contending that NRC has a continuing obligation “to oversee USEC adherence to a course that will ensure a reliable and economical domestic source of enrichment services.”²⁴ But Petitioners provide no authority for their position other than an assertion of broad public interest. Section 193(f) explicitly states “[n]o license or certificate of compliance may be issued” There is nothing in the statute or the legislative history to suggest that section 193(f) should be applied in situations other than certificate issuances. The Director showed that the section 193(f) reviews are

²² Petitioners state that the Director’s conclusions are “based on a still secret analysis.” Appeal at 4; Petition at 22. Presumably, Petitioners are referring to advice of counsel that was referenced in correspondence from Chairman Meserve to Representative Tom Bliley, Chairman, Committee on Commerce, United States House of Representatives, dated September 11, 2000. The Director’s Decision speaks for itself and the basis for the decision is set forth therein. Similarly, this Decision speaks for itself.

²³ Director’s Decision, DD-01-3, 54 NRC at 324.

²⁴ Appeal at 17. The Commission notes that the amendment increased the capability of USEC to provide domestic enrichment services. As described above, it was USEC’s actions based on its business judgment, over which NRC had no control, that caused the Portsmouth GDP to cease operation.

not required at the time of recertifications for a GDP or in connection with other events that do not involve a change in control, such as the upgrade amendment at issue in this matter, and we agree with that conclusion.²⁵

In addition to the language of section 193(f) itself, we find it persuasive that the AEA establishes in section 1701(c)(4) a requirement for the Commission to make periodic findings concerning the status of the operation of the GDPs. Congress was clearly aware of this provision of the AEA at the time of enactment of section 193(f) because it amended this section as part of the USEC Privatization Act.²⁶ The section specifically states that the NRC is to focus on health, safety, and the common defense and security. The NRC was not charged with a recurring obligation to consider whether USEC was continuing to maintain a reliable and economical source of domestic enrichment services. The absence of such a provision as part of the NRC's recurring obligation is clear evidence that the NRC was not expected to have a continuing obligation to consider the vitality of the domestic enrichment industry.²⁷

Moreover, the Petitioners' interpretation of the statute would essentially place NRC in the position of being a promoter of domestic enrichment capability by having NRC oversee "adherence to a course that will ensure a reliable and economical domestic source of enrichment services." Such a role is inconsistent with the role of a safety regulator. It would place the NRC in the position of having to balance the need for safety actions against preserving economic viability. In fact, the very purpose of establishing NRC was to separate the promotional and development functions of the Atomic Energy Commission from the oversight and licensing functions.²⁸ We believe clear legislative intent is necessary before we would interpret section 193(f) as requiring such a significant departure from the singular regulatory role of the NRC. There is no such intent here.

2. The Focus of Section 193(f) Is Principally Foreign Entities

The Petitioners argue that the Director ignored the plain language of the statute in not finding that the "reliable and economical" provision of section 193(f)(2)(B)

²⁵ Director's Decision, DD-01-3, 54 NRC at 317-19. The Petitioners also argued that a different result was warranted here as the subject amendment was not "routine." Appeal at 14-15. However, regardless of the uniqueness, complexity, or importance of an amendment, the central issue for application of section 193(f) is whether the amendment involves a transfer of control. There was no transfer of control associated with the subject amendment.

²⁶ The frequency of recertification in section 1701(b)(2) was amended by section 3116(b)(3) of Pub. L. No. 104-134.

²⁷ The Congress also did not give the Commission the authority to require USEC or its successors to continue to operate the GDPs to provide for a domestic enrichment source. This is in contrast to section 108 of the Atomic Energy Act, which states that the Commission, if Congress declares a state of war or national emergency, has the authority to require production and utilization facilities to continue to operate if necessary for the common defense and security.

²⁸ Section 2(a) of the Energy Reorganization Act of 1974, as amended. It is clear that NRC was established to address "the criticism of the mixture of development and regulatory functions within the AEC." H.R. Rep. No. 93-707, at 4 (1973) and S. Rep. No. 93-980, at 2 (1974).

is independent of the “foreign ownership” test of section 193(f)(2). The Director confronted the fact that in the final language of section 193(f)(2), the concept of foreign control was separated from the provision on maintaining a domestic source of enrichment services; he did not ignore it.²⁹ As noted in the Decision, the legislative history explains that the NRC may deny a license or certificate of compliance if issuance of a license or certificate would be

inimical to the maintenance of a *reliable and economical domestic source of enrichment services* due to the nature and extent of the ownership, control or domination of the Corporation by a foreign corporation or a foreign government or any other relevant factors or circumstances.³⁰

Petitioners’ construction not only is inconsistent with the legislative history, but also would have the NRC delving into matters of economic viability which are unrelated to NRC’s traditional role as a regulator of radiological health and safety, and the common defense and security.³¹ In our view, the Director appropriately considered the language in section 193(f), its latent ambiguities, its legislative history, and the regulatory scheme established under the AEA in construing the statute.³² He properly concluded that section 193(f) provides for two related tests:

(1) Is the certificate holder to be owned, controlled, or dominated by a foreign entity; and (2) if the certificate holder is not to be owned, controlled, or dominated by a foreign entity, is the certificate holder likely to be subject to influence by an entity, principally a foreign entity, that would be inimical to (a) the common defense and security or (b) maintaining a domestic enrichment capability?³³

3. The Commission Is Not Bound by the Draft SRP

The Petitioners take issue with the Director’s reliance on *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) and

²⁹ Director’s Decision, DD-01-3, 54 NRC at 320.

³⁰ S. Rep. No. 104-173, at 20 (1995). See also the report of the House Commerce Committee on its version of the Privatization Act which stated that

uranium enrichment activities will be subject to the same foreign ownership limitations as any other nuclear production or utilization facility. It is expected that any interpretation of the terms in new subsection (f) would be consistent with the historical administrative interpretation of similar language in sections 103, 104, and 1502(a) of the AEA.

H.R. Rep. No. 104-86, at 20 (1995). While the language of the House bill was different than the Senate’s, it reflects the focus on foreign involvement.

³¹ Looking to the legislative intent is warranted when a statute appears to depart from the normal regulatory scheme. See *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 24 (1976). See also *United States v. American Trucking Association*, 310 U.S. 534, 543-44 (1940).

³² Director’s Decision, DD-01-3, 54 NRC at 320-22. See also note 31. In *Train*, the Court noted that “when aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination.’” *Train*, 426 U.S. at 10. See also *Ann v. United States*, 205 F.3d 1168, 1175 (9th Cir. 2000); *Owen v. Magaw*, 122 F.3d 1350, 1354 (10th Cir. 1997).

³³ Director’s Decision, DD-01-3, 54 NRC at 320.

Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999), in light of the recent Supreme Court decision in *United States v. Mead*, ___ U.S. ___, 121 S. Ct. 2164, 2001 WL 672258 (June 18, 2001). The *Mead* decision, which focused on the scope of deference offered by courts to agency interpretations was issued 3 days after the issuance of the Director's decision.³⁴

The Director in addressing the authority to reconsider the position reflected in the Staff's draft Standard Review Plan (SRP), cited *Chevron* and *Wolf Creek* for the proposition that agencies can change their positions. The *Mead* case did not undermine the reality, reflected in *Chevron*, that agency interpretations are not carved in stone, but rather must be subject to reevaluation of their wisdom on a continuing basis.³⁵ The Petitioners would have the Commission bound to apply a draft Staff SRP that had never been applied to an amendment.³⁶ The Director fully addressed the basis for the NRC changing its position from the draft SRP and why the Commission was not bound by the draft SRP.³⁷

IV. CONCLUSION AND ORDER

The Commission has given careful consideration to the Petitioners' arguments and USEC's responses. The Commission agrees with the Director's determination that Petitioners have not demonstrated the requisite interest to seek review under 10 C.F.R. § 76.45 as a matter of right. Further, the Director has fully considered the statutory language and the relevant legislative history. As explained above, the Commission has adopted the Director's Decision and analysis as the appropriate interpretation of section 193(f)(2)(B) of the AEA. The review defined by section 193(f)(2)(B) is not required and is not appropriate for an enrichment assay upgrade amendment to the Paducah certificate.

The public policy issues raised by Petitioners are more appropriately raised before the Congress or before executive agencies and departments that report to the President.

³⁴The issue in *Mead* was the deference due to one tariff classification ruling out of more than 10,000 issued a year by Customs' headquarters and by 46 different Customs' offices. The Court held that such rulings did not have the force of law and were not entitled to deference under *Chevron*, but were entitled to respect based on their individual "power to persuade."

³⁵*Chevron*, 467 U.S. at 863-64.

³⁶The Petitioners, citing SECY-00-0181, August 24, 2000, noted that the Staff did perform a financial analysis pursuant to the draft SRP following USEC's credit downgrading. However, as the Director noted, it was the result of the change in credit rating that led to the reconsideration of the position in the draft SRP and resulted in the views the Commission provided its congressional oversight committees in letters dated September 11, 2000.

³⁷Director's Decision, DD-01-3, 54 NRC at 323-24. See also *International Uranium (USA) Corp.* (Request for Materials License Amendment), CLI-00-1, 51 NRC 9, 19 (2000) (where the Commission held it was not bound by NRC's Alternative Feed Guidance): "Like NRC NUREGs and Regulatory Guides, NRC Guidance documents are routine agency policy pronouncements that do not carry the binding effect of regulations." *Id.*

For the reasons stated in this Decision, the Commission denies the Appeal of the Petitioners submitted pursuant to 10 C.F.R. § 76.45(e) and adopts the June 14, 2001, Director's Decision.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of November 2001.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alan S. Rosenthal, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of

Docket No. 40-8838-MLA
(ASLBP No. 00-776-04-MLA)

U.S. ARMY
(Jefferson Proving Ground Site)

November 7, 2001

RULES OF PRACTICE: MOOTNESS

The withdrawal of a license amendment application will render any established proceeding on that application moot. However, the rejection by the NRC Staff of a license termination plan submitted in connection with the application will not moot the proceeding if, notwithstanding that rejection, the application remains in existence.

RULES OF PRACTICE: NEED TO REESTABLISH STANDING

An intervenor who has demonstrated its standing to challenge a license amendment application need not reestablish that standing should the license termination plan submitted with the application be withdrawn and an entirely new and different plan ultimately substituted for it. In such circumstances, to obtain a hearing on the application as thus altered, the intervenor need demonstrate merely a concern germane to the new plan.

MEMORANDUM AND ORDER
(Granting Request To Hold Proceeding in Abeyance)

Because of recent unanticipated developments, it is manifest that there are currently no issues susceptible of adjudication in this materials license amendment proceeding. Not quite as clear is what should be done with the proceeding at this juncture given those developments. Intervenor Save the Valley, Inc. (STV), has asked that the proceeding be held in abeyance until there are once again substantive issues possibly requiring adjudicatory consideration. For its part, the Licensee Department of the Army (Army) is agreeable to that course on certain conditions. Having been invited to submit its views on the matter (although it is not otherwise participating in the proceeding), the NRC Staff takes a different position. It maintains that, in the totality of the present circumstances, I should dismiss the proceeding.

Because there apparently is no record of a like situation having arisen in the past, it is not surprising that my research and that of the parties has failed to uncover anything in the Commission's jurisprudence that might shed light on the appropriate disposition of the question at hand. Moreover, there seemingly is nothing in the Rules of Practice pertaining to Subpart L proceedings such as the one at bar that might provide some guidance. In short, the waters are entirely uncharted. That being so, my task is to determine what course seems to make the most sense, all relevant factors taken into consideration.

On the basis of what follows, I conclude that, although the Staff's view might not be entirely devoid of merit, there is greater reason for holding the proceeding in abeyance rather than terminating it. Accordingly, the STV request seeking that relief, not opposed by the Army, is granted.

I. BACKGROUND

A. This proceeding had its genesis in the notice of opportunity for hearing that the Commission published in December 1999 in connection with the Army's application for an amendment to its materials license (SUB-1435) that would authorize the decommissioning of its Jefferson Proving Ground (JPG) site located in Madison, Indiana. 64 Fed. Reg. 70,294 (Dec. 16, 1999). As the notice explained, under the aegis of that license the Army had engaged in activities on the site that had produced an accumulation thereon of depleted uranium (DU) munitions. What the Army sought was authorization, in accordance with governing Commission regulations, for the restricted release of the site.

The notice went on to refer to a site decommissioning plan that the Army had supplied to the Commission. On administrative review, that plan had been found acceptable from the standpoint of allowing the commencement of a

technical review. Before the sought amendment could be approved, however, the Commission would have to make the findings required by statute and regulation, to be documented in a Safety Evaluation Report and an Environmental Assessment. *Ibid.*

In response to this notice, STV filed a timely hearing request. That request was granted in LBP-00-9, 51 NRC 159 (2000) on a determination that STV had established, as required by 10 C.F.R. § 2.1205(h), both its standing and the existence of an area of concern that was germane to the subject matter of the proceeding. In the course of reaching that conclusion, LBP-00-9 noted that the Army's answer to the hearing request had pointed to "a distinct possibility that the current decommissioning plan will undergo revision in material respects" and had explicitly requested "that further proceedings be held in abeyance pending the outcome of its anticipated further interaction with the NRC Staff with regard to [that] plan." *Id.* at 161. On that score, the decision went on to observe that, insofar as concerned the need for and timing of further adjudicatory action, the situation was "quite fluid." *Ibid.*

In point of fact, following the grant of the hearing request in April 2000, nothing transpired on the adjudicatory front apart from the submission by the Army of quarterly status reports that reflected, among other things, that it had submitted its decommissioning plan to STV for its consideration and had received comments from the Intervenor.¹ Then, in June 2001, the Army took the unexpected step that triggered the issue now at hand. It furnished the NRC with an entirely new plan, which it characterized as a "final decommissioning/license termination plan" (LTP). According to the June 27 letter that accompanied its transmission, this LTP was being submitted for the purpose of facilitating the termination of the NRC license to which the amendment application referred. The letter went on to note that, as had been previously discussed with the NRC Staff, the Army proposed to submit the supporting Environmental Report by the end of October 2001.

As it turned out, the June 2001 LTP received a very cool reception from the NRC Staff. Although, as noted in the notice of opportunity for hearing, the 1999 site decommissioning plan had obtained the acceptance on administrative review that generally precedes the commencement of a technical review, in a September 27 letter the Army was informed that such acceptance was being withheld in the case of the new LTP. According to the NRC official who signed the letter, the Staff had "noted a number of deficiencies [in the LTP] that must be corrected before the staff can initiate a technical review." (In an attachment to the letter, seven such deficiencies were summarized.) The letter went on to state that it

¹In a June 1, 2000 memorandum, memorializing a telephone status conference, I explicitly directed (at 2) that the proceeding be "held in abeyance until it appears appropriate to move forward." That directive did not, however, forecast the developments a year later that now require consideration.

was anticipated that the environmental report that the Army was to supply in late October would “answer some of the questions raised during the acceptance review.” It then expressed the Staff’s desire to discuss the deficiencies with the Army in order both to ensure that the Licensee understood the NRC concerns and “to develop a schedule for resubmission” of the LTP.

The September 27 letter was followed on October 17 by another communication signed by the same Staff official. It provided the Army with formal notification that the Staff considered the LTP to supercede the previously furnished site decommissioning plan, with the consequence that the latter would receive no further review.

B. On September 13, STV filed its request that the proceeding be held in abeyance. Coming before the Staff had announced the results of its administrative review of the LTP, the request was essentially founded on the fact that that plan was “very different” from the earlier site decommissioning plan that had prompted the STV decision to seek a hearing. Further, STV noted that it had received an assurance that the NRC Staff would solicit public comment on the LTP and, in a *Federal Register* notice, provide an opportunity to seek a hearing on it. In these circumstances, STV thought it inappropriate to pursue a hearing on the earlier plan; rather, the Intervenor thought it best that its granted hearing request be put on the shelf to “conform to the new timeline to be submitted by the NRC staff.”

While not objecting to holding the proceeding in abeyance, in its September 25 response to the STV request for that relief the Army noted that its agreement was conditioned upon STV setting forth at the appropriate time its areas of concern with regard to the LTP and the Army then having an opportunity to respond. The NRC Staff, however, saw the matter quite differently in an October 1 filing.

Appending to that filing the September 27 letter to the Army summarized above, the Staff maintained that, given the rejection of the LTP, the proceeding initiated by the STV hearing request should be deemed moot. The Staff did acknowledge (at 3) that the Army might endeavor to correct or to explain the perceived deficiencies in the LTP and then to resubmit a revised version of that plan. In the Staff’s view, however, until that should occur “there can be no case or controversy before the Commission.” *Ibid.* Given the current state of affairs, the Staff concluded, “there can be no proceeding to consider the adequacy of” any site decommissioning plan.

On October 18, a telephone conference was held by Judge Murphy and me with counsel and other representatives of the parties and the Staff for the purpose of further exploring the issues raised by the STV abeyance request and the Staff’s response to it. While not retreating from the position taken in that response, Staff counsel did recognize that it was very likely that the Army would be submitting revisions to the LTP to accomplish the ultimate objective that it had in seeking the license amendment. Indeed, she observed, “the staff will be meeting with [the

Army] to discuss the particulars of what needs to be put into the plan.” Tr. 27. Moreover, counsel acknowledged that holding the proceeding in abeyance would not disadvantage or prejudice the Staff as a practical matter. In that connection, she agreed that, if for some reason the Army were to elect not to submit a new plan, upon that fact being brought to the Presiding Officer’s attention the proceeding could be then terminated. Tr. 27-28. On that subject, Army counsel stated that it was his client’s intent “at this juncture to proceed and to accomplish the goal that [it has] been pursuing here all along.” Tr. 28. Although an abandonment of the endeavor might be an option, he was “hard pressed to think of a circumstance” in which that option might be chosen. *Ibid.*

II. ANALYSIS

A. Central to the position taken by the NRC Staff is the premise that, because there has been a summary rejection of the LTP, the proceeding is necessarily moot with the consequence that there is no longer an existing case or controversy before me. (As the Army was advised in the October 17 letter, the Staff regards the previously submitted site decommissioning plan to have been superceded by the LTP and, therefore, no longer under its review.) Should that premise survive scrutiny, it might well follow that a dismissal of the proceeding would be mandated. For there is assuredly no reason to continue to maintain on the docket a matter that has become entirely academic by reason of supervening events.² Accordingly, the first task is to determine whether the premise passes muster.

Had the Army chosen to withdraw its license amendment application upon receiving word of the Staff’s rejection of the LTP for technical review, there would be little room for doubt that the proceeding — established for the sole purpose of considering whether that application should be granted — would have become moot. Similarly, assuming without deciding that the Staff could have chosen to deny the application upon determining that the successor LTP was deficient, had that option been selected the granted hearing request seemingly would have become academic. As we have seen, however, the Army has not withdrawn its application and, insofar as the record before me reflects, the Staff has not formally denied it.

To the contrary, for all that now appears it is safe to assume that the Army has every intention of going forward with the license amendment application by endeavoring to cure the deficiencies that the Staff has discerned in the LTP — indeed, as seen, its counsel so represented during the October 18 telephone

²This is so notwithstanding that the restriction placed on the federal judiciary by the “case or controversy” clause in article III of the United States Constitution does not govern our jurisdiction. See *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 93 (1983).

conference. This is scarcely surprising. The application was obviously motivated by the Army's desire to settle the matter of the long-term treatment to be accorded to the DU munitions now accumulated on the JPG site. There is no reason to believe that that desire was diminished to any extent by the Staff's determination that, in its present form, the submitted LTP has fatal flaws. Rather, there is every reason to think that the Army regards its current task to be the remedying of those discerned flaws.

Insofar as the Staff is concerned, its September 27 letter reflects with clarity not only an assumption that the Army will move forward to rectify the existing LTP efficiencies, but also a Staff desire to meet with the Licensee to facilitate the process — including the development of “a schedule for resubmission” of the LTP. In short, far from considering the license amendment application to have failed, the Staff is actively involved in the matter of the further development of its necessary underpinning — an acceptable (to the Staff at least) site decommissioning (i.e., license termination) plan.

In these circumstances, from the standpoint of mootness, it does not appear that analytically there is a material difference between the current seemingly novel situation and a more typical one in which there is but one submitted plan that must undergo substantial revision at the Staff's insistence before an adjudicatory hearing on it might be held. If, for example, the Army had stayed with the plan submitted in 1999 but was now confronted with the need to modify it substantially in order to meet Staff concerns, would there be any possible basis for a claim of mootness? I would think not.

In that regard, we have seen that from the very beginning of this proceeding there was a recognition by the Army, noted in the decision granting the hearing request, that the plan then on the table might undergo significant revision along the way. In fact, to repeat, that recognition had led the Army to ask in its response to the STV hearing request that further proceedings be held in abeyance pending its further interaction with the Staff with regard to that plan. Although it might not have been then foreseen that the interaction with the Staff would extend to a substitute plan that the Army would elect to submit, it is difficult to see why that fortuitous circumstance should be accorded operative importance.

In sum, I conclude that the continued existence of the license amendment application,³ coupled with the likelihood that a revised LTP will surface that might adequately address the Staff's current concerns and thus be ripe for adjudicatory

³ In an October 29 letter submitted by the Staff following the telephone conference for the purpose of summarizing its position, its counsel maintains that, because the Staff has discontinued its review of the site decommissioning plan submitted with the license amendment application, “the license amendment under consideration has become moot and is no longer pending before it.” By “license amendment” counsel apparently has reference to the plan rather than to the license amendment application itself. At least insofar as the information at hand reflects, the Staff did not require the Army to file a new and distinct application when it submitted the LTP last June and likewise presumably will not require a new and distinct application in connection with any revised LTP that might come to

(Continued)

consideration, precludes a dismissal of this proceeding on the ground of mootness. What remains to be determined is whether there is some other justification for terminating the proceeding given the current state of affairs. I now turn to that question.

B. At the October 18 telephone conference, Staff counsel confirmed that, as she had previously informed STV's representative, a new notice of opportunity for hearing would be published in connection with the LTP before any adjudicatory proceedings were conducted on it. Tr. 18. As she noted, the Staff regards the LTP as being so different from its predecessor site decommissioning plan that the notice that had been issued in December 1999 did not adequately apprise the public of the content of what now might be considered. Given that intent, a dismissal of this proceeding would not foreclose STV from participation in any adjudicatory hearing on the LTP that might take place. It would, of course, be free to file a hearing request in response to the new notice.

The real question is not, however, whether it is necessary to keep this proceeding alive in order to ensure that STV will have an opportunity to challenge the LTP if not satisfied that, as revised in response to Staff objections, the plan meets its concerns. Rather, it is whether any useful purpose might be served by requiring that Intervenor in such circumstances to return to square one and to file a new hearing request in which it would be obligated to replot the entire ground covered in the hearing request granted 18 months ago in LBP-00-9.

If such a purpose exists, it is most elusive indeed. I can perceive no good reason for putting STV to the burden, light as it might turn out to be, of having to reestablish its standing to question an Army decommissioning plan (no matter how denominated) for the JPG site. Nor is there readily apparent cause for requiring it to do more than demonstrate that, as it had an area of concern that was germane to the 1999 site decommissioning plan, so too it has such an area of concern with regard to whatever version of the LTP might be cited in the new *Federal Register* notice.⁴

It need be added in this regard only that neither the Army nor the NRC Staff has claimed, let alone shown, that it would be prejudiced by retaining this proceeding in a state of suspended animation pending further developments respecting the LTP. Indeed, once again, it was the Army itself that at the very outset had successfully sought holding a hearing in abeyance pending the

the fore. Absent contrary indication, and here there is none, it is reasonable to assume that a license amendment application concerned with the decommissioning of a particular site is deemed to cover not only the specific plan that accompanied it but, as well, any revisions to that plan or substitute plans that might surface during the consideration of what the decommissioning effort might require.

⁴ Although I need not reach them here, the approach taken by the NRC Staff in this matter raises a number of unanswered questions that might prove of procedural significance in another case. One such question relates to the circumstances in which the Staff is justified in concluding that a new hearing notice is required despite the fact that it has chosen to leave intact the license amendment application that was the subject of the prior notice.

outcome of the interaction between it and the Staff regarding the plan for JPG site decommissioning.

For the foregoing reasons, the STV request to hold in abeyance further proceedings in this cause is hereby *granted* subject to the following conditions.⁵

1. Pending further order of the Presiding Officer, the Army shall continue to furnish quarterly status reports, the next one to be due at the end of December 2001. Should the license amendment application be withdrawn or abandoned, that fact is to be reported immediately by the Army.

2. In the event that the Commission should publish in the *Federal Register* a notice of opportunity for hearing in connection with the LTP or some successor JPG site decommissioning plan, within thirty (30) days of that publication STV shall file with the Presiding Officer, and serve upon the Army, a statement specifying its area(s) of concern, if any, relative to the plan in question.

3. Within 10 days of its receipt of the STV statement outlining its areas of concern regarding the new plan, the Army may file a response confined to the question of whether a germane area of concern has been adequately identified in the statement.

It is so ORDERED.

BY THE PRESIDING OFFICER⁶

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 7, 2001

⁵In actuality, the grant of the request has the effect of *continuing* the suspension of activity in the proceeding that had been decreed in June 2000. *See supra* note 1.

⁶Copies of this Memorandum and Order were sent this date by Internet electronic mail transmission to the representative of STV, counsel for the Army, and the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Presiding Officer
Dr. Richard F. Cole, Special Assistant

In the Matter of

**Docket Nos. 40-3453-MLA-4
40-3453-MLA-5
(ASLBP Nos. 99-763-05-MLA
00-781-07-MLA)
(Amendment of License
Condition (LC) 55 B(2),
Source Material
License SUA-17)**

**MOAB MILL RECLAMATION TRUST
(formerly ATLAS CORPORATION)
(Moab, Utah Facility)**

November 15, 2001

In two consolidated proceedings involving the remediation and decommissioning of the Moab Mills tailings site, the Presiding Officer terminates the proceedings as a result of transfer of jurisdiction over the site, effective October 30, 2001, to the Department of Energy, in accordance with the provisions of the Floyd D. Spence National Defense Authorization Act (Pub. L. No. 106-398).

**MEMORANDUM AND ORDER
(Terminating Proceedings)**

By letter dated November 1, 2001, which transmitted copies of a letter dated October 25, 2001, from the NRC Staff to the Trustee of the Moab Mill Reclamation

Trust, the NRC Staff informed the Presiding Officer and his Special Assistant for these proceedings, as well as all parties, that, as required by the Floyd D. Spence National Defense Authorization Act (Pub. L. No. 106-398), which directed that the site be transferred to the U.S. Department of Energy no later than October 30, 2001, the materials license under review in these consolidated proceedings has been terminated, effective October 30, 2001. A further description of the provisions of Pub. L. No. 106-398 appears in my Memorandum and Order (Motion and Supplement to Motion for Prompt Relief; Alleged Improper Contacts), dated June 27, 2001 (unpublished), and in my Memorandum and Order (Denying Motion for Reconsideration), dated August 10, 2001 (unpublished).

Accordingly, since NRC no longer has jurisdiction to direct remediation of the site in question, these proceedings are hereby *terminated*. Efforts of the Intervenor, Ms. Sarah Fields, to participate in the site remediation process must hereafter be directed to the Department of Energy.

IT IS SO ORDERED.

Charles Bechhoefer, Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 15, 2001

[Copies of this Memorandum and Order have been transmitted this date by e-mail to counsel or representatives of each of the parties.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

November 30, 2001

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), acting pursuant to 10 C.F.R. § 2.749, the Licensing Board denies a PFS request for summary disposition in its favor regarding contention SUWA B, Railroad Alignment Alternatives, because there is a deficiency in connection with the NRC Staff's National Environmental Policy Act (NEPA) analysis of at least one rail spur alignment alternative proffered by PFS in support of its dispositive motion.

RULES OF PRACTICE: SUMMARY DISPOSITION (BURDEN OF PERSUASION; BURDEN OF PROOF)

Under 10 C.F.R. § 2.749(a), (d), summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." The movant bears the initial burden of making the requisite showing that

there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

NEPA: CONSIDERATION OF ALTERNATIVES; INDEPENDENT INQUIRY BY FEDERAL AGENCY; NRC RESPONSIBILITIES

RULES OF PRACTICE: SUMMARY DISPOSITION (NEPA)

In the context of the environmental impact statement drafting process, when a reasonable alternative has been identified it must be objectively considered by the evaluating agency so as not to fall victim to “the sort of tendentious decisionmaking that NEPA seeks to avoid.” *I-291 Why? Association v. Burns*, 372 F. Supp. 223, 253 (D. Conn. 1974), *aff'd*, 517 F.2d 1077 (2d Cir. 1975). In this vein, 10 C.F.R. § 51.70(b) requires that for a draft environmental impact statement (DEIS), the NRC Staff must independently evaluate, and is responsible for the reliability of, all the information used in the DEIS.

NEPA: CONSIDERATION OF ALTERNATIVES; ENVIRONMENTAL IMPACT STATEMENT (LICENSING BOARD DECISION AS AMENDMENT)

RULES OF PRACTICE: SUMMARY DISPOSITION (NEPA)

In support of its motion for summary disposition, if the movant offers a new alternative not analyzed by the Staff in its DEIS and, in responding to the dispositive motion, the Staff acknowledges it has not fully evaluated this alternative and indicates that this shortcoming precludes it from expressing an opinion on the validity of the movant's material factual statements regarding an alternative, there remains a deficiency relative to the agency's NEPA process that precludes the presiding officer from making a merits determination that all reasonable alternatives have been adequately developed and analyzed as is required by NEPA. To whatever degree a presiding officer may be able to revise/supplement the agency's environmental impact analysis *pro tanto* in rendering a summary disposition ruling, that authority does not extend to this particular shortcoming associated with Staff compliance with section 51.70(b).

MEMORANDUM AND ORDER
(Denying Motion for Summary Disposition Regarding
Contention SUWA B)

Pursuant to 10 C.F.R. § 2.749, Applicant Private Fuel Storage, L.L.C. (PFS), has requested that summary disposition be entered in its favor regarding Intervenor Southern Utah Wilderness Alliance's (SUWA) contention SUWA B, Railroad Alignment Alternatives. As admitted, contention SUWA B asserts that PFS, in its application for authorization to construct and operate a 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI) in Skull Valley, Utah, has failed adequately to develop and analyze a meaningful range of alternatives to the proposed Low Corridor rail spur as is required under the National Environmental Policy Act of 1969 (NEPA). The NRC Staff supports the PFS summary disposition request, while SUWA opposes the request.

For the reasons set forth below, the Board denies the PFS request for summary disposition relative to contention SUWA B.

I. BACKGROUND

As the Licensing Board outlined in LBP-98-29, 48 NRC 286, 289 (1998), in its initial June 1997 license application for its proposed ISFSI, PFS put forward two methods — truck and rail — for transporting shipping casks containing nuclear reactor spent fuel to the Skull Valley area from the Union Pacific mainline that runs along the southern shore of the Great Salt Lake. Relative to the latter option, in that application PFS proposed construction of a rail spur from near the Rowley Junction Interstate 80 (I-80) interchange that would run south, parallel to the existing Skull Valley Road that roughly bisects the Skull Valley, and then west onto the reservation of Intervenor Skull Valley Band of Goshute Indians (Skull Valley Band) where the facility would be located. In August 1998, however, PFS filed a license application amendment requesting to make what has been labeled the Low Junction or Low Corridor rail spur the preferred rail transportation route. That route would run from Skunk Ridge, near the Low, Utah I-80 interchange, south along the western side of Skull Valley, and finally onto the Skull Valley Band reservation.

In response to this development, Intervenor SUWA sought to enter this proceeding and filed two contentions challenging the proposed licensing amendment. The Licensing Board granted SUWA party status and admitted one of SUWA's two proffered contentions, contention SUWA B. *See* LBP-99-3, 49 NRC 40, *aff'd*, CLI-99-10, 49 NRC 318 (1999). Contention SUWA B, which was admitted by the Board relative to the issue of the alignment alternatives for the proposed railroad spur, states:

The License Application Amendment fails to develop and analyze a meaningful range of alternatives to the Low Corridor Rail Spur and the associated fire buffer zone that will preserve the wilderness character and the potential wilderness designation of a tract of roadless Bureau of Land Management (BLM) land — the North Cedar Mountains — which it crosses.

Id. at 53.

In June 2000, the Staff issued its draft environmental impact statement (DEIS) regarding the proposed PFS facility. *See* Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, NUREG-1714 (June 200) [hereinafter DEIS]. In its DEIS, the Staff discussed the use of the railroad spur to transport spent fuel to the storage facility and the proposed location of the rail line. *See id.* at 2-12 to -14.

Based upon the DEIS, PFS filed the instant motion, supported by a statement of material facts not in dispute, claiming there is no genuine issue of material fact in dispute with respect to the concerns raised in contention SUWA B and that a decision on the merits should be entered in favor of PFS on that contention. [PFS] Motion for Summary Disposition of Contention SUWA B — Railroad Alignment Alternatives (June 29, 2001) [hereinafter PFS Motion]. In its motion, PFS alleges that the United States Department of the Interior’s Bureau of Land Management (BLM) considered and rejected the nearby North Cedar Mountain Area (NCMA) for designation as a protected wilderness area under the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136, and the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1784; therefore, the purported impact of the Low Corridor rail spur alignment on the NCMA’s wilderness designation is moot. *See* PFS Motion at 8. In addition, PFS claims to have considered a number of “reasonable alternative” alignments for the rail line, but determined that the Low Corridor rail spur was the preferable alternative. *See* PFS Motion at 9.

On July 19, 2001, in its response to the PFS summary disposition motion, the Staff declared its support for the PFS request. *See* NRC Staff’s Response to [PFS] Motion for Summary Disposition of Contention SUWA B — Railroad Alignment Alternatives (July 19, 2001) [Staff Response]. In its response, the Staff agrees that the potential for designation of the NCMA as a wilderness area is speculative and so does not warrant consideration of additional alternatives. *See* Staff Response at 11. In addition, the Staff contends that alternative alignments were adequately considered in the DEIS. *See id.* at 8.

In its July 23, 2001 response, SUWA opposes the PFS dispositive motion regarding contention SUWA B, asserting it is premature and not based on undisputed material facts. *See* [SUWA] Response (and Objection) to [PFS’s] Motion for Summary Disposition of SUWA’s Contention B (July 23, 2001) at 4, 8 [hereinafter SUWA Response]. In addition, SUWA argues that both PFS and

the NRC have failed to consider a reasonable range of alternatives for the Low Corridor rail spur. *See id.* at 7.

II. ANALYSIS

A. Standard for Summary Disposition Review

The standard governing motions for summary disposition is well established and has been used repeatedly by this Licensing Board in ruling on previous PFS motions, and we again will rely upon that standard in this matter:

Under 10 C.F.R. § 2.749(a), (d), summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows that there is “no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.” The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting materials, or the movant’s facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

LBP-99-23, 49 NRC 485, 491 (1999).

With this precedent in mind, the Board addresses the PFS summary disposition motion regarding contention SUWA B.

B. Contention SUWA B

1. PFS Position

In response to SUWA’s contention that PFS has failed to develop a meaningful range of alternatives to the Low Corridor rail spur, PFS submits twenty-six purported undisputed material facts to demonstrate that there has been an adequate consideration of rail spur alternatives so as to merit the entry of summary disposition in its favor. *See PFS Motion, Statement of Material Facts on Which No Genuine Dispute Exists.* In support of this result, PFS first argues that in 1980 the BLM considered and rejected the NCMA for designation as a wilderness area on the basis that human imprints and developments had hampered the opportunity for solitude and recreational activity in the NCMA. *See PFS Motion at 7.* Thereafter, in 1999 the BLM reassessed Utah lands for possible wilderness area designation, but again did not include the NCMA. *See id.* at 8. Given this clear BLM rejection of the NCMA as a wilderness area, PFS asserts, SUWA’s concern

that the proposed rail line would hamper any future potential for wilderness designation is moot.

In addition, PFS contends that a decision regarding contention SUWA B should be entered in its favor because PFS has adequately considered and rejected all reasonable alternatives to the proposed rail line. *See id.* at 9. According to PFS, the alternatives it has considered are the proposed Low Corridor spur line; a different alignment slightly to the east of the proposed Low Corridor rail spur; an alignment that would run through the middle of Skull Valley; and four alignments that would run through the eastern portion of Skull Valley.

As was noted earlier, the Low Corridor alignment, which PFS proposes to implement, connects the planned ISFSI facility with the Union Pacific railroad mainline at Low Junction, Utah.¹ As advanced by PFS, this alignment would isolate the far easternmost portion of the NCMA, with the result that the area thereafter would be legally precluded from consideration as a statutorily protected wilderness area.² Relative to the alternative central alignment that would run from the existing Union Pacific mainline through the center of the Skull Valley, according to PFS this alignment would require construction of a bridge to cross I-80 and acquisition of a permit from the United States Army Corps of Engineers to cross an area of wetlands, which PFS maintains the Corps of Engineers will be reluctant to grant. *See* PFS Motion at 12 (citing 40 C.F.R. § 230.10(a)). Further, in connection with the four eastern alignments that would begin at various points along the Union Pacific mainline north of Skull Valley and run south along the east side of the Skull Valley road, PFS declares these alignments were rejected because they also would require crossing I-80 and would adversely affect wetlands at Horseshoe Springs as well as neighboring homes and ranches.

In addition to these rail spur siting alternatives, PFS claims to have considered another alternative alignment, which it labels the West Skull Valley Alternative. Although the West Skull Valley Alternative is similar to the Low Corridor alignment, to avoid the NCMA it runs 2000 to 3000 feet to the east of the proposed Low Corridor rail spur for roughly 6.5 miles. *See* PFS Motion, Attach. at 5 (Declaration of Douglas Hayes) [hereinafter Hayes Declaration]. According to PFS, pushing the alignment east requires careful routing to avoid a parcel of State-owned land near the northern section of the NCMA, which PFS indicates it would not utilize because of the State's opposition to its proposed ISFSI, and a large section of wetlands (i.e., mudflats) near the southern portion of the NCMA, which it would avoid to avert the potential environmental impacts that

¹ The proposed Low Corridor alignment is described in DEIS § 2.1.1.3.

² According to PFS, the Wilderness Act of 1963 requires all wilderness areas to be roadless areas of 5000 acres or more. As a consequence, the proposed alignment that would "cut off" the easternmost section of NCMA would preclude that section from being considered as a wilderness area, although the remainder of the NCMA could still be designated because it would exceed the 5000 acres requirement. *See* PFS Motion at 6.

could occur.³ PFS also claims that, in contrast to the proposed Low Corridor alignment in which the material needed to be “cut” to level portions of the rail bed is approximately equal to the material needed to “fill” other bed portions to make them level, the West Skull Valley Alternative would require PFS to bring from offsite an additional 260,000 cubic yards of “fill” earth to level the rail corridor, raising the cost of construction 15% to 25%. *See* PFS Motion at 11; Hayes Declaration at 6-7. Also, according to PFS, although a number of the environmental impacts (e.g., noise, flora and fauna, air pollution, resources consumption) involved in the West Skull Valley Alternative are similar to the Low Corridor alignment, the additional fill would adversely affect the surrounding environment to a greater degree. This is so, PFS claims, because construction of that alignment would result in berms up to 20 feet high that would increase the visual impact of the rail line as well as block access to surrounding land and roads to the west, thereby potentially interfering with wildlife and cattle grazing and wildfire fighting. As a result, PFS concludes this alignment should be rejected in favor of the Low Corridor alignment. *See* PFS Motion at 11-12.

2. Staff Position

The Staff indicates that after reviewing the PFS statement of material facts it agrees with Material Fact Nos. 6-9 and 17-26, but does not express a position on Material Fact Nos. 10-16, which concern the PFS analysis of the proposed West Skull Valley Alternative. *See* Staff Response at 8. Specifically, in support of the PFS assertions that reasonable alternatives to the Low Corridor alignment have received sufficient consideration, the Staff declares that the DEIS “explicitly” considered two alternatives to the proposed alignment. *Id.* at 9. According to the Staff, the DEIS considered one new rail corridor that would run along the eastern side of Skull Valley (along Skull Valley Road) and another that would use an existing rail line east of the Stansbury Mountains, which are on the eastern side of Skull Valley, and a newly constructed rail corridor between 1-80 and the north end of the mountains that would continue south along the eastern side of the Skull Valley Road. The Staff claims that neither the eastern nor the northern alternative was considered acceptable due to their likely impact upon the Horseshoe Springs wetlands and the surrounding homes and ranches near the Skull Valley Road, while the northern line, the Staff declares, would require substantial excavation at the north end of the Stansbury mountains. According to the Staff, when compared to the proposed Low Corridor alignment, both alternatives would involve greater environmental impacts. *See id.* at 10.

³ PFS contends that it is not credible to plan a rail line alternative through State-owned lands because of the “State’s vehement opposition to this project.” PFS Motion at 11.

The Staff also notes that while it did not afford DEIS consideration to the West Skull Valley Alternative outlined by PFS in its summary disposition motion, Staff expert Gregory P. Zimmerman is satisfied with the conclusions drawn by PFS concerning this alternative. *See* Staff Response at 3 n.3. For his part, Mr. Zimmerman indicates that the Staff was not given specific design details for this additional western alignment and hence is unable to fully evaluate the proposed alternative. *See* Staff Response, unnumbered attach. at 5 (Affidavit of Gregory P. Zimmerman Concerning Contention SUWA B) [hereinafter Zimmerman Affidavit]. Moreover, because the Staff did not fully evaluate the proposed alternative, Mr. Zimmerman declares the Staff cannot express an opinion on Material Fact Nos. 10-16. Nonetheless, he declares he agrees with the PFS conclusion that the West Skull Valley Alternative would result in similar or greater impacts to the environment than the Low Corridor alignment. *See id.*

Also in support of the PFS motion, the Staff maintains that, given the previous BLM review and rejection of the NCMA for designation as a wilderness area, consideration of additional alternatives is unwarranted as “entirely speculative.” Staff Response at 11. According to the Staff, a possible change in legislation or policy that would compel consideration of an additional alternative does not require consideration in the DEIS under the well-established NEPA “rule of reason” analysis. *See id.* at 14 (citing *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 145-46 (1993)). The Staff thus concludes that this speculative possibility of wilderness designation does not require consideration in the DEIS. *See id.*

3. SUWA Position

In its response in opposition to the PFS motion, SUWA claims initially that the PFS motion is premature. SUWA contends that in affirming the Licensing Board’s admission of contention SUWA B in CLI-99-10, the Commission acknowledged that NEPA requires PFS and the Staff to perform an analysis of reasonable alternatives, which SUWA asserts must be done in the context of the final environmental impact statement (FEIS) for the proposed PFS facility. Because the Staff has not yet completed the FEIS, SUWA claims that at this point in the proceeding its contention is not ripe for a decision on the merits. *See id.* at 4.

SUWA also argues that the PFS presentation of the West Skull Valley Alternative, which was put forth for the first time in the PFS dispositive motion, cannot be incorporated into the DEIS. *See id.* at 5. SUWA contends that the PFS presentation was not “an objective presentation of the pros and cons” for that alternative, but instead is “a justification of the Low Corridor alignment and a vigorous argument as to why that new alternative is not worthy of further consideration.” *Id.* at 5-6. The PFS presentation, SUWA declares, is not sufficiently objective or informative to serve the NEPA purpose of instructing

the public and the eventual decision maker regarding the available reasonable alternatives to the PFS proposal. SUWA thus asserts this evaluation should not be incorporated into the DEIS and so cannot be the basis for summary disposition.

In addition, SUWA complains that PFS and the Staff have not adequately considered other reasonable alternatives to the proposed Low Corridor rail spur. *See id.* at 6. SUWA states that the DEIS “consider[ed]” and dismissed two alternatives by only giving them “short shrift shows” of consideration. *Id.* And in doing so, SUWA claims the Staff failed to formulate an alignment that would minimize the rail line right of way or fire buffer zones to reduce the impact these areas would have upon the “wilderness character” of the NCMA. *See id.* at 7. SUWA also argues that the agency did not formulate an alternative that, like the Low Corridor alignment, would originate at Skunk Ridge but not cross the NCMA. *See id.*

SUWA’s response further alleges that many of the material facts put forth by PFS are in dispute. In particular, SUWA contends that the PFS rejection of any alternative rail spur that would cross State-owned land is based upon an “incorrect assumption.” *Id.* at 8. Focusing on the Western Skull Valley Alternative, SUWA states that the parcel of land PFS asserts constrains that alignment is “State school trust land” that the State by law must manage in a manner that will “maximize[] monetary return.” *Id.* at 9 (citing *National Parks and Conservation Association v. Board of State Lands*, 869 P.2d 909, 920 (Utah 1993)). According to SUWA, because of the land’s status, the State cannot consider its own opposition to the PFS project when evaluating a PFS request to use the land, but must act in a manner that will maximize the benefits for the State’s school system. SUWA thus concludes that, contrary to the stated PFS assumption, the use of the State-owned land is not per se unreasonable so as to excuse the need for any further consideration of alignments crossing such land.

SUWA’s final argument in opposition to the PFS dispositive motion responds to the Applicant’s position that BLM and congressional refusal to designate NCMA as a wilderness area renders contention SUWA B moot. This assertion, SUWA contends, was previously addressed in LBP-99-3 in which the Board indicated that because the NCMA displays wilderness characteristics, the Staff must consider alternatives that would minimize impacts upon these characteristics, regardless of whether the BLM or the Congress plans to approve SUWA’s petition for wilderness designation. *See id.* at 11. Furthermore, SUWA argues, considerable congressional support does exist for protecting the NCMA with a wilderness designation, thus establishing that contention SUWA B is not moot.

C. Board Ruling

Addressing first the PFS and the Staff claims that in previous evaluations the BLM and the Congress have failed to acknowledge NCMA as a wilderness area,

thereby rendering contention SUWA B moot, we note that, as SUWA indicates, this issue previously was raised by both PFS and the Staff and addressed by the Board in admitting contention SUWA B. As we stated in LBP-99-3, 49 NRC at 51 n.6 (citation omitted):

Both PFS and the Staff maintain that the fact BLM previously declined to designate the area in question as potential “wilderness” area for further consideration by Congress renders speculative any SUWA injury in losing the opportunity to have the land designated for protection. . . . As we have noted, however, in the context of NEPA, even absent the FLPMA statutory scheme, there would be a need to consider the natural state of the land and the alternatives, if any, that would be available to preserve that status.

Having already ruled on this issue, the Board sees no reason to reconsider its determination at this time.⁴

While SUWA thus has the better of this argument, its approach to the merits of the balance of the PFS claims in support of its motion leaves much to be desired. The Commission’s Rules of Practice make it clear that in opposing a motion for summary disposition, a party must annex a short and concise statement of material facts upon which it contends that there is a genuine issue to be heard. *See* 10 C.F.R. § 2.749(a). Moreover, under these regulations, all material facts set forth in the moving party’s statement will be deemed admitted unless controverted in a statement of disputed material facts submitted by the opposing party. *See id.* In this instance, although PFS submitted twenty-six material facts about which PFS claims no genuine dispute exists, in responding to the PFS motion SUWA provided only a legal brief without the required statement of material facts in dispute. Thus, on the basis of the SUWA submission, in accord with section 2.749(a) the Board would be justified in finding all twenty-six material facts submitted by PFS as not in dispute. Nonetheless, this SUWA pleading defect turns out not to be controlling because another deficiency pertaining to the Staff’s evaluation of the alternative routes to the Low Corridor alignment, in particular the recently proposed West Skull Valley Alternative, makes the entry of summary disposition inappropriate in this instance.

In the context of the environmental impact statement drafting process, when a reasonable alternative has been identified it must be objectively considered by the evaluating agency so as not to fall victim to “the sort of tendentious decisionmaking that NEPA seeks to avoid.” *I-291 Why? Association v. Burns*, 372 F. Supp. 223, 253 (D. Conn. 1974), *aff’d*, 517 F.2d 1077 (2d Cir. 1975). In this vein, 10 C.F.R. § 51.70(b) requires that for a DEIS, the NRC Staff must independently evaluate, and is responsible for the reliability of, all the information

⁴Given that there has been no statutory wilderness designation regarding the NCMA, in any further litigation concerning this contention the question of the “natural state” of the area at issue will be a matter for party presentations via direct and/or cross-examination testimony.

used in the DEIS.⁵ As was noted above, in the DEIS for the proposed PFS facility, the Staff considered two alternatives to the Low Corridor alignment: a corridor originating in the northern portion of Skull Valley and a corridor that would run through the eastern section of Skull Valley. *See* DEIS at 2-42 to -43. In support of its motion for summary disposition relative to contention SUWA B, however, PFS presented a new western alternative bypassing the NCMA area in controversy that PFS asserts definitively establishes all reasonable alternatives have been given consideration. This alternative was not analyzed by the Staff in the DEIS.⁶ Indeed, in responding to the PFS dispositive motion, although the Staff's supporting witness indicated satisfaction with the PFS evaluation of this alignment, he also acknowledged that the Staff has not fully evaluated this proposed western alternative. *See* Zimmerman Affidavit at 5. The Staff echoed this characterization, indicating that this shortcoming precluded it from expressing an opinion on the validity of the PFS material factual statements regarding this alternative alignment.⁷ *See* Staff Response at 8.

There thus remains a deficiency relative to the agency's NEPA process that precludes the Board from making a merits determination that all reasonable alternatives to the proposed Low Corridor alignment have been adequately developed and analyzed as is required by NEPA.⁸ Accordingly, summary disposition of contention SUWA B is inappropriate at this juncture.⁹

⁵ 10 C.F.R. § 51.70(b) provides:

The draft environmental impact statement will be concise, clear and analytic, will be written in plain language with appropriate graphics, will state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of NEPA and of any other relevant and applicable environmental laws and policies, will identify any methodologies used and sources relied upon, and will be supported by evidence that the necessary environmental analyses have been made. The format provided in section I(a) of appendix A of this subpart should be used. The NRC staff will independently evaluate and be responsible for the reliability of all information used in the draft environmental impact statement.

⁶ In this regard, we note that the total number of alternatives to the Low Corridor alignment considered by PFS, at least as characterized in its summary disposition motion, apparently does not coincide with the number discussed by the Staff in its DEIS. *Compare* PFS Motion at 9 (six rail alignment alternatives) *with* Staff Response at 9 (two rail alignment alternatives).

⁷ To whatever degree the Licensing Board may be able to revise/supplement the agency's environmental impact analysis *pro tanto* in rendering a summary disposition ruling, that authority does not extend to the particular shortcoming associated with Staff compliance with section 51.70(b) that is extant in this proceeding.

⁸ Although the focus of our ruling here is the sufficiency of the discussion of rail spur alternatives in light of the West Skull Valley Alternative proposed by PFS in its dispositive motion, nothing in this ruling precludes further litigation regarding the expressed SUWA concern about the sufficiency of the environmental impact analysis of fire buffer zone alignment alternatives or the validity of the PFS premise that State lands are unavailable for rail spur use. *See* SUWA Response at 7, 8-10.

⁹ Given our ruling in this regard, we need not reach the question of whether, as SUWA suggests, in the NEPA context we are precluded from granting the PFS summary disposition request because an FEIS has not yet been issued. We note, however, that to the degree the SUWA objection regarding the appropriateness of summary disposition at this juncture is based on a concern about the ability of a party to contest subsequent changes in the FEIS, it does not account for the availability of a late-filed contention as a means to challenge any significant change that occurs between the DEIS and the FEIS. *See* 10 C.F.R. § 2.714(b)(2)(iii).

III. CONCLUSION

Relative to the June 2000 DEIS, because there is a deficiency in connection with the sufficiency of the Staff analysis of at least one Low Corridor rail spur alignment alternative proffered in support of the PFS request for summary disposition regarding contention SUWA B, Railroad Alignment Alternatives, we deny the PFS dispositive motion.

For the foregoing reasons, it is, this thirtieth day of November 2001, ORDERED that the June 29, 2001 motion of PFS for summary disposition of contention SUWA B is *denied*.

THE ATOMIC SAFETY AND
LICENSING BOARD¹⁰

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 30, 2001

¹⁰ Copies of this Memorandum and Order were sent this date by Internet e-mail and/or facsimile transmission to (1) Applicant PFS; (2) Intervenor Skull Valley Band, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Martin J. Virgilio, Director

In the Matter of

**Docket No. 70-7001
(Certificate GDP-1)**

**U.S. ENRICHMENT CORPORATION
(Paducah, Kentucky Gaseous
Diffusion Plant)**

June 14, 2001

RULES OF PRACTICE: PETITION FOR REVIEW UNDER PART 76

Petitioners under 10 C.F.R. § 76.45(d) bear the burden to allege facts sufficient to establish standing.

RULES OF PRACTICE: STANDING

To meet the Commission's standing requirements, a person must show that the agency action at issue will cause the person injury in fact, and that the injury complained of is within the zone of interests protected by the statutes governing the proceeding.

RULES OF PRACTICE: STANDING

To establish injury in fact, a person must allege a concrete and particularized injury that is fairly traceable to the challenged agency action. A generalized grievance shared by a large class of citizens is not an injury in fact sufficient to support standing.

*DD-01-3 was inadvertently omitted from the June 2001 Issuances.

RULES OF PRACTICE: STANDING; ZONE OF INTERESTS

The continued employment of workers at gaseous diffusion plants is not an economic interest within the zone of interests protected by AEA § 193(f).

ATOMIC ENERGY ACT: USEC CERTIFICATE OF COMPLIANCE

The “reliable and economical” concern reflected in AEA § 193(f)(2)(B) does not need to be addressed in routine recertifications or license amendments that do not involve a change in control.

REGULATIONS: INTERPRETATION OF 10 C.F.R. § 76.45(a)

Section 76.45(a) of 10 C.F.R. does not establish the criteria for issuance of an amendment to a certificate of compliance; rather, its purpose is to inform the applicant of the degree of detail required for information contained in an amendment application.

REGULATIONS: INTERPRETATION OF 10 C.F.R. § 76.70(b)

Section 76.70 of 10 C.F.R. does not establish a recurring obligation to apply the “reliable and economical” analysis required by AEA § 193(f)(2)(B).

ATOMIC ENERGY ACT: INTERPRETATION

Where a statute despite its superficial clarity contains latent ambiguities, the Commission has substantial discretion in interpreting its obligations thereunder.

ATOMIC ENERGY ACT: INTERPRETATION OF SECTION 193(f)(2)(B)

The focus of any inquiry under AEA § 193(f)(2)(B) as to the viability of enrichment services operations should be on the control of the corporation by interests, principally foreign, to the detriment of an ongoing domestic industry. This inquiry need only be conducted at the time of initial privatization, a proposed certification of a new owner, or other transfer of control meeting the threshold of 10 C.F.R. § 76.65.

RULES OF PRACTICE: PRECEDENTIAL EFFECT OF STAFF GUIDANCE DOCUMENTS

Although draft guidance document NUREG-1671, “Standard Review Plan for the Recertification of the Gaseous Diffusion Plants,” suggested that the “reliable and economical” finding required by AEA § 193(f)(2)(B) would be made upon an application for recertification by a plant with a poor credit rating, Staff guidance documents, whether draft or final, are not binding upon the Commission.

RULES OF PRACTICE: PRECEDENTIAL EFFECT OF STAFF GUIDANCE DOCUMENTS

Where a statute is susceptible to more than one permissible interpretation, an agency is free to choose among those interpretations. Such interpretations are subject to reevaluation by the Commission on a continuing basis and may be reformed, even if the later interpretation represents a departure from prior agency views, as long as the new approach is justified by a reasoned analysis supporting a permissible construction.

DIRECTOR’S DECISION UNDER 10 C.F.R. § 76.45(d)

On March 19, 2001, the Staff issued an amendment to the Paducah Gaseous Diffusion Plant Certificate (GDP-1) which provided the authority for the U.S. Enrichment Corporation (USEC) to increase the enrichment capacity of the Paducah Gaseous Diffusion Plant (GDP).¹

On April 17, 2001, Dan Guttman, counsel to PACE Local 5-689, submitted on behalf of Daniel J. Minter, President of PACE Local 5-689 and members of PACE 5-689 (PACE or Petitioners) pursuant to 10 C.F.R. § 76.45(d) a “Request for Director’s Review of Staff Decision Certificate Amendment to U.S. Enrichment Corporation Paducah GDP” (Petition). The petition requested that the amendment issued on March 19, 2001, be reconsidered and that the NRC conduct

- (1) the “reliable and economic” review asserted to be required by statute, the Commission’s rules, and the public interest; and
- (2) make public the results of that review and seek comment on appropriate conditions that may be employed to bring USEC into compliance with the [Atomic Energy Act].²

¹Letter from Eric J. Leeds, Chief, Special Projects Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards, to Morris Brown, Vice President Operations, USEC, entitled Paducah Gaseous Diffusion Plant Certificate Amendment Request: Higher Assay Upgrade Project (TAC No. L32415).

²Petition at 27.

On May 1, 2001, USEC submitted “United States Enrichment Corporation Response to Petition for Director’s Review of March 19, 2001, Determination on Certificate Amendment Request,” seeking that the NRC deny the petition.

I. STANDING

Pursuant to 10 C.F.R. § 76.45(d), any person whose interest may be affected may file a petition requesting the Director of the Office of Nuclear Material Safety and Safeguards (NMSS) to review an NRC Staff determination on an amendment application. Section 76.45(d) limits eligibility to petition for review of a Director’s decision to those persons “whose interest may be affected.”

The issue of standing in a certificate proceeding was addressed by the Commission in *U.S. Enrichment Corp.* (Paducah, Kentucky, and Piketon, Ohio), CLI-96-12, 44 NRC 231, 236 (1996). In that proceeding, which was pursuant to 10 C.F.R. § 76.62(c),³ the Commission, recognizing that the petitioners were appearing *pro se* and that it was the first instance in which the Commission had considered petitions under Part 76, accepted the petitioners as “interested persons” without meeting “their obligation to explain their ‘interested person’ status.” *Id.* However, the Commission cautioned “that in future Part 76 certification decisions, it will expect Petitioners more specifically to explain their ‘interested person’ status.” *Id.* For guidance, the Commission directed that “Petitioners may look to the Commission’s adjudicatory decisions on standing,” referencing *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115-17 (1995). In NRC adjudicatory proceedings, “[p]etitioners bear the burden to allege facts sufficient to establish standing.”⁴

To meet the Commission’s standing requirements, a person must show that “(a) the action will cause ‘injury in fact,’ and (b) the injury is arguably within the ‘zone of interests’ protected by the statutes governing the proceeding.” *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). The person must allege a concrete and particularized injury that is fairly traceable to the challenged action. *Georgia Tech*, CLI-95-12, 42 NRC at 115. A “‘generalized grievance’ shared in substantially equal measure by all or a large class of citizens will not result in a distinct and palpable harm sufficient to support standing.” *Three Mile Island*, CLI-83-25, 18 NRC at 333;

³The current proceeding is based on 10 C.F.R. § 76.45(d). However, the Commission’s interpretation of section 76.62(c) is directly applicable as its language is identical to section 76.45(d) in that it also limits eligibility for review of Directors’ decisions to those persons “whose interest may be affected.”

⁴*Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000).

North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-27, 50 NRC 251, 263 n.5 (1999); and *Warth v. Seldin*, 422 U.S. 490, 508 (1975).⁵

The Petitioners here are represented by experienced counsel and are therefore expected to understand their obligation to demonstrate that they have an interest that may be affected by the amendment. The petition, while addressing the merits of the Petitioners' concerns, does not make any attempt to explain why the Petitioners' interests are affected by the amendment. The Petitioners have clearly not met the Commission's explicit expectations. Consequently, I need not further consider the petition. However, this case raises issues concerning standing that would benefit from further discussion.

To further address standing, I have made some assumptions concerning the potential interests of the Petitioners that may be impacted by the amendment. Presumably, the Petitioners being members of a union at the GDP located in Piketon, Ohio, do not reside in proximity of the Paducah plant. There appears to be no association between the Petitioners and the Paducah plant.

Assuming that the Petitioners' interest is in maintaining a reliable and economical domestic source of enrichment services, such an interest, while within the zone of interests of the statute, does not appear to have been affected in a manner that presents a concrete injury to them. Petitioners are not purchasers of enrichment services that might have a concrete and particularized injury if there were not a domestic source of enrichment services. The Petitioners' interest in a domestic source of enrichment services is a generalized grievance shared in substantially equal measure by all or a large class of citizens. A generalized grievance of broad public concern is not a sufficient interest to confer standing under the Commission's adjudicatory decisions.

Another potential interest that might be assumed from the petition is that the Petitioners, being union members, are interested in protecting their employment positions at the Piketon, Ohio, plant. This interest would be based on the assertion that there is a direct relation between granting the amendment to upgrade the Paducah plant and the business decision to close the Piketon plant.⁶ The focus of section 193(f) of the Atomic Energy Act (AEA) of 1954, as amended, with respect to maintaining an economical and reliable source of enrichment services is not on maintaining jobs. In fact, the statute recognizes the potential for one of the GDPs to be closed as a result of privatization.⁷ Taking the assertion as

⁵ For example in *Warth*, where the plaintiff was challenging exclusionary zoning practices, the Court held that the plaintiff "must allege specific, concrete facts demonstrating that the challenged practices harm him and he would benefit in a tangible way" from the proceeding.

⁶ The Petition, at 26, states that "there is no dispute that the imminent shutdown of the Portsmouth [Piketon, Ohio] plant and the proposed upgrade of the Paducah plant go hand-in hand."

⁷ Section 3110(a)(5) of the AEA of 1954, as amended, addresses how employees are to be treated in the event of a plant closing or mass layoff as a result of privatization.

true for purposes of considering standing,⁸ maintaining employment in the face of plant closing is an economic interest that is not within the zone of interests protected by the AEA.⁹ Moreover, apart from the zone-of-interests test, the NRC has not interpreted the term “interests” to encompass the economic interest of employees.¹⁰

In view of the foregoing, I find that Petitioners have wholly failed to establish that they have the requisite interest to seek the Director’s review under 10 C.F.R. § 76.45(d) and I deny the petition on that ground. Nonetheless, I believe it would be useful to address, and clearly explain the Director’s position on, the Petitioners’ main arguments.

II. APPLICATION OF SECTION 193(f) OF THE ATOMIC ENERGY ACT

The thrust of the Petitioners’ argument in seeking that the assay upgrade amendment be reconsidered is that

- (1) NRC is required to consider the ability of USEC to maintain a reliable and economic domestic source of enrichment services before amending a certificate,¹¹ and
- (2) For this amendment, there are technical and economic concerns that raise questions on the ability of USEC to maintain a reliable and economic domestic source of enrichment services.¹²

⁸ However, it should be noted that the NRC does not have regulatory oversight over the business judgment for USEC to reduce operations at the Piketon plant. While closing the Piketon plant may be related to the grant of the amendment for Paducah, it was not compelled by the amendment. There is nothing in the amendment or NRC requirements that would have prohibited USEC from operating both GDPs following the amendment.

⁹ The Commission in the past has found the economic interests of a competitor and employees of loss of employment as outside the statutes governing the NRC. Cf. *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 8-17 (1998), *aff’d*, *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999) (holding that an entity’s competitive interests do not bring it within the zone of interests of either the AEA or the National Environmental Policy Act (NEPA) for the purpose of policing a competitor’s compliance with licensing requirements); and *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992) (holding that the loss of employment does not fall within the zone of interests protected by NEPA). See also *Air Courier Conference of America v. American Postal Workers Union*, 498 U.S. 517, 528 (1991) (holding that a union’s interest in employment opportunities was not within the zone of interests of the Private Express Statutes (PES) as PES was intended to serve the nation as a whole and not designed to protect postal employment). More recent standing guidance of *National Credit Union Administrators v. First National Bank & Trust Co.*, 522 U.S. 479 (1998) is unavailing since there is nothing in the statute that would suggest that PACE has an interest protected by the statute. If there is any benefit to PACE from the statute, it is “merely incidental.” *Id.* at 494 n.7.

¹⁰ *Envirocare of Utah v. NRC*, 194 F.3d 72 (D.C. Cir. 1999).

¹¹ The Petition, at 14-26, argues that section 193(f) of the AEA, 10 C.F.R. § 76.22, and the Staff’s view of the meaning of section 193(f) reflected in SECY-97-071 require consideration of the ability to maintain a reliable and economic source of enrichment services when certificates are issued and that pursuant to 10 C.F.R. § 76.45 a similar consideration must be made before a certificate may be amended.

¹² These concerns are described in the Petition at 8-14 and include:

- a) the alleged uncertainty that the Paducah upgrade will provide 4.5 million separative work units (SWU),

(Continued)

By way of background, the NRC customarily focuses on technical issues related to the maintenance of safety at nuclear facilities. The obligation to expand NRC's scrutiny in the case of the GDPs arises from section 193(f) of the AEA. That section provides that the NRC is to consider whether "the *issuance* of a . . . certificate of compliance would be inimical to . . . (B) the maintenance of a reliable and economical domestic source of enrichment services" (emphasis added) before the NRC issues certificates. This requirement was readily satisfied at the time of the initial certification and subsequent recertification of the GDPs.

Last year, after USEC's corporate credit rating was downgraded following USEC's announcement of lower financial projections, dividend reductions, and plans to lay off employees at the GDPs, the Staff initiated a reexamination of USEC's financial status. As a result, the agency focused on the question as to how or whether the "maintenance of a reliable and economical domestic source of enrichment services" should be evaluated. As explained below, the Staff's position is now that the "reliable and economical" concern reflected in section 193(f)(2)(B) is not a recurring obligation that needs to be addressed at the time of routine recertifications for a GDP or in connection with other events that do not involve a change in control, such as the upgrade amendment at issue in this matter.¹³ It applies only at the time of initial privatization or any time there is a proposal to transfer a certificate. In addition, as the Commission has explained in its letters to its congressional oversight committees, findings concerning the "reliable and economical" issue are "principally directed to the possibility of foreign entities gaining control and undermining U.S. domestic enrichment capabilities,"¹⁴ which would be inimical to the interest of the United States.

While the Petitioners have raised several public policy issues concerning the capability of USEC to provide the necessary enrichment services for US domestic needs while only operating the Paducah plant, these issues are more appropriately raised before the Congress or before executive agencies and departments that report to the President.¹⁵ NRC has only a limited role in this area.

b) the assertion that, if the upgrade does not work or there is a substantial outage at the Paducah plant, USEC will not be capable of supplying sufficient enrichment services, and

c) the assertion that, even if the upgrade does work, interruption of the Russian supply of HEU may leave USEC incapable of producing sufficient enrichment services.

¹³ Pursuant to 10 C.F.R. § 76.65, the NRC must approve a transfer of a certificate. That would include a transfer to a new owner.

¹⁴ See note 42, *infra*.

¹⁵ In fact, DOE is taking action to preserve the operability of certain of the equipment at Portsmouth that USEC does not intend to use for enrichment services. Letters to Chairman, Subcommittee on Energy and Water Development, House Committee on Appropriations, and Senate Committee on Appropriations, from Michael Telson, DOE Chief Financial Officer, dated April 4, 2001. In addition, President Clinton on May 26, 1998, established by Executive Order 13085, the Enrichment Oversight Committee (EOC). 63 Fed. Reg. 29,335 (May 28, 1998). Section 6 of this Executive Order provides that the EOC shall collect information related to the domestic enrichment industries.

In any event, the upgrading of the capacity of the Paducah facility which is the subject of the amendment can only improve the domestic capability by increasing the enrichment capability at that facility.

A. Statutory Framework

The framework under which the Commission provides oversight of the enrichment facilities was established by the Energy Policy Act of 1992 and is set out in section 1701 (“Gaseous Diffusion Facilities”) of the AEA, Chapter 27 (“Licensing and Regulation of Uranium Enrichment Facilities”). This provision was adopted as part of the initial phase of the move toward privatization when the United States Enrichment Corporation was established and operation of the facilities was transferred to USEC. Section 1701 directed the Commission to set standards and also established the timing and process for the Commission to periodically review and certify USEC’s operations.

The Energy Policy Act also established the framework for ultimate privatization of the operation of the gaseous diffusion facilities. The newly established United States Enrichment Corporation was directed by sections 1501 and 1502 of the AEA to develop and implement a strategic plan for privatization. Section 1502(a) authorized the Corporation to implement the plan if the Corporation determined, in consultation with appropriate agencies of the United States

that privatization will—

- (1) result in a return to the United States at least equal to the net present value of the Corporation;
- (2) not result in the Corporation being owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government;
- (3) not be inimical to the health and safety of the public or the common defense and security; and
- (4) provide reasonable assurance that adequate enrichment capacity will remain available to meet the domestic electric utility industry.

As to section 1701(a), the NRC was directed to establish standards for the GDPs in order “to protect the public health and safety from radiological hazards and provide for the common defense and security.” Section 1701(c) required the Commission to establish a certification process and the Corporation to apply annually¹⁶ to the NRC for a certificate of compliance. The NRC was directed to review the operations of the GDPs to ensure that public health and safety are adequately protected. The NRC’s findings during this review are limited by section 1701(c)(4)(C). That section states that the NRC “shall

¹⁶ Section 3116 of the USEC Privatization Act subsequently changed this to a requirement of periodic certification, as determined by the Commission, but not less than every 5 years.

limit its finding” to whether the facilities are in compliance with the standards established in section 1701(a), that is, whether or not the facilities meet the health and safety and common defense and security requirements established by the Commission. Section 1701(b) requires the NRC, in consultation with DOE and the Environmental Protection Agency (EPA), to report, at least at the frequency of recertifications, to the Congress on the status of health, safety, and environmental conditions at the GDPs. The report is to include a determination regarding whether the facilities are in compliance with the standards established under subsection (a) and all applicable laws.¹⁷ Section 1701(d) (“Requirement for Operation”) prohibits the Corporation from operating the GDPs unless the NRC has made a determination under subsection (b), in consultation with the EPA, that the standards set out in section 1701(a) and “all applicable laws” have been met.

On April 26, 1996, President Clinton signed into law H.R. 3019 (Pub. L. No. 104-134), legislation that provided FY 1996 appropriations to a number of federal agencies. Included within this legislation is a subchapter entitled “USEC Privatization Act.” Section 3103 of this Act authorized the Corporation to transfer the interest of the United States to the private sector in a manner that (1) provides for the long-term viability of the Corporation; (2) provides for the continuation by the Corporation of the operation of DOE’s gaseous diffusion plants; (3) provides for the protection of the public interest in maintaining a reliable and economical domestic source of uranium mining, enrichment, and conversion services; and (4) to the extent consistent with such purposes, secures the maximum proceeds to the United States.

Section 3116 of the USEC Privatization Act amended several provisions of the AEA including section 193 by adding the following:

- (f) LIMITATION.—No license or certificate of compliance may be issued to the United States Enrichment Corporation or its successor under this section or sections 53, 63, or 1701, if the Commission determines that—
 - (1) the Corporation is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government; or
 - (2) the issuance of such a license or certificate of compliance would be inimical to—
 - (A) the common defense and security of the United States; or
 - (B) the maintenance of a reliable and economical domestic source of enrichment services.

The statute required the NRC to make a finding concerning whether the issuance of a certificate would be inimical to a reliable and economical domestic source of enrichment services. The NRC’s continuing obligation set out in section 1701 of the AEA extends only to issues associated with the health, safety, and common defense and security. There is no implication in the statutory language

¹⁷ Section 1312 of the Energy Policy Act specified the applicability of certain federal laws to the Corporation.

that the NRC's continuing obligation extends to findings associated with the question of a reliable and economic domestic source of enrichment services at times other than upon initial issuance or transfer of a certificate.

B. Legislative History

The evolution of section 193(f) indicates that the intent behind the provision was to guard against attempts by foreign corporations or governments to acquire control of the GDPs and subsequently take actions to undermine the U.S. enrichment capability. There is no indication that there was an intent to consider the question of a reliable and economical domestic source of enrichment services at times other than upon initial issuance or transfer of a certificate.

The substance of section 193(f) was initially proposed in a draft bill submitted by the Administration providing comments on S. 755, a bill to provide for USEC privatization. The Administration's comments included the following provision as a new section entitled, "Section 1704 Foreign Ownership Limitation," in Chapter 27 of the AEA:

No license or certificate of compliance may be issued to the Corporation under Sections 53, 63, 193, or 1701 if, in the opinion of the Nuclear Regulatory Commission, *the issuance of such a license or certificate of compliance to the Corporation would be inimical to the common defense and security of the United States due to the nature and extent of the ownership, control or domination of the corporation by a foreign corporation or a foreign government or any other relevant factors or circumstances.*¹⁸ [Emphasis added.]

The Administration's bill included the following codification change to the AEA as section 193(f):

(f) LIMITATION—No license or certificate of compliance may be issued to the United States Enrichment Corporation or its successor under this section or Sections 53, 63, or 1701, if in the opinion of the Commission, the issuance of such a license or certificate of compliance—

- (i) would be inimical to the common defense and security of the United States; or
- (ii) *would be inimical to the maintenance of a reliable and economical domestic source of enrichment services because of the nature and extent of the ownership, control, or domination of the Corporation by a foreign corporation or a foreign government or any other relevant factors or circumstances.*¹⁹ [Emphasis added.]

S. 755, as reported by the Senate Committee on Energy and Natural Resources, included the Administration's proposed codification of an amendment to section

¹⁸S. Rep. No. 104-173, at 50 (1995) (June 19, 1995, Letter from William H. Timbers, Jr., enclosing draft bill).

¹⁹*Id.* at 54.

193 of the AEA.²⁰ The Committee's report to accompany S. 755 discusses the provision in a section entitled "Limitations on Foreign Ownership." It noted that

S. 755, as introduced, contains a provision providing the Nuclear Regulatory Commission with the authority to deny a license or certificate of compliance if the "issuance of such a license or certificate of compliance to the corporation would be inimical to the *common defense and security of the United States* due to the nature and extent of the ownership, control or domination of the Corporation by a foreign corporation or foreign government or any other relevant factors or circumstances" [emphasis added].

The committee substitute, in section 17(a)(2) includes the "common defense and security" requirement while adding that the NRC may also deny a license or certificate of compliance if doing so would be "inimical to the maintenance of a *reliable and economical domestic source of enrichment services* due to the nature and extent of the ownership, control or domination of the Corporation by a foreign corporation or a foreign government or any other relevant factors or circumstances. This provision was added to guard against the possibility of a foreign uranium enrichment company acquiring the Corporation with the intent of operating it in a manner inconsistent with its maintenance as an ongoing uranium enrichment concern."²¹

The report further states that no certificate or license should be issued

if in the opinion of the NRC the issuance of such a license or certificate of compliance would be inimical to the common defense and security of the United States or would be *inimical to the maintenance of a reliable and economical domestic source of enrichment services because of the nature and extent of the ownership, control, or domination of the Corporation by a foreign corporation or a foreign government or any other relevant factors or circumstances.* *Id.* at 31. [Emphasis added.]

The language contained in S. 755, to provide for a USEC Privatization Act, was merged into S. 1357, a bill to provide for a Balanced Budget Reconciliation Act of 1995 which passed the Senate on October 27, 1995.²² S. 1357 included the language reported out on S. 755. On the next day, the Senate then inserted S. 1357 into H.R. 2491 which was the House bill for the same budget act.²³

The House bill also contained language for a section 193(f). Its version provided language addressing common defense and security and foreign ownership and control, but not language addressing a reliable and economical domestic source of enrichment.²⁴ The intent of the House bill was to ensure that enrichment activities

²⁰ *Id.* at 11.

²¹ *Id.* at 19-20 (emphasis in original).

²² 141 Cong. Rec. S16096 (daily ed. Oct. 27, 1995).

²³ 141 Cong. Rec. S16159 (daily ed. Oct. 28, 1995).

²⁴ H.R. 2491 as enrolled by the House on October 27, 1995, contained the following language:

If the privatization of the United States Enrichment Corporation results in the corporation being—

- (1) owned, controlled, or dominated by a foreign corporation or a Foreign government, or
- (2) otherwise inimical to the common defense or security of the United States, any license held by the Corporation under sections 53 and 63 shall be terminated.

would be subject to the same foreign ownership limitations as any other nuclear production or utilization facility and that the interpretation of section 193(f) be consistent with interpretations of similar language in sections 103 and 104 of the AEA.²⁵

Following the conference on the two bills, the Congress enacted the language that is in the current statute. The Conference report stated that it was adopting the Senate version with minor changes. While a few provisions were discussed, there was no discussion relevant to the section 193 provision.²⁶ Thus, there is no indication that the language in the conference version of H.R. 2491 — separating the concept of a reliable and economical domestic source of enrichment from the common defense and security — was intended to change the intent described in Senate Report 104-173 which was to guard against the possibility of a foreign uranium enrichment company acquiring the Corporation with the intent of operating it in a manner inconsistent with its maintenance as an ongoing uranium enrichment concern.

On December 6, 1995, the President vetoed the Balanced Budget Reconciliation Act of 1995 for reasons unrelated to its enrichment provisions.

Thereafter, on January 26, 1996, Mr. Murkowski submitted a substitute amendment to S. 755. In introducing this legislation, he stated that this bill “is virtually identical to USEC privatization language contained in the Budget Reconciliation measure passed earlier by the Senate.” As to section 193(f), it contained the same language that the President had earlier vetoed as part of the Balanced Budget Reconciliation Act of 1995. Thereafter, the substitute language of S. 755 was incorporated into the legislation that was enacted into the USEC Privatization Act as Pub. L. No. 104-134 (Apr. 26, 1996). There was no further discussion that addressed section 193(f).

In sum, as there were no floor discussions in either the House or Senate pertaining to section 193(f), the only relevant legislative history is contained in Senate Report 104-173. Again, that report states that the NRC may also deny a license or certificate of compliance if issuance of a license or certificate would be

inimical to the maintenance of a *reliable and economical domestic source of enrichment services* due to the nature and extent of the ownership, control or domination of the Corporation by a foreign corporation or a foreign government or any other relevant factors or circumstances. This provision was added to guard against the possibility of a foreign uranium enrichment company acquiring the Corporation with the intent of operating it in a manner inconsistent with its maintenance as an ongoing uranium enrichment concern.

²⁵H.R. Rep. No. 104-86, at 20 (1995) on H.R. 1216, a bill to establish the USEC Privatization Act, which was incorporated into H.R. 2491. The report noted that in establishing a private corporation, one of the purposes of the corporation was to “help maintain a reliable and economical domestic source of uranium enrichment services.” See H.R. Rep. No. 104-86, at 18.

²⁶H.R. Rep. No. 104-350, at 1015 (1995).

C. The Issuance of an Amendment to a Certificate Does Not Require the Findings Under AEA § 193(f) To Be Made

In analyzing the Commission's obligations under section 193(f), the first question that arises upon reading the various statutory provisions and the limited legislative history is when must the findings required by section 193(f) be made.

Section 193(f) provides that “[n]o license or certificate . . . *may be issued* . . . if the Commission determines that . . . *issuance* of such a license or certificate . . . would be inimical to . . . the maintenance of a reliable and economical domestic source of enrichment services” (emphasis added). The operative language is a determination whether *issuance* would be inimical to the maintenance of a domestic industry. It is clear from the language that it applies to the issuance of a certificate. There is no indication in the language of the statute or the legislative history that suggests the NRC is to make this finding when a certificate is amended. Since the thrust of the legislative history is on foreign ownership and domination, it is appropriate to read the statute as applying only when a new entity is issued a certificate to take over the control of a GDP.

Construing the finding to be made in this manner makes sense for initial certification of a newly privatized owner or at times when control may change, such as a new entity seeking to purchase the right to operate a GDP. Such an approach would place the NRC in the role of determining whether the initial or new applicant would be likely to operate the GDPs in a manner intended to maintain domestic enrichment services. At these stages, the NRC's denial of a certificate would have opened the opportunity for another bidder but would not have necessarily entailed a suspension of operations. The existing operator would remain responsible until a new certificate holder was approved. At other stages, such as during recertification or issuance of an amendment to the certificate, if the Commission were to determine that USEC or a successor is operating in a manner that is inimical to “maintenance of a reliable and economical domestic source of enrichment services,” then surely a denial of a recertification or an amendment by the Commission could only exacerbate that condition, thereby making it even more difficult for USEC or the successor to maintain a reliable and economical domestic source of enrichment services. If this is in fact the process contemplated, even absent the awkward construction of section 193(f), the statute would appear to establish a process that potentially places the Commission at cross purposes with the apparent intent of the provision. Thus, the Staff views the statute as requiring the finding only at times when the ownership of the GDPs may change.²⁷

²⁷ Petitioners contend that 10 C.F.R. § 76.22 provides further support for their position. However, the Commission in promulgating that regulation was merely incorporating section 193(f) into its regulations. See discussion below on 10 C.F.R. § 76.22.

The Petitioner contends that 10 C.F.R. § 76.45(a) “provides that the criteria to be employed in the initial certificate are to be employed in an amendment.”²⁸ The only basis provided for that contention was the language in the regulation. The Petitioners have misconstrued the regulation. Section 76.45(a) provides in relevant part:

The amendment application *should* contain sufficient information for the NRC to make findings of compliance or acceptability for the proposed activities *in the same manner* as was required for the original certificate. [Emphasis added.]

This provision is procedural and not substantive. Its purpose is to instruct the applicant that the information presented to support the proposed activity to be covered by the amendment should be in the same degree of detail that was submitted in the original application. It does not establish the criteria for the issuance of the amendment. In any event, its direction is described in permissive, not mandatory language. The Staff does not interpret 10 C.F.R. § 76.45(a) as providing any indication to the Staff that, at the time of an amendment, all the findings that were made at the time of initial certification must be remade.

It is recognized that one can read 10 C.F.R. § 76.70(b) as establishing a recurring obligation to apply the direction of section 193(f). Section 76.70(b) was adopted as part of the initial set of requirements for the GDPs in Part 76 and includes the standard provision included in all NRC licensing or certifying regulations invoking the general enforcement provision of section 186 of the AEA that a license may be suspended, amended, or revoked for any condition that would warrant the Commission refusing to grant the license on an original application.²⁹ However, the Commission is not obligated to take enforcement action (such as suspension or revocation of the certificates) as enforcement decisions are inherently discretionary. To require enforcement action against the certificate at stages when control is not changing if there are indications that the certificate holder was not maintaining a reliable and economical domestic source of enrichment would, as noted above, exacerbate the certificate holder’s existing condition, thereby making it even more difficult for the certificate holder to maintain a reliable and economical domestic source of enrichment. Taking enforcement action in such a case could amount to an abuse of discretion.³⁰ The

²⁸ Petition at 19.

²⁹ The statutory provision and regulatory implementation of it codify a discretionary enforcement power available to the Commission. Its availability does not mandate that the Commission initiate any particular enforcement action or any particular review preliminary to possible enforcement action.

³⁰ The Petitioners contend (Petition at 25) that if the NRC concludes that the issue “cannot be cured by Commission action,” it should at least notify the Congress, other Executive Branch agencies, and the public. However, section 193(f) is not a notification provision. It provides only for the denial of a certificate without which a GDP cannot operate.

Staff does not read 10 C.F.R. § 76.70 as establishing a recurring obligation to apply the direction of section 193(f).

Moreover, as noted above, the AEA establishes in section 1701(c)(4) a requirement for the Commission to make periodic findings concerning the status of the operation of the GDPs. Congress was clearly aware of this section of the AEA as it amended it as part of the USEC Privatization Act.³¹ The section specifically sets out what the NRC is to review. The focus is only on health, safety, and the common defense and security. It is noteworthy that the NRC was not charged with a recurring obligation to consider whether USEC was continuing to maintain a reliable and economical source of domestic enrichment services. The absence of such a provision as part of the NRC's recurring obligation is persuasive evidence that the NRC was not expected to have a continuous obligation to consider the vitality of the domestic enrichment industry.³²

Finally, as noted in the statutory framework discussion above, language similar to that found in section 193 was also included in two provisions in the Energy Policy Act and in the Privatization Act prescribing findings that had to be made by USEC and other departments of the Executive Branch before they could proceed to implement privatization. Providing for an independent review or finding by the Commission in conjunction with other Executive Branch action has parallels elsewhere in the AEA.³³ Accordingly, construing section 193(f) in tandem with the substantially similar finding required of USEC under section 1502 at initial privatization, supports the view that the NRC's obligation is not recurring.

Therefore, the Staff does not interpret section 193(f) of the AEA, or the Commission's regulations, as requiring the findings under section 193(f) to be made prior to issuance of an amendment to a certificate.

D. The Finding Under Section 193(f)(2)(B) Is Principally Directed to the Possibility of Foreign Entities Gaining Control and Undermining U.S. Domestic Enrichment Capabilities in the Privatized USEC

Even though the Staff did not conduct a "reliable and economical" review for this amendment (nor do I believe such a review was required for a certificate amendment), the Commission has, as noted above, indicated that it believes that any such review is principally directed to the possibility of foreign entities gaining

³¹The frequency of recertification in section 1701(b)(2) was amended by section 3116(b)(3) of Pub. L. No. 104-134.

³²Importantly, the Congress did not give the Commission the authority to require USEC or its successors to continue to operate the GDPs to provide for a domestic enrichment source. This is in contrast to section 108 of the Atomic Energy Act which states that the Commission, if Congress declares a state of war or national emergency, has the authority to require production and utilization facilities to continue to operate if necessary for the common defense and security.

³³See AEA §§ 123-129.

control and undermining U.S. domestic enrichment capabilities in the privatized USEC. While unnecessary to my decision, the following observations support the Commission's position.

It is clear from the legislative history discussed above that the Administration and the drafters of this legislation were concerned about the potential for foreign ownership of the GDPs. Senate Report 104-173, quoted above, on S. 755, the bill that was adopted in the final legislation, clearly explains that the purpose of section 193(f) was "to guard against the possibility of a foreign uranium enrichment company acquiring the Corporation with the intent of operating it in a manner inconsistent with its maintenance as an ongoing uranium enrichment concern."

It is true that in the final language of section 193(f), the concept of foreign control was separated from the provision on maintaining a domestic source of enrichment services. However, as set out above in the discussion on the legislative history, there is no indication that the changed language was intended to serve a different purpose and provide separate independent tests. This one-sentence provision was part of a bill that was almost 400 pages. The Conference report, in explaining the departure from the Senate-passed language which came from S. 755, stated that minor changes had been made and then it proceeded to discuss the specific changes.³⁴ There was no discussion that addressed section 193(f). This is surprising in light of the final language that, if read literally, would have the NRC delving into matters of economic viability. This is an area where the NRC has virtually no experience since it is unrelated to its traditional role under the Atomic Energy Act as a regulator of radiological health and safety, and the common defense and security. One can only conclude that the drafter of the final version did not intend to change the purpose of the language. Thus, it would be reasonable to read the statute as providing three related tests: (1) Is the certificate holder to be owned, controlled, or dominated by a foreign entity; and (2) if the certificate holder is not to be owned, controlled, or dominated by a foreign entity, is the certificate holder likely to be subject to influence by an entity, principally a foreign entity, that would be inimical to (a) the common defense and security or (b) maintaining a domestic enrichment capability?

Turning to the specific language of section 193(f)(2)(B), the terms used are open to various interpretations. The common usage of the terms as reflected in *Webster's New Collegiate Dictionary* (1977) defines "reliable" as "suitable or fit to be relied on: dependable . . . giving the same result on successive trials"; "economical" as "marked by careful efficient, and prudent use of resources: thrifty: operating with little waste or at a savings"; and "inimical" as having "the

³⁴H.R. Rep. No. 104-350, at 1015 (1995).

disposition of an enemy: hostile . . . reflecting or indicating hostility: unfriendly . . . being adverse usually by reason or indicating hostility or malevolence.”

The Petitioners believe that these terms mean that USEC must be able to produce “8 million SWU to fulfill its role as a reliable source of domestic supply.”³⁵ However, a literal reading of section 193(f) leads to the result that the Commission must find upon issuance of a certificate that the certificate holder will maintain *a* reliable and economical domestic source of enrichment services. Such a reading could suggest that as long as the certificate holder can provide some enrichment services, even a very limited amount, in an economical and reliable manner, the certificated holder is maintaining *a* reliable and economical source of enrichment service. Such an interpretation, while true to the plain meaning of the words, may not be rational.³⁶ While there is no express or implied legislative intent to reach such a result, neither is there an intent expressed to define reliable as capable of supplying 100% of the enrichment services required by domestic power plants. On the other hand, the GDPs have operated in a dependable manner over many years.

Similarly, the term “economical” is open to a wide variety of possible interpretations. These various interpretations might require the NRC to determine whether the certificate holder has a positive cash flow, can produce SWU below selling cost in order to sell services at a profit, can compete on the world market, or can sell services at an affordable price, even if it is above the world market price, to meet the statute. It is also noted that the AEA uses the term “inimical” in the context of common defense and security. It is uncommon to relate it to financial or economic issues as suggested literally by the statute.

Thus, the NRC is faced with implementing a statute that despite its superficial clarity contains latent ambiguities.³⁷ Given the lack of definition in the law and the ambiguity of the language, the Commission has substantial discretion in interpreting its obligations.³⁸

³⁵ Petition at 8.

³⁶ “[I]f a literal construction of the words of a statute would lead to an absurd, unjust, or unintended result, the statute must be construed so as to avoid that result.” *United States v. Mendoza*, 565 F.2d 1285, 1288 (5th Cir. 1978) (citing *Church of the Holy Trinity v. United States*, 143 U.S. 457, 461, 12 S. Ct. 511, 512 (1892)). See also *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400, 86 S. Ct. 852, 857 (1966); *Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1529 (11th Cir. 1996); Sutherland Statutory Construction (5th ed.) § 46.07 (1992 Supp.). “[E]ven when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole, this Court has followed [the purpose of the act] rather than the literal words.” *United States v. American Trucking Associations, Inc.*, 310 U.S. 534, 542-44, 84 L. Ed. 1345, 60 S. Ct. 1059 (1940).

³⁷ It is appropriate to turn to a statute’s legislative history for guidance when a statute contains latent ambiguities despite its superficial clarity. *West v. Kerr-McGee Corp.*, 765 F.2d 526, 530 (5th Cir. 1985).

³⁸ The Supreme Court has long held that great deference is due the interpretation of a statute by the officers or agency charged with its administration. *FDA v. Brown & Williams Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Smiley v. Citibank*, 116 S. Ct. 1730, 1733 (1996); *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The Commission, of course, is responsible for all of the licensing and related regulatory functions set forth in the AEA. See generally Energy Reorganization Act of 1974, § 201, 42 U.S.C. § 5841. Its interpretation of

(Continued)

From its review of the structure of the AEA as a whole and the legislative history, the NRC has concluded that the focus of any inquiry under section 193(f)(2)(B) as to the viability of the enrichment services operations should be on the possibility of control of the corporation by interests, principally foreign, to the detriment of an ongoing domestic industry.³⁹ This is consistent with the view held by the Senate Committee on Energy and Natural Resources, which introduced the section, entitled “Limitations on Foreign Ownership,” of S. 755 that became section 193(f) as expressed in Senate Report 104-173.

The Commission relied on the view of this Committee when it promulgated changes to Part 76 to reflect the Privatization Act. In 1997, the Commission adopted the statutory language of section 193(f) without change in 10 C.F.R. § 76.22. In the Statement of Considerations for this rule, the Commission noted that it had not been directed in the past “in its regulatory decisions to evaluate whether a proposed action is inimical to the viability of the domestic industries subject to the NRC regulation.”⁴⁰ The Commission went on to say that “*information about the intent of the language* is contained in a Senate Committee Report on an earlier version of the legislation (S. Rep. No. 104-173 on S. 755, November 17, 1995)” (emphasis added). It then quoted the provisions of the report which have been set out above.

The guidance provided in the Statement of Considerations for evaluating this issue focused on (1) information under 10 C.F.R. § 76.33(a)(2) related to foreign control and ownership, and (2) information obtained to meet requirements for access to and protection of classified information.⁴¹ The Commission noted its authority to require a certificate holder or applicant to provide additional information concerning the issuance of a certificate and that the Staff was considering the need to submit further information addressing whether issuance would be inimical to the maintenance of a reliable and economical source of enrichment services. It is clear that the Commission took the view at the time of the promulgation of the regulation that section 193(f) and the associated regulation at 10 C.F.R. § 76.22 focused on the potential for a foreign concern not maintaining a domestic enrichment capability.

the AEA, therefore, is entitled to great weight. The AEA affords the Commission uniquely “broad responsibility” in determining how the statutory objectives will be achieved. *Siegel v. Atomic Energy Commission*, 400 F.2d 778, 783 (D.C. Cir. 1968).

³⁹The Commission has followed a similar contextual analysis approach with the other foreign ownership provision of the Atomic Energy Act, § 104(d). As noted in the “Final Standard Review Plan on Foreign Ownership, Control and Domination,” “the Commission has stated that in context with the other provisions of Section 104d, the foreign control limitation should be given an orientation toward safeguarding the national defense and security. Thus an applicant that may pose a risk to national security by reason of even limited foreign ownership would be ineligible for a license.” 64 Fed. Reg. 52,355, 52,358 (Sept. 28, 1999) (§ 3.2 “Guidance on Applying Basic Limitations”).

⁴⁰Final Rule on USEC Privatization Act: Certification and Licensing of Uranium Enrichment Facilities, 62 Fed. Reg. 6664, 6665 (Feb. 12, 1997).

⁴¹*Id.*

E. The NRC Is Not Bound by the Position in Draft NUREG-1671, “Standard Review Plan for the Recertification of the Gaseous Diffusion Plants”

Following the promulgation of the final rule implementing section 193(f), the Staff considered the need for additional information, prepared SECY-97-071, and published a draft guidance document for comment, NUREG-1671, “Standard Review Plan for the Recertification of the Gaseous Diffusion Plants” (SRP) which, among other things, provided information on the way in which the NRC Staff would make determinations regarding the “foreign ownership, control or domination” criterion as well as the “reliable and economical” finding if needed. The draft SRP stated that the financial vitality of the applicant will be reviewed and if the actual or estimated credit rating is below investment grade, the reviewer should consider whether any other economic, financial, or business characteristics provide reasonable assurance of the applicant’s viability over at least 5 years. It is important to emphasize that by its terms the draft SRP addressed only recertification and it has not in practice been applied to amendments of certificates.

The recertification of USEC in 1999 included a review against the provisions of the draft SRP. At that time, based on USEC’s favorable credit rating the NRC was not confronted with an unfavorable credit rating and, therefore, did not need to closely examine the statute or focus on whether there was a requirement to perform a detailed financial vitality review including economic, financial, or business characteristics.

However, a subsequent significant change in USEC’s credit rating prompted the NRC to review USEC’s financial status and to closely examine whether and when there is a need for a “reliable and economical” review under section 193(f) of the AEA. That examination led to the Commission’s conclusion that the “reliable and economical” finding is not a recurring obligation, but is only pertinent at the time of the initial privatization or whenever there is a transfer of a certificate.⁴² The Commission also concluded that the scope of any examination under the “reliable and economical” review is limited principally to the issue of foreign control.

Admittedly, the Commission’s conclusion differs from the Staff position provided in the draft SRP where the Staff proposed to do a financial vitality review as part of the “reliable and economical” review at every recertification. However, as the Commission recently explained in *Kansas Gas and Electric Co.*

⁴²The Commission on the public record informed its congressional oversight committees of this position in letters dated September 11, 2000. In addition, it informed the Petitioners of its view in a letter dated January 10, 2001, from Eric J. Leeds, Chief, Special Projects Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards. The issue was also raised during the March 27, 2001, hearing before the U.S. House of Representatives, Commerce Committee.

(Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441 (1999), an agency can change an agency position.⁴³ It is well established in administrative law that, when a statute is susceptible to more than one permissible interpretation, an agency is free to choose among those interpretations.⁴⁴ This is so even when a recent interpretation may be viewed as a departure from prior agency views.⁴⁵ As the Supreme Court explained in *Chevron*, agency interpretations and policies are not “carved in stone” but rather must be subject to reevaluation of their wisdom on a continuing basis.⁴⁶ The Commission should have even greater flexibility in this case where the position being changed is one reflected in an initial draft SRP that has yet to be finalized. Of course, an SRP, whether draft or final, is not binding on the Commission.⁴⁷ Thus, the Staff concludes that NRC can change its interpretation of section 193(f) so long as it justifies its new approach with a “reasoned analysis” supporting a permissible construction.⁴⁸

As noted earlier, the Commission has examined the matter of its obligation to make findings concerning a reliable and economical domestic source of enrichment services. That examination was based on a detailed analysis of the legislative history and resulted in the position that was articulated in letters to the Commission’s congressional oversight committees.⁴⁹

Based on the above, the Staff concludes that in making determinations required by section 193(f)(2)(B), it should focus on the issue of entities, principally foreign entities, gaining control and undermining U.S. domestic enrichment capabilities, which would be inimical to the interest of the United States, and that this review need only be conducted at the time of a proposed certification of a new owner or other transfer of control meeting the threshold of 10 C.F.R. § 76.65. Such a review is not required and is not appropriate for an enrichment assay upgrade amendment to the Paducah certificate.

⁴³ The Petitioners recognize that an agency can change its position but noted that the Commission in *Wolf Creek* sought more public input before making its decision. In the instant case, the NRC has made no secret of its position. While NRC did not seek public comment on its position, there was opportunity for the public to provide their views to the NRC. The Petitioners were aware of the NRC position.

⁴⁴ *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

⁴⁵ *Id.* at 862; *Wolf Creek*, CLI-99-19, 49 NRC at 460.

⁴⁶ *Chevron*, 467 U.S. at 863-64; *FDA v. Brown and Williams Tobacco Co.*, 529 U.S. 120, 157 (2000).

⁴⁷ SRPs are Staff documents not issued by the Commission. They are not interpretations of the Commission requirements binding on the Commission pursuant to 10 C.F.R. § 76.6. SRPs like Regulatory Guides provide guidance on how requirements might be met but they are not substitutes for the requirements. The Commission has held that NUREGs and Regulatory Guides “are advisory in nature and do not in themselves impose legal requirements on either the Commission or its licensees.” *Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 397 (1995). Guidance issued by the Staff is subject to question and the Staff may have to demonstrate the validity of its guidance if challenged in an adjudication. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-698, 16 NRC 1290, 1299 (1982) (*rev’d in part on other grounds*, CLI-83-22, 18 NRC 299 (1983)).

⁴⁸ *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991); *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1302 (10th Cir. 1998). See also *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973); *Hatch v. FERC*, 654 F.2d 825, 834 (D.C. Cir. 1981); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1971).

⁴⁹ See note 42, *supra*.

III. CONCLUSION

For the reasons given above, the petition is denied. In denying this petition, the Staff does not intend to imply that the Petitioners have not raised public policy issues concerning the capabilities of USEC to provide domestic enrichment services. The NRC is not the agency to address these issues. Rather, these issues are appropriately addressed by the Congress and other Executive Branch agencies.

Pursuant to 10 C.F.R. § 76.45(e), a petition requesting review by the Commission of this Director's Decision must be filed within 30 days of the date of this Decision.

FOR THE NUCLEAR REGULATORY
COMMISSION

Martin J. Virgilio, Director
Office of Nuclear Material Safety
and Safeguards

Dated at Rockville, Maryland,
June 14, 2001.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of

Docket No. 50-247
(License No. DPR-26)

ENERGY NUCLEAR OPERATIONS, INC.
and ENERGY NUCLEAR INDIAN
POINT 2 LLC
(Indian Point, Unit 2)

November 21, 2001

The Petitioners requested the following: (1) NRC suspend the license for the Indian Point Unit 2 (IP2) facility due to persistent and pervasive negligent management by the Licensee, ConEd, which has endangered the public health and safety and the environment due to significant safety problems existent at the site for decades; (2) specifically, that NRC investigate the apparent misrepresentation of material fact by the utility to determine whether the significantly insufficient engineering calculations relied on to ensure adequacy of design of key systems, including the steam generator (SG) analysis and the electric bus analysis at the IP2 reactor, were due to a lack of rigor and thoroughness or a result of deliberately misleading information; (3) should the investigation determine that ConEd deliberately provided insufficient and false information, the Petitioners specifically request that ConEd's operating license be revoked for its IP2 reactor; (4) should NRC not revoke the license, and the IP2 reactor returns to operation, the Petitioners specifically request that it remain on the list of agency focus reactors to oversee the operation of the reactor until such time as its management demonstrates that it can fulfill its regulatory requirements and commitments; (5) no license transfer requests should be approved for IP2 until such time that its management can demonstrate that the Updated Final Safety Analysis Report (UFSAR) backlog and the maintenance requirements are up to date and workers have been retrained to the complete and revised UFSAR; (6) NRC should keep IP2 off-line until the fundamental breakdown in management is analyzed and corrected.

The final Director's Decision on this petition was issued on November 21, 2001. In that decision, the NRC Staff concluded that the information contained in the petition and the supplement did not warrant NRC Staff action to suspend or revoke the operating license for IP2. Likewise, the Staff did not find any basis for initiating an investigation into wrongdoing on the part of ConEd. For these issues, the Petitioners' requested actions were not granted. However, the NRC granted in part the Petitioners' request that IP2 remain on the list of agency focus plants (i.e., plants with multiple/repetitive degraded cornerstones). The NRC Staff did not grant the Petitioners' request to define under what conditions IP2 will be removed from the list of plants with multiple/repetitive degraded cornerstones. In addition, the Staff found that the Petitioners' request to delay or deny a request to transfer the operating license for IP2 until the Licensee's management can demonstrate that the UFSAR, CR backlog, and maintenance requirements are up to date and that plant workers have been retrained to the modified UFSAR did not meet the requirements for review under 10 C.F.R. § 2.206.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

On December 4, 2000, Citizens Awareness Network (CAN), Public Citizen, Westchester Peoples Action Coalition, Nuclear Information and Resource Service, and Environmental Advocates (Petitioners) filed a petition pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206). The Petitioners requested that the U.S. Nuclear Regulatory Commission (Commission or NRC) take the following actions with regard to Indian Point Nuclear Generating Unit No. 2 (IP2), previously owned and operated by the Consolidated Edison Company of New York, Inc. (ConEd or the Licensee): (1) suspend the license for the IP2 reactor based on the Licensee's "persistent and pervasive, negligent management of the reactor"; (2) investigate whether the potential misrepresentation of material fact by the utility regarding "significantly insufficient" engineering calculations was due to a lack of rigor and thoroughness or was deliberate; (3) revoke the IP2 operating license if it is found that the Licensee deliberately provided insufficient and false information; (4) if the license is not revoked, then maintain IP2 on the list of "agency focus" plants until IP2 management demonstrates it can fulfill its regulatory requirements and commitments; (5) not approve the transfer of the IP2 license until management can demonstrate that the Updated Final Safety Analysis Report (UFSAR), the condition report (CR) backlog, and the maintenance requirements are up to date and workers have been retrained; and (6) not allow the IP2 reactor to restart until

the fundamental breakdown in management is analyzed and corrected. The bases for the requested actions are discussed later in this section.

In a transcribed public meeting between the Petitioners and the Office of Nuclear Reactor Regulation's (NRR's) Petition Review Board on January 24, 2001, the Petitioners clarified issues in the petition. The transcript of this meeting was treated as a supplement to the petition and is available for inspection at the Commission's Public Document Room, at One White Flint North, 11555 Rockville Pike (first floor), Rockville Maryland, and electronically accessible in the Agencywide Documents Access and Management System (ADAMS) through the NRC Public Electronic Reading Room at <http://www.nrc.gov/reading-rm.html> (ADAMS Accession No. ML010450222). If you do not have access to ADAMS, or if you have problems in accessing the documents in ADAMS, contact the NRC Public Document Room (PDR) reference Staff at 1-800-397-4209 or 301-415-4737 or by e-mail to pdrr@nrc.gov.

During the public meeting, the Petitioners gave the NRC Staff three documents to consider in deciding whether to review the petition under 10 C.F.R. § 2.206. The documents consisted of (1) several hundred reports on the condition of the reactor and the associated facility from the IP2 condition report system; (2) a January 19, 2001, evaluation of the condition reports by the Union of Concerned Scientists (UCS); and (3) a January 10, 2001, redacted version of the document "Citizens Awareness Network, Inc.'s Revised Contention on Financial Qualifications in the License Transfers for James A. FitzPatrick and Indian Point 3 Nuclear Power Stations per Commission Memorandum & Order, November 27, 2000." The Petitioners provided the documents to supplement the bases for the requested actions in the petition. The documents contained no new requests for NRC action. On September 6, 2001, the operating license for IP2 was transferred from ConEd to Entergy Nuclear IP2 and Entergy Nuclear Operations, Inc. (Entergy). By letter dated September 20, 2001, Entergy requested that the NRC continue to review all requests pending with the NRC when ConEd requested the license transfer.

As a basis for the requested actions, the Petitioners stated that ConEd's systemic mismanagement of the plant had resulted in, among other things, inconsistencies and inaccuracies in the UFSAR, safety systems whose compliance with the regulations could not be verified, design-basis analyses that might not be accurate, and an UFSAR that might not be up to date. The Petitioners referenced numerous NRC inspection reports, licensee event reports, letters between the NRC Staff and ConEd, plant performance review summaries, and other documents. In addition, the Petitioners contended that the CRs turned over to the NRC Staff during the January 24, 2001, public meeting provided further evidence of ConEd's mismanagement of the IP2 facility, evidence that may not have been previously considered by the NRC Staff. The Petitioners stated that ConEd's mismanagement of the plant has compromised the health and safety of the workers and the public, potentially exposing them to radiation levels higher than

warranted. The Petitioners also stated that ConEd's mismanagement had allowed ConEd to operate the plant out of compliance with the technical specifications.

The Petitioners also contended that IP2 senior management deliberately chose to continue operating the plant with deteriorating steam generators, in spite of communications and technical guidance from the NRC. The Petitioners stated that a license amendment to defer a June 1999 steam generator tube inspection to June 2000 resulted in the February 2000 steam generator tube failure event. The Petitioners further stated that the NRC's decision to approve the license amendment was based on data provided by ConEd which was later deemed inaccurate.

The Petitioners also requested that no license transfer be approved until the management of IP2 can demonstrate that the UFSAR, CR backlog, and maintenance requirements are up to date, and that the plant workers have been retrained to the modified UFSAR. The Petitioners clarified the bases of their request during the January 24, 2001, public meeting. The Petitioners stated that the plant was "too far out of its licensing bases and design bases at this point and the licensing documentation . . . too inaccurate to justify a transfer at this point." In addition, the Petitioners stated: "On the basis of the violations that have occurred and the way that Con Edison has been running the reactor, . . . Con Edison has not earned the privilege to be able to transfer its liability to another operator." The Petitioners also questioned the adequacy of the license transfer process to evaluate nuclear power plants with a history of poor performance. Finally, the Petitioners questioned Entergy's financial qualifications to handle a plant as troubled as IP2 in light of the many acquisitions the company has recently made. As further basis for their concerns, during the January 24, 2001, public meeting, the Petitioners submitted the document entitled "Citizens Awareness Network, Inc.'s Revised Contention on Financial Qualifications in the License Transfers for James A. FitzPatrick and Indian Point 3 Nuclear Power Stations per Commission Memorandum & Order, November 27, 2000." The document discusses CAN's financial concerns regarding Entergy's efforts to purchase James A. FitzPatrick and Indian Point 3. The Petitioners contended that their concerns about the financial qualifications of Entergy in this proceeding were also relevant to the transfer of the IP2 license to Entergy.

By letter dated May 3, 2001, the NRC Staff requested that ConEd provide a voluntary response to the issues identified in the petition. On May 17, 2001, ConEd provided a response to the issues identified in the petition (ADAMS Accession No. ML011420230).

The NRC Staff sent a proposed version of the Director's Decision to the Petitioners and ConEd by letter dated July 25, 2001, with an invitation to comment on the completeness and accuracy of the decision. The Petitioners' reply and the NRC Staff's response to the Petitioners' reply are included as

Attachments 1 and 2 (not published), respectively. ConEd did not comment on the proposed Director's Decision.

II. DISCUSSION

The Staff reviewed the information in the petition and the supplemental documents submitted during the January 24, 2001, public meeting. The NRC Staff identified the following issues to be addressed in this Director's Decision: (1) Does the performance of the operators of IP2 warrant enforcement action to prevent the plant restart or suspend the operating license? If not, should IP2 remain on the list of plants receiving enhanced NRC oversight? (2) Is there a basis to initiate an investigation of ConEd regarding the August 1999 and February 2000 events at IP2? (3) Based on the performance problems discussed in the petition, should ConEd be allowed to transfer the IP2 license to another owner?

Issue 1

Does the performance of the operators of IP2 warrant enforcement action to prevent plant restart or suspend the operating license? If not, should IP2 remain on the list of plants receiving enhanced NRC oversight?

The Petitioners contend that management of the IP2 reactor facility has degraded to the point where public health and safety are not assured and the environment is not protected. As evidence for their claim, the Petitioners provided numerous examples of plant performance problems documented in NRC inspection reports and plant performance reviews for IP2, licensee event reports submitted by ConEd to the NRC under 10 C.F.R. § 50.73, and other similar documents. These examples include errors in design and licensing basis documentation, errors in translating the design of the plant into hardware and procedures, degraded plant conditions, deficiencies in emergency preparedness, and what the Petitioners believe is a general disregard of NRC technical and administrative communications. The Petitioners requested that the NRC keep the IP2 reactor off line until the fundamental breakdown in management described in the December 4, 2000, Petition is analyzed and corrected.

As further evidence of management problems at IP2, the Petitioners gave the NRC recent IP2 CRs and UCS's evaluation of those CRs. The UCS CR evaluation highlights a variety of out-of-normal conditions, including deficiencies in the IP2 problem identification and resolution process and deficiencies in the material condition of the plant. The Petitioners specifically requested that if the plant is allowed to operate, IP2 remain on the list of "agency focus" plants until management for IP2 demonstrates it can fulfill its regulatory requirements and commitments.

NRC Response

In a conference call prior to the December 2000 restart of IP2, the NRC Staff informed Deborah Katz of CAN, the contact person for this petition, that the Petitioners' request to prohibit the restart of the IP2 reactor until the fundamental breakdown in management is analyzed and corrected (Request Action 6) was not granted. The Director of NRR did not grant the requested action because the findings and issues that provided the basis for the requested action had all been evaluated previously during NRC's inspections and assessments of IP2. At the time of the Petitioners' request, the findings from the NRC's assessment of IP2 did not warrant prohibiting the restart of IP2. The Staff informed Ms. Katz of the decision not to prevent the restart of the IP2 reactor in a letter dated March 9, 2001.

The NRC has been concerned for some time about performance weaknesses at IP2. The Petitioners' concerns about IP2 are, for the most part, the same concerns the NRC Staff has been documenting for some time. Although performance issues continue to pose challenges for this facility, recent NRC Staff assessments of Licensee performance indicate that IP2 is being operated safely.

In recent years, the NRC has maintained a very strong regulatory presence at IP2, as reflected by numerous inspection and assessment reports resulting in significant civil penalties. For example, inspections conducted in 1996 and 1997 brought to light a variety of performance issues, many identical to those raised by the Petitioners. The last Systematic Assessment of Licensee Performance report (issued in March of 1997) captured these issues and conveyed NRC's concerns to ConEd through significantly lowered performance ratings. In response to these concerns, NRC inspections by resident and region-based inspectors increased significantly. Performance problems continued. An independent, in-depth safety assessment was conducted at the plant in early 1998 in accordance with a confirmatory action letter. An NRC team oversaw this independent effort. In all, more than \$500,000 in civil penalties were assessed by the NRC in connection with inspection findings at IP2 from 1997 to 2000. Over the period 1999–2001, the number of inspection hours logged by the NRC at IP2 was more than double the average at single-unit sites. In the last 16 months, NRC senior managers participated in fifteen management meetings with ConEd, ten in the vicinity of IP2, and five at either the NRC regional office or at NRC Headquarters in Rockville, Maryland. The number of meetings with NRC senior managers was significantly higher than the number for an average single-unit site.

During this period, Region I raised specific concerns with safety equipment, human performance, engineering and technical support, control of design activities, emergency preparedness and corrective action programs, the same kind of issues identified in the petition. In response, ConEd developed improvement programs. ConEd's performance improvement efforts yielded some progress, but

two recent events, the August 1999 reactor shutdown with complications and the steam generator tube failure in February 2000, indicated that these efforts had not effectively remedied the underlying problems. Consequently, senior NRC managers determined in May 2000 that weaknesses in numerous areas warranted designating IP2 as an “agency focus” plant. Subsequently, in accordance with the plant assessment guidance established as part of the Reactor Oversight Process (ROP), IP2 was designated as a plant with “multiple degraded cornerstones,” requiring heightened oversight and inspection. A detailed description of the ROP is given in NUREG-1649, Revision 3, “Reactor Oversight Process,” which is available for inspection at the Commission’s Public Document Room, at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, and electronically accessible in ADAMS through the NRC Public Electronic Reading Room at <http://www.nrc.gov/reading-rm.html>.

Following the guidance in the ROP, NRC provided enhanced inspection and oversight at IP2 over the past year. To augment the baseline inspections, regional and Headquarters personnel have performed special reviews and inspections. Prior to the restart of the IP2 reactor on December 30, 2000, the NRC Staff employed a disciplined, internal process for screening and addressing issues that could impact safety during the plant startup and subsequent power operation. In addition to inspecting steam generator replacement work and associated plant restoration activities, the NRC Staff inspected numerous equipment, training, and system readiness issues. Important among these were design control deficiencies identified in ConEd’s communications with its nuclear steam supply system vendor. The NRC Staff documented the preliminary results of these inspections in a letter to ConEd dated December 22, 2000 (ADAMS Accession No. ML003780263).

Notwithstanding the inspection and oversight activities prior to and during the plant restart, the NRC Staff performed the supplemental inspection (95003) prescribed by the ROP for a plant with multiple degraded cornerstones. Fourteen inspectors spent 3 weeks onsite examining key safety issues, such as human performance, equipment performance, design and configuration control, emergency preparedness, and corrective action processes. This inspection evaluated many of the areas of concern identified by the Petitioners. The purpose of this inspection was to make sure the NRC had not missed important issues and to provide a supplemental assessment of the situation and the underlying causes of the performance problems at IP2. Recognizing that performance problems and weaknesses existed, the NRC charged the team with independently evaluating whether there was an acceptable margin of safety at IP2. The inspection scope was selected in a manner consistent with the 95003 procedure, a procedure developed as an integral part of the revised ROP. The procedure includes a review of the effectiveness of the IP2 management in operating the plant safely. The findings

from that inspection were documented in a report dated April 10, 2001 (NRC Inspection Report 05000247/2001-002, ADAMS Accession No. ML011000373).

Throughout all of these inspections and reviews, the NRC Staff has consistently assessed problems and issues in relation to their impact on plant safety. The NRC expects the Licensee for IP2 to assess all deficiencies in terms of the operability of safety systems, regardless of whether the deficiency was identified during an NRC inspection or by a plant employee through the Licensee's corrective action process. This is particularly important in the period before plant restart after a long shutdown. If, during any of the reviews and inspections, the NRC Staff had encountered conditions that ultimately defeated the functions of safety systems, the NRC Staff would have taken appropriate action to ensure the plant was placed in a safe condition and expanded the scope of reviews or inspections. During the inspections and assessments performed at IP2, the NRC Staff did not identify multiple, significant violations of requirements that would cause the NRC to lose confidence in the Licensee's ability to maintain and operate the facility safely. Likewise, the NRC did not identify safety-significant examples of operation of the facility outside its design basis.

In evaluating the concerns of the Petitioners, the NRC Staff took additional actions to ensure that the Licensee CRs submitted by the Petitioners during the January 24, 2001, public meeting contained no new safety-significant issues. CRs document out-of-normal conditions. Licensee management investigates the conditions and remediates conditions that are confirmed as requiring attention on a safety-prioritized basis. The NRC Staff does not review each CR; rather, the NRC Staff screens CRs for risk or safety significance as one of many inputs to inspection activities.

ConEd has set a low threshold for reporting out-of-normal conditions at the plant and encourages all members of the plant staff to initiate CRs. As a result, some reports are repetitions and others describe conditions that are of low safety significance. The CRs submitted by the Petitioners to the NRC were a sampling of the CRs entered into the CR database by ConEd employees over a 5-month period (September 2000–January 2001). Many of these reports describe out-of-normal plant conditions that are of low safety significance.

The NRC Staff reviewed each of the CRs, including those highlighted in the UCS evaluation submitted to the Staff during the January 24, 2001, public meeting, to determine whether the reports provided new evidence that ConEd was not operating IP2 safely. The Staff screened the reports for the types of issues identified by the Petitioners. For example, the NRC Staff selected CRs that repeatedly documented similar out-of-normal conditions (suggesting that ConEd had failed to fix the root causes of problems) and CRs that documented ineffective corrective actions. The NRC Staff also selected CRs that highlighted discrepancies between the as-built plant and the intended design of the plant, and CRs that identified defects in the material condition of the plant. The

Staff identified approximately forty such CRs. The Staff compared these reports and those identified by the UCS to the findings from the region-based Problem Identification and Resolution Inspection conducted October 2–20, 2000, and the NRC Supplemental Inspection 95003 conducted January 16–February 9, 2001. The Staff found that an overwhelming majority of reports screened by the NRC Staff discussed issues that were similar to the issues identified by regional inspectors and did not conflict with previous NRC conclusions from those inspections (*see* NRC Inspection Reports 50-247/00-012, dated December 4, 2000, and 05000247/2001-002, dated April 10, 2001, at ADAMS Accession Nos. ML003774212 and ML011000373, respectively). The NRC Staff performed an additional inspection of reactor protection system (RPS) wiring defects at IP2 (documented in CR 200100327). Based on the inspection, the Staff found no problems that would render the RPS incapable of performing its intended safety function. The NRC Staff documented the results in Inspection Report 05000247/2001-005, dated June 11, 2001 (ADAMS Accession No. ML011630055). None of the remaining CRs indicated any immediate or past safety or operability concerns at IP2.

The NRC Staff acknowledges that performance problems at the station require continued Licensee and NRC attention. While recognizing that some progress to improve performance has been made, the NRC Staff has expressed its concern to ConEd (most recently in an annual assessment letter for IP2 dated May 31, 2001, ADAMS Accession No. ML011510375) that such progress has been slow overall and limited in some areas. However, the NRC Staff does not believe that the limited improvement in performance warrants a suspension of IP2's license. The NRC's recent inspections indicate that the Licensee for IP2 is operating within its Technical Specifications, the NRC regulations, and its license.

Although challenges still exist for the Licensee of IP2 in the areas of problem identification and resolution and design control, NRC findings from the April 10, 2001, inspection report indicate the plant is being operated safely. The Staff expects that Entergy, as the new Licensee for IP2, will continue to review all condition reports, determine their significance to plant safety, and take appropriate actions to correct out-of-normal conditions in a timely manner. The NRC Staff will assess the effectiveness of Entergy's corrective action program and monitor Entergy's progress in reducing the backlog of out-of-normal conditions.

The Petitioners also requested that IP2 remain on the list of "agency focus" plants until the Licensee demonstrates that it can fulfill its regulatory requirements and commitments. The NRC replaced the licensee evaluation process that produced the list of agency focus plants with the ROP. Under the ROP, IP2 was designated as a plant with "multiple/repetitive degraded cornerstones." This designation requires specific agency actions, including enhanced oversight and additional inspections by the NRC (similar to the actions taken in the past for an agency focus plant). The Petitioners' request to maintain the plant on a list of

plants requiring enhanced oversight and inspection is consistent with NRC actions already taken at IP2. For this reason, the NRC Staff grants the Petitioners' request to maintain IP2 on the list of agency focus plants. However, the Petitioners' request also provides specific actions that must be performed by the Licensee to be removed from the agency focus list ("until the Licensee demonstrates that it can fulfill its regulatory requirements and commitments"), actions that are not in accordance with the guidance in the ROP and inconsistent with the finding from this review. Therefore, the NRC Staff does not grant this portion of the Petitioners' request. The NRC will continue heightened oversight of IP2 in accordance with the ROP until it gains confidence that the performance improvement program has substantially addressed the performance weaknesses that have been identified.

Issue 2

Is there a basis to initiate an investigation of ConEd regarding the August 1999 and February 2000 events at IP2?

The Petitioners specifically requested that the NRC investigate the potential misrepresentation of material facts by the utility to determine whether the significantly insufficient calculations relied on to ensure the adequacy of design of key systems, including the calculations supporting the steam generator analysis and the electric bus analysis, were due to a lack of rigor and thoroughness or deliberately misleading. The Petitioners stated that the NRC granted the license amendment deferring the midcycle inspection based on faulty and inaccurate information provided by ConEd; for example, tube defects were missed during the June 1997 steam generator tube nondestructive examination due to improper use of testing equipment, inadequate procedures, and inadequate analysis by ConEd. These errors contributed to the tube failure event. The Petitioners believe ConEd may have deliberately misled the NRC during the review of the license amendment. The Petitioners speculated that another event in August 1999, which involved complications following an automatic reactor shutdown, might have been caused by similar deliberate actions by ConEd. The Petitioners did not provide any additional information as to why they believe the August 1999 and February 2000 events warrant an investigation of potential Licensee wrongdoing.

NRC Response

The NRC Staff held internal meetings following the steam generator tube failure event to determine whether there was any specific indication of wrongdoing by ConEd in obtaining the NRC's approval of the amendment to allow a one-time extension of the steam generator inspection interval. A specific indication of wrongdoing, beyond mere suspicion, would have prompted an investigation of

ConEd by the NRC's Office of Investigations (OI). During these meetings, the participants discussed the facts of the steam generator tube failure event. Based on a review of the facts, the participants reached the consensus that an investigation was not warranted. The participants concluded that there was no reasonable basis for suspecting that a willful violation of 10 C.F.R. § 50.9, "Completeness and Accuracy of Information," occurred. The NRC's OI staff was present at the meetings, participated in the discussions, and agreed with the decision not to conduct an investigation.

The NRC also dispatched two Augmented Inspection Teams to review the causes and safety implications of, and ConEd's actions after, the reactor automatic shutdown with complications in August 1999 and the steam generator tube failure in February 2000. The findings from each inspection were documented in letters to Mr. A. Alan Blind of ConEd, dated October 19, 1999 (NRC Inspection Report 05000247/99-08) and April 28, 2000 (NRC Inspection Report 05000247/2000-002) (ADAMS Accession Nos. ML992950033 and ML003709064, respectively). The Staff identified human performance issues (such as configuration control, poor management oversight, and corrective action program deficiencies) as causes of the events. The Staff identified no specific indication of wrongdoing on the part of ConEd. Therefore, the Staff found no basis to initiate an OI investigation of the August 1999 or February 2000 events.

A specific indication of wrongdoing, beyond mere suspicion or potential, is the threshold to initiate an OI investigation. The Petitioners did not provide any new information in the petition or in the supplemental documents, beyond mere speculation, about wrongdoing by ConEd in the August 1999 or February 2000 events. Consequently, the Petitioners' request to initiate an investigation is not granted.

Issue 3

Based on the performance problems discussed in the petition, should ConEd be allowed to transfer the IP2 license to another owner?

The Petitioners requested that the NRC deny any license transfer for IP2 until the Licensee's management can demonstrate that the UFSAR, CR backlog, and maintenance requirements are up to date, and that plant workers have been retrained to the modified UFSAR. During the January 24, 2001, public meeting, the Petitioners clarified their position on this request by stating that IP2 was operating too far out of its licensing basis and the licensing documentation was too inaccurate to justify a license transfer at this time. In addition, the Petitioners contended that the NRC's procedure for reviewing license transfer applications was unequipped to evaluate the transfer of an agency focus plant to a new entity that was not an electric utility. The Petitioners were concerned about Entergy's "ability to go back to ratepayers and recover costs for an extended outage or for

bringing the reactor back into compliance.” Finally, the Petitioners contended that Entergy does not have the financial qualifications to address the kinds of problems posed by IP2 at this time. The Petitioners based their conclusions, in part, on the document “Citizens Awareness Network, Inc.’s Revised Contention on Financial Qualifications in the License Transfers for James A. FitzPatrick and Indian Point 3 Nuclear Power Stations per Commission Memorandum & Order, November 27, 2000,” submitted to the NRC Staff during the January 24, 2001, public meeting.

NRC Response

After reviewing the Petitioners’ request to deny any license transfer requests for IP2, the Staff determined that the Petitioners’ request does not meet the requirements for review under 10 C.F.R. § 2.206. The Licensee performance issues that constitute the basis for the Petitioners’ request to deny any license transfers for IP2 have been addressed in the NRC Staff’s response to Issue 1 of this Director’s Decision.

A request to transfer an NRC operating license under 10 C.F.R. § 50.80 to a new entity is processed as an amendment to the license. NRC Management Directive 8.11, “Review Process for 10 C.F.R. 2.206 Petitions,” Handbook 8.11, Part III, section C(2)(c), specifies that petitioners who request that a license amendment be denied should address such a request in the context of the relevant licensing action, not as a petition for enforcement action under 10 C.F.R. § 2.206. At the time this petition was submitted, there was no proceeding in which the Petitioners could address their concerns regarding the transfer of the IP2 operating license. However, on December 12, 2000, ConEd submitted a joint application to transfer the operating licenses for Indian Point Nuclear Generating Units Nos. 1 and 2. Notice of the request for approval and an opportunity to request a hearing or to submit written comments was published in the *Federal Register* on January 29, 2001 (66 Fed. Reg. 8122). Pursuant to the notice, on February 20, 2001, CAN filed hearing requests and petitions to intervene in the review of the license transfer applications.

The Petitioners also stated during the January 24, 2001, public meeting that the NRC should not approve any license transfer requests for IP2 due to deficiencies in the license transfer review process. Section 2.206 provides the opportunity for any person to file a request to institute a proceeding pursuant to 10 C.F.R. § 2.202, “Orders,” to modify, suspend, or revoke a license, or for any other action as may be proper. However, a request that the NRC institute a proceeding under section 2.202 due to perceived deficiencies in existing NRC regulations is not within the scope of section 2.206. If the Petitioners consider the license transfer regulations deficient, they may address the deficiency by filing a petition for rulemaking

pursuant to 10 C.F.R. § 2.802, “Petition for Rulemaking,” to amend or rescind the regulation.

Consequently, the Petitioners’ request that the NRC not approve any license transfer does not meet the requirements for review under section 2.206.

It should be noted, however, that the NRC Staff shares the Petitioners’ concerns about the financial qualifications of a transferee. Section 50.80, “Transfer of Licenses,” provides the regulatory requirements for license transfers and stipulates that an application for transfer shall include as much of the technical and financial qualifications information described in 10 C.F.R. § 50.33, “Contents of application; general information,” and § 50.34, “Contents of application; technical information,” as would be required by those sections if the application were for an initial license. The Commission will approve an application for the transfer of a license only if the Commission determines that the proposed transferee is qualified to be the holder of the license and the transfer of the license is otherwise consistent with the applicable provisions of law, regulations, and orders issued by the Commission.

As specified in section 50.33, a license transfer applicant must provide information that demonstrates it possesses or has reasonable assurance of obtaining the funds necessary to cover the estimated operating costs for each of the first 5 years, and must identify the source of these funds. Using this information, the Commission determines whether the transferee’s financial qualifications meet the requirements for license transfer.

The Petitioners’ issues concerning the operational performance of the current Licensee, including errors and inaccuracies in the UFSAR, maintenance and CR backlogs, and other operational concerns, do not have a direct bearing on the decision to approve or deny the transfer of a license. As previously stated in Commission Memorandum and Order CLI-00-20, 52 NRC 151 (2000) (ADAMS Accession No. ML003758115), a license transfer proceeding is not a forum for a full-scale health-and-safety review of the plant. Operational issues of the kind described in the petition and the supplement will need to be addressed by the Licensee whether or not the license is transferred. The Commission cannot deny a license transfer request solely on the basis of licensee performance. If the proposed transferee meets the provisions of 10 C.F.R. § 50.80, the Commission will approve the transfer of the license.

III. CONCLUSION

The NRC has completed its review of the information provided by the Petitioners, and for the reasons discussed herein, the NRC Staff concludes that the information contained in the petition and the supplement does not warrant NRC Staff action to suspend or revoke the operating license for IP2. Likewise, the Staff

finds no basis for initiating an investigation into wrongdoing on the part of ConEd. For these issues, the Petitioners' requested actions are not granted. However, the NRC grants in part the Petitioners' request that IP2 remain on the list of agency focus plants (i.e., plants with multiple/repetitive degraded cornerstones). The NRC Staff did not grant the Petitioners' request to define under what conditions IP2 will be removed from the list of plants with multiple/repetitive degraded cornerstones.

In addition, the Staff finds that the Petitioners' request to delay or deny a request to transfer the operating license for IP2 until the Licensee's management can demonstrate that the UFSAR, CR backlog, and maintenance requirements are up to date, and that plant workers have been retrained to the modified UFSAR does not meet the requirements for review under section 2.206.

A copy of this Decision will be filed with the Secretary of the Commission for the Commission's review in accordance with 10 C.F.R. § 2.206(c). As provided for by that regulation, the Decision will constitute the final action of the Commission 25 days after the date of issuance of the Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR REGULATORY
COMMISSION

Samuel J. Collins, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this 21st day of November 2001.

Attachments (not published):

1. Petitioners' reply to the draft Director's Decision
2. NRC response to the Petitioners' reply

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of

Docket No. 50-247
(License No. DPR-26)ENTERGY NUCLEAR OPERATIONS, INC.
(Indian Point, Unit 2)

November 26, 2001

The Petitioner requests that the NRC issue a Demand for Information (DFI) to each of the Licensees listed in the Petitioner's letter dated April 24, 2001, requiring each Licensee to provide a docketed response as to how it complies with 10 C.F.R. §§ 26.10 and 26.20, specifically the requirements that: (1) "Fitness-for-duty programs must: [p]rovide reasonable measures for the early detection of persons who are not fit to perform activities within the scope of this part" (10 C.F.R. § 26.10); and (2) "Licensee policy should also address other factors that could affect fitness for duty [FFD] such as mental stress, fatigue and illness" (10 C.F.R. § 26.20).

The final Director's Decision on this petition was issued on November 26, 2001. In that decision the Staff noted that the petition raised generic policy questions concerning how the NRC requirements apply to circumstances involving individuals who declare themselves not fit for duty because of fatigue and to the actions taken by licensees in response to such declarations. Specifically, the manner in which a licensee or its contractor implements certain conditions of employment or policies for preventing the abuse of leave can potentially discourage employees from reporting that they are not fit for duty or contribute to inadequacies in the assessment of employee FFD. Either outcome would undermine the effectiveness of a licensee's FFD program. The Staff noted that these concerns may not be limited to licensees that use Wackenhut security personnel. As a result, the Staff did not believe that a regulatory action limited to licensees that use Wackenhut security personnel is an appropriate means to address this concern. The Staff also believed that in matters concerning

self-declaration of FFD, the potential for conflicts with NRC requirements was largely in the implementation of Licensee policies, procedures, and conditions of employment, rather than the written terms of these documents. Accordingly, a DFI requesting such documents was not expected to provide significant new information to the Staff and therefore did not appear warranted. However, the Staff granted the Petitioner's request to the extent that the NRC will address the Petitioner's concerns through the generic communication process. Specifically, the Staff would develop a communication to all nuclear power plant licensees subject to the requirements of Part 26. That communication will highlight the concerns identified in the petition and articulate the NRC's requirements as they apply to matters involving a worker's self-declaration of FFD. Further, as the Staff proceeds with proposals to revise Part 26 and address worker fatigue through rulemaking, it will consider the need to clarify the NRC's expectations concerning worker declarations of FFD and work scheduling.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By letter dated April 24, 2001, as supplemented by letter dated May 3, 2001, Mr. David A. Lochbaum, on behalf of the Union of Concerned Scientists (Petitioner), pursuant to section 2.206 of Title 10 of the *Code of Federal Regulations* (10 C.F.R. § 2.206), requested that the U.S. Nuclear Regulatory Commission (Commission or NRC) issue a Demand for Information (DFI) to Licensees that use security personnel supplied by Wackenhut Corporation (Wackenhut), requiring them to provide a docketed response explaining how they comply with the requirement of 10 C.F.R. § 26.10 that licensees "provide reasonable measures for the early detection of persons who are not fit to perform activities within the scope of this part" and the requirement of 10 C.F.R. § 26.20 that "[I]icensee policy should also address other factors that could affect fitness for duty [FFD] such as mental stress, fatigue and illness."

The Petitioner also requested that the DFI require each Licensee to generally describe its policy for the aforementioned factors and to explicitly describe its policy for these factors as applied to the security personnel supplied by Wackenhut.

II. BACKGROUND

As a basis for the request described above, the Petitioner stated that:

An individual employed by Wackenhut Corporation and assigned duties as a security officer at Indian Nuclear 2 was fired on June 26, 2000 The individual had worked five straight

12-hour shifts [(12 hours on shift followed by 12 hours off for 5 straight days)] and declined to report for a sixth straight 12-hour shift because he reported to his management — in writing — that it would be “physically and mentally exhausting.” The individual reported to his management — in writing — that he was fully aware of his condition and “would not want to be negligent in performing [his] duties as a security officer.” The security officer had unescorted access to Indian Point 2 and thus was covered by 10 C.F.R. Part 26 as specified in Section 26.2

The Petitioner also pointed out that Wackenhut employees are required by terms of their employment application, their Collective Bargaining Agreement, and the Security Officer Handbook to report to work when directed.

The Petitioner stated that the subject security officer reported to his management that he felt not fit for duty, declined to report for mandated overtime, and was terminated.

The Petitioner also stated that “10 C.F.R. 26.20 requires all licensees to have [a] formal policy and written procedures for factors that could render plant workers not fit for duty. Fatigue is specifically mentioned in 10 C.F.R. 26.20.”¹ The Petitioner contended that Wackenhut’s contractual right conflicts with the federal regulations in 10 C.F.R. § 26.10(a) and (b) and that in this case, the individual essentially provided “reasonable measures for early detection” of a condition rendering him not fit to perform activities within the scope of Part 26. The Petitioner further stated that, rather than respecting the individual’s judgment or seeking another opinion by a Medical Review Officer or other health care professional, Wackenhut fired that individual.

Subsequently, the Petitioner provided additional information by letter dated May 3, 2001, and addressed the Petition Review Board (PRB) in a transcribed telephone conference on May 7, 2001. The transcript of this telephone conference is available in the Agencywide Documents Access and Management System (ADAMS) for inspection at the Commission’s Public Document Room (ADAMS accession number ML012150128), at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, and from the ADAMS Public Library on the NRC’s Web site at <http://www.nrc.gov/reading-rm.html> (the Public Electronic Reading Room). If you do not have access to ADAMS, or if you have problems in accessing the documents in ADAMS, contact the NRC Public Document Room (PDR) reference staff at 1-800-397-4209 or 301-415-4737 or by e-mail to pdr@nrc.gov. Based on the information provided by the Petitioner, the PRB determined that his request met the criteria for review under section 2.206. In addition, by letter dated June 13, 2001, the NRC responded to the Petitioner’s

¹ The Staff acknowledges that 10 C.F.R. § 26.20 specifically mentions fatigue. However, the language is nonmandatory. Paragraph 26.20(a) states that “licensee policy *should* [emphasis added] also address other factors that could affect fitness for duty such as mental stress, fatigue, and illness.”

letter dated April 23, 2001, in which he requested clarification of NRC policy concerning fatigue of security personnel.

By letter dated September 28, 2001, NRC Staff sent the proposed Director's Decision to the Petitioner. The Petitioner's reply and the Staff response to the Petitioner's comments are attached as Enclosures 1 and 2 (not published), respectively.

III. DISCUSSION

In response to the petition, the Staff reviewed (1) the Wackenhut Security Officer Handbook and (2) the Agreement between Wackenhut Corporation and International Union, United Plant Guard Workers of America (UGPWA) and its Amalgamated Local 515 for Security Employees at ConEd Nuclear Power Station, Indian Point, New York, for the period of March 8, 1999, to March 3, 2002 (Agreement). The purpose of the review was to determine whether the terms or conditions of these documents, as they pertain to a worker's declaration of FFD, are contrary to requirements applicable to NRC licensees, their contractors or subcontractors, or their employees. The Staff also reviewed concerns received by the NRC in the last 2 years that Licensee procedures, policies, or practices discouraged individuals from reporting that they were not fit for duty because of excessive fatigue. Through these reviews, the Staff sought to determine whether a DFI, as requested through the petition, was warranted. The NRC is independently addressing the adverse employment action taken against the subject security guard consistent with agency procedures. Further, the Staff has reviewed the relationship between Consolidated Edison Company of New York, Inc. (ConEd) and Wackenhut. The Staff determined that Wackenhut is required to implement the Licensee's procedures regarding fitness for duty. Thus, the Licensee maintains an awareness of Wackenhut personnel procedures and practices. Also, the NRC issued a "chilling effect letter" to ConEd on February 27, 2001. The NRC issued this letter following a February 8, 2001, letter from the Area Director of the Occupational Safety and Health Administration (OSHA). The letter stated that OSHA's investigation indicated that a contract security employee was engaged in a protected activity within the scope of the Energy Reorganization Act and that discrimination, as defined and prohibited by the statute, was a factor in the termination of the individual's employment. Although there was a settlement in the OSHA case, the NRC is continuing to review this matter.

A. Staff's Findings

The preface to the Wackenhut Security Officer Handbook states: "The company retains the absolute right to terminate any employee, at any time, with

or without good cause.’’ In addition, section 2.15, Discipline, of the Wackenhut Security Officer Handbook, itemizes ‘‘refusal to work’’ as grounds for immediate dismissal. The Staff identified these statements as terms of employment that may be applicable to instances of workers who refuse to work because of FFD concerns. However, the Staff finds no *necessary* inconsistency between these statements and Part 26. Although individuals may declare to their employer that they are not fit for duty because of excessive fatigue, and the NRC encourages individuals to inform their employer if they believe their FFD is suspect, Part 26 does not require the individual to refuse to work and thereby risk disciplinary action. Rather, 10 C.F.R. § 26.27(b)(1) states that ‘‘[i]mpaired workers, or those whose fitness may be questionable, shall be removed from activities within the scope of this part, and may be returned only after determined to be fit to safely and competently perform activities within the scope of this part.’’ As a consequence, when presented with information that a worker’s fitness for duty is questionable, it is the Licensee’s responsibility to make a determination that the individual is fit for duty, prior to returning the individual to his or her duties.

In reviewing the Agreement between Wackenhut and UGPWA, the Staff noted that article 18 of the Agreement, Separability, states:

Should any provisions of this Agreement at any time during its life be found in conflict with the federal or state law, or as such laws may be amended, then such provisions shall continue in effect only to the fullest extent permissible under the applicable law

Thus, the document makes it clear that compliance with NRC requirements is required, regardless of any terms or conditions in the Agreement that may be in conflict with federal law.

Part 26 does not constitute the only regulatory constraint upon licensees and their contractors in matters concerning worker declarations of FFD. Section 50.7 prohibits discrimination by a licensee, or a licensee contractor or subcontractor, against an employee for engaging in protected activities.² As a consequence, it is a violation of section 50.7 for a licensee, or its contractor or subcontractor, to take adverse personnel action against an individual when the basis of the action is, either in whole or in part, the individual’s assertion that he or she is not fit for duty or the individual’s refusal to work based upon reasonable belief that returning to work would be a violation of Part 26. However, pursuant to section 50.7(d), an employee’s engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

²Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment.

In the event that an individual asserts that a licensee, or its contractor or subcontractor, took adverse employment action against an individual following a self-declaration that he or she is not fit for duty, the NRC reviews the circumstances of, and the bases for, the action in order to make a determination concerning the potential violation of any NRC requirements. In reviewing the licensee's basis for any employee sanction, with respect to the requirements of section 50.7, the NRC would consider whether the licensee had a legitimate, nondiscriminatory basis for the sanction.

Separate from its inquiry into potential violations of section 50.7, the NRC may, under certain circumstances, also consider whether a licensee's FFD program meets the general performance objective of Part 26 that licensee FFD programs provide reasonable assurance that nuclear power plant personnel are not "mentally or physically impaired from any cause, which in any way affects their ability to safely and competently perform their duties." Specifically, the NRC may assess whether a licensee's work schedule and practices for assessing fitness for duty are resulting in personnel performance consistent with reasonable assurance that personnel are fit for duty.

Although employees who report FFD concerns may be subject to employer sanctions for other, nonprohibited, considerations (e.g., personal negligence with respect to maintaining one's FFD), the Staff notes that such sanctions, depending upon how they are implemented and or communicated, can potentially discourage future self-declarations. Pursuant to 10 C.F.R. § 26.10(b), FFD programs must provide reasonable measures for the early detection of persons who are not fit to perform their activities. The NRC considers self-declaration to be an important adjunct to behavioral observation in providing early detection of persons who are not fit for duty because of fatigue. As a result, the NRC may, under certain circumstances, find it appropriate to assess whether a licensee's actions, in conjunction with the prescribed work schedules, has created an environment that is not conducive to the reporting of FFD concerns. The NRC may also find it appropriate to assess such circumstances relative to the NRC's policy statement, "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation."

IV. CONCLUSION

As clarified in Petitioner's October 2, 2001 letter, the Petitioner has raised the concern that Wackenhut security personnel at NRC-licensed facilities who feel their performance may be impaired and report it to their supervisors will have their fatigue concerns dismissed and be forced to work. The Petitioner contends that security officers are required by the terms of their employment application, the Collective Bargaining Agreement, and the Wackenhut Security Officer Handbook

to report to work when directed and that this “contractual right” is in conflict with specific requirements of Part 26. The Staff’s review indicates that these written conditions and agreements among Wackenhut, its employees at the ConEd Nuclear Power Station, and UGPWA are not, by themselves, violations of NRC requirements. However, when informed that a worker’s fitness for duty is questionable, licensees are required, pursuant to 10 C.F.R. § 26.27(b)(1), to make a determination that the worker is fit for duty, prior to returning the worker to his or her duties.

The Staff notes that the petition has raised generic policy questions concerning how NRC requirements apply to circumstances involving individuals who declare themselves not fit for duty because of fatigue and to the actions taken by licensees in response to such declarations. Specifically, the manner in which a licensee or its contractor implements certain conditions of employment or policies for preventing the abuse of leave can potentially discourage employees from reporting that they are not fit for duty or contribute to inadequacies in the assessment of employee FFD. Either outcome would undermine the effectiveness of a licensee’s FFD program. These concerns may not be limited to licensees that use Wackenhut security personnel. As a result, the Staff does not believe that a regulatory action limited to licensees that use Wackenhut security personnel is an appropriate means to address this concern. In addition, the Staff believes that in matters concerning self-declaration of FFD, the potential for conflicts with NRC requirements is largely in the implementation of licensee policies, procedures, and conditions of employment, rather than the written terms of these documents. Accordingly, a DFI requesting such documents is not expected to provide significant new information to the Staff and therefore does not appear warranted. However, the Staff has decided to grant the Petitioner’s request to the extent that the NRC will address the Petitioner’s concerns through the generic communication process. Specifically, the Staff is developing a communication to all nuclear power plant licensees subject to the requirements of Part 26. The communication will highlight the concerns identified in the petition and articulate the NRC’s requirements as they apply to matters involving a worker’s self-declaration of FFD. The Staff intends to issue the communication in the near future. Further, as the Staff proceeds with proposals to revise Part 26 and address worker fatigue through rulemaking, it will consider the need to clarify the NRC’s expectations concerning worker declarations of FFD and work scheduling.

A copy of this Decision will be filed with the Secretary of the Commission so that the Commission may review it in accordance with 10 C.F.R. § 2.206(c). As provided for by this regulation, the Decision will constitute the final action of the

Commission 25 days after the date of the decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

FOR THE NUCLEAR REGULATORY
COMMISSION

Samuel J. Collins, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this 26th day of November 2001.

Enclosures (not published):

1. Comments on Proposed Director's Decision
2. NRC Staff Response to Petitioner's Comments

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

**Docket Nos. 50-336-LA
50-423-LA**

**DOMINION NUCLEAR
CONNECTICUT, INC.
(Millstone Nuclear Power Station,
Units 2 and 3)**

December 5, 2001

The Commission reviews an Atomic Safety and Licensing Board decision that denied a request for hearing in this license amendment proceeding. The Commission affirms the Licensing Board's decision.

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.36)

The required contents of technical specifications are outlined in 10 C.F.R. § 50.36. Technical specifications that do not meet any of the criteria found in section 50.36 may be transferred to licensee-controlled documents.

RULES OF PRACTICE: CONTENTIONS

The contention rule insists upon some reasonably specific factual and legal basis for the contention. Under the rule, presiding officers may not admit open-ended or ill-defined contentions lacking in specificity or basis. Petitioners must articulate at the outset the specific issues they wish to litigate as a prerequisite to gaining formal admission as parties.

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.36)

There is no statutory or regulatory requirement that every operational detail be subject to a technical specification. Not all licensee actions or changes in procedures must carry with them an opportunity for public hearing. Technical specifications should focus upon those plant conditions most important to safety.

RULES OF PRACTICE: CONTENTIONS

Petitioners may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies.

RULES OF PRACTICE: CONTENTIONS

In some past cases, the Commission or its hearing boards have admitted contentions based upon claims of poor licensee “character” or “integrity.” We have always insisted, however, that for management character to be an appropriate basis for adjudication in a licensing proceeding, there must be some direct and obvious relationship between the character issues and the licensing action in dispute. Allegations of management improprieties must be of more than historical interest: they must relate directly to the proposed licensing action.

MEMORANDUM AND ORDER

I. INTRODUCTION

Today we review an Atomic Safety and Licensing Board decision, *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-01-10, 53 NRC 273 (2001), that denied a petition for leave to intervene and request for hearing filed by the Connecticut Coalition Against Millstone and the STAR (“Standing for Truth About Radiation”) Foundation. The Petitioners seek to challenge two related license amendments — one for Unit 2 and the other for Unit 3 — which remove some procedural details from the Millstone technical specifications and relocate them in the Millstone Radiological Effluent Monitoring and Offsite Dose Calculation Manual (REMODOCM). The Board found the Petitioners’ sole contention inadmissible, and thus denied the petition for intervention. Pursuant to 10 C.F.R. § 2.714a, the Petitioners have appealed

the Board's decision.¹ Dominion Nuclear Connecticut, Inc. (DNC),² and the NRC Staff support the decision. For the reasons we give below, we affirm.

II. BACKGROUND

This proceeding arises from a license amendment application that NNECO submitted to the NRC on February 22, 2000. Issued November 28, 2000, the license amendments transfer certain details from the Licensee's technical specifications — specifically, its Radiological Effluent Technical Specifications (RETS)) — to a Licensee-controlled document, the REMODCM.

The transfer of items from technical specifications to Licensee-controlled documents is part of an NRC-initiated program to improve technical specifications at all nuclear power reactors. Because the amendments in this proceeding stem directly from this program, the Commission believes it would be helpful, at the outset, to outline the general NRC effort to improve technical specifications and to focus them on the most critical safety details. We then turn to the particular license amendments and contention at issue in this case.

1. Technical Specifications and the NRC's Policy To Improve Them

Under the Atomic Energy Act (AEA), every license to operate a production or utilization facility must contain a list of technical specifications necessary for adequate protection of public health and safety. *See* 42 U.S.C. § 2232. Technical specifications must include information on the amount, kind, and source of special nuclear material; the place of use; and the particular characteristics of the facility. *Id.* The AEA, however, leaves it up to the Commission to determine, and prescribe by rule or regulation, what additional information should be included in technical specifications to ensure public health and safety and the common defense and security.

In 1968, the NRC promulgated 10 C.F.R. § 50.36, a rule outlining the required contents of technical specifications. *See* 33 Fed. Reg. 18,610 (Dec. 17, 1968). As originally issued, however, section 50.36 lacked “well-defined criteria.”

¹ The Petitioners filed their appeal under 10 C.F.R. § 2.786. However, because this is an appeal from a decision wholly denying a petition for leave to intervene, the appropriate regulation is 10 C.F.R. § 2.714a. We, therefore, treat the appeal as if it were filed under the appropriate regulation.

² When this proceeding began, the Licensee for Millstone Units 2 and 3 was Northeast Nuclear Energy Company (NNECO). In March 2001, the NRC issued an order approving a request to transfer the operating licenses for Millstone Units 2 and 3 from NNECO and certain co-licensee owners to DNC. *See* 66 Fed. Reg. 15,911. Conforming license amendments were issued on March 31, 2001. *See* 66 Fed. Reg. 20,016. Accordingly, the new operator licensee — and party in this proceeding — is DNC. The Petitioners indicate in their appeal brief that they are challenging in state court the legitimacy of the transfer of operating authority to DNC. Their judicial challenge involves nonradiological matters raised under the Clean Water Act and do not bear directly on the radiological effluent issues raised in this proceeding.

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-96-13, 44 NRC 315, 318 (1996) (citing Final Policy Statement on Technical Specifications Improvements for Nuclear Power Reactors, 58 Fed. Reg. 39,132, 39,132 (July 22, 1993)). This caused the number of items included in technical specifications to “mushroom[] after the rule was issued.” *Perry*, 44 NRC at 318. Over time, technical specifications “essentially came to include all ‘Commission requirements governing the operations of nuclear power reactors.’” *Id.* (citing Policy Statement, 58 Fed. Reg. at 39,133).

As a result, the NRC Staff attempted to rid technical specifications of excessive detail and confine them to the most safety-significant matters:

By the early 1980s, the NRC Staff concluded that the burgeoning number of items commonly included in standard technical specifications was both diverting Staff and licensee attention from the most significant safety requirements and unnecessarily burdening agency and industry resources with a severalfold increase in license amendment applications. To remedy this trend, the Staff initiated a Technical Specifications Improvement Project. The project resulted in a policy to limit technical specifications to those items deemed most important to safety.

Perry, 44 NRC at 318 (citations omitted).

As part of its technical specifications initiative, the NRC revised section 50.36, which now identifies criteria to be used in determining what items must be included in technical specifications. *See* 10 C.F.R. § 50.36. If a procedural or other requirement meets any one of the criteria, it must be retained in the technical specifications. *Id.* Technical specifications that do not meet any of the criteria may be transferred to licensee-controlled documents. *See generally* Technical Specifications, Final Rule, 60 Fed. Reg. 36,953 (July 19, 1995). Licensees are encouraged to “voluntarily use the criteria to relocate existing technical specifications that do not meet any of the criteria.” *Id.* at 36,958. Thus, the agency policy is to prune technical specifications of voluminous details that are relatively less significant, and thereby “focus licensee and plant operator attention” on the most significant technical concerns. *See* Policy Statement, 58 Fed. Reg. at 39,135.

As part of the policy to streamline technical specifications, the NRC Staff over the past several years has been identifying what kinds of items can be removed — without adverse consequences for adequate assurance of safety — from the standard technical specifications. NRC “generic letters,” issued to licensees industrywide, have identified particular items deemed amenable to removal from the technical specifications.

2. *The License Amendments*

The license amendments in this proceeding stem from Generic Letter 89-01, which advised all power reactor licensees and applicants that “the procedural details . . . on radioactive effluents and radiological environmental monitoring can be relocated to the Offsite Dose Calculation Manual.”³ The letter enumerates specific radiological effluent technical specifications that licensees may choose to relocate. Pursuant to Generic Letter 89-01, the license amendments at issue here eliminate from the technical specifications numerous detailed procedures for monitoring routine radioactive releases. The challenged amendments transfer these procedural details to the Millstone REMODCM.

Licensees must adhere to a number of regulatory limits upon effluent releases. Various procedures and instruments enable licensees to sample the concentration levels of radioactive effluents and to monitor the release rate of routine, low-level releases of gaseous and liquid effluents. Part of this surveillance program consists of low-level radiation monitors set up to initiate an automatic alarm that can alert the licensee well before an effluent release might exceed an applicable radiological limit. In addition to an alarm, many of these monitors also have an automatic trip function that will terminate the effluent release before it exceeds applicable regulatory limits. A host of detailed procedural requirements govern how frequently these monitors should be checked, tested, or calibrated, and what measures should be taken when one or more of them might be inoperable. Such detailed procedures are among the items that the license amendments in this proceeding relocate.

It bears noting, however, that these license amendments involve only the monitoring of common releases of low-level radioactive effluents. All nuclear power plants routinely release low-level concentrations of radioactive materials in their gaseous and liquid effluents. The instruments and procedures for monitoring low-level releases are not intended to stop or mitigate reactor accidents. Low-level monitors are designed to operate only within a specific low range of radioactive material concentrations associated with routine operations, and not to monitor the elevated levels of radioactive materials that would be expected in a reactor accident. Licensees have other, so-called “mid-range” or “high-range” radiation monitors that monitor the elevated levels of materials that would occur in the event of a serious accident. Thus, nuclear power plants have separate instruments and procedures for tracking those effluent releases associated with accidents and those involving merely routine operations. The license amendments at issue here bear only upon the latter.

³Generic Letter 89-01, “Implementation of Programmatic Controls for Radiological Effluent Technical Specifications in the Administrative Controls Section of the Technical Specifications and the Relocation of Procedural Details of RETS to the Offsite Dose Calculation Manual or to the Process Control Program” (Jan. 31, 1989) at 1.

While the license amendments at issue here *transfer* certain procedural requirements from the technical specifications to the REMODCM, they neither change nor abolish any of these requirements. In other words, the amendments do not themselves alter any effluent monitoring instrumentation or procedures. Nor is the licensee's obligation to follow these monitoring procedures in the least diminished by the transfer of procedures to the REMODCM. Just as licensees must comply with the requirements listed in technical specifications, they also must comply with the commitments specified in licensee-controlled documents, such as the REMODCM. The NRC Staff oversees compliance with such documents.

The practical effect of the amendments, however, is that the Licensee in the *future* can make changes to the transferred effluent monitoring procedures without a license amendment. Because technical specifications are part of an operating license, any change to them requires a license amendment. In contrast, the REMODCM typically can be adjusted without a license amendment.⁴

A licensee is not free to alter its REMODCM indiscriminately, however. Although the licensee need not obtain prior NRC approval, the licensee must justify and report any change in the procedures listed in the REMODCM. The NRC Staff is then in a position to verify that the procedures conform to NRC regulations and standards on effluent surveillance. More importantly, though, altering REMODCM procedures has *no* impact on the NRC's substantive regulatory requirements governing radioactive effluents and radiological environmental monitoring, found in 10 C.F.R. Part 20 and Appendix I to 10 C.F.R. Part 50. *See also* 40 C.F.R. Part 190. Regardless of any potential modification of procedures listed in the REMODCM, existing limits on the concentration of radioactive material that can be released in effluents remain the same, as do limits on the rate of effluent release — “dose rate” — and all applicable offsite public dose limits. *See, e.g.*, Table 2 of Appendix B to Part 20 (regarding concentration); *see also* 10 C.F.R. Part 50, Appendix I (design criteria for equipment to process and maintain radioactive effluent releases as low as is reasonably achievable (ALARA)); 10 C.F.R. § 20.1302; 10 C.F.R. § 20.1501 (requirement to demonstrate the accuracy of surveys of effluent concentrations and offsite dose levels, to assure compliance with applicable dose limits).⁵ In fact, all licensees are specifically required to

⁴There are applicable control requirements governing changes to a REMODCM, found under both section 6 of the Technical Specifications and 10 C.F.R. § 50.59. These could require a change to the REMODCM to be accompanied by a license amendment, in which case there would be public notice and opportunity for a hearing.

⁵Generic Letter 89-01 thus states that the relocation of effluent monitoring procedures is intended to improve technical specifications, but not to “reduce the level of radiological effluent control.” *See* Generic Letter 89-01 at 1. Numerous details do not warrant inclusion in the technical specifications, the letter explains, because they already would be addressed and covered by programmatic controls in the technical specifications. These programmatic controls constitute extensive overall parameters and limitations on gaseous and liquid effluent releases. *See, e.g.*, Technical Specifications 6.20 for Unit 2. Many requirements found in the programmatic controls indeed add to or otherwise exceed those found in our regulations. The Petitioners, we note, have not raised any claim challenging the adequacy of the programmatic technical specifications.

include and maintain technical specifications governing the release of radioactive materials during normal operations so as to assure that any releases not only comply with section 20.1301, but also with the obligation to keep releases as low as is reasonably achievable. *See* 10 C.F.R. § 50.36a(a). In addition, each licensee is required to submit a report to the Commission annually that specifies the quantity of principal radionuclides released to the unrestricted areas in liquid and gaseous effluents during the previous 12 months. *Id.* § 50.36a(a)(2). This report is a public document. *See* 10 C.F.R. § 2.790.

In short, by transferring procedural details out of the technical specifications, the licensee in the future may make adjustments to particular effluent monitoring procedures without a license amendment. But all public dose limits for liquid and gaseous effluent continue unchanged. Thus, licensees are not free to make any adjustment in monitoring procedures that reasonably could lead to a violation of radiological effluent limits or related surveillance requirements.

As a routine matter, the NRC Staff checks the adequacy of procedures outlined in a licensee's REMODCM, and also verifies whether the listed procedures have been followed. In addition, the NRC Staff may examine a licensee's calculation of monitor "setpoints." Setpoints establish the level of radioactivity at which a monitor will sound an alarm or at which an effluent release will be terminated. Before the Licensing Board, there seemingly was much confusion over setpoints. *See* Transcript at 101-06. Closely read, however, the transcript indicates that the license amendments at issue here *do not affect* the Licensee's ability to adjust a monitor's setpoint. *See id.* at 104-05. None of the technical specifications being transferred to the REMODCM specifies particular setpoints.⁶

It is possible that a licensee may calculate an inappropriate setpoint for a particular batch release, but that was also true prior to the contested license amendments. Even before these license amendments the Licensee *already* had the authority to adjust monitor setpoints as needed. The license amendments give the Licensee no greater authority or flexibility to adjust setpoints.

⁶ Setpoints typically are calculated and vary release-by-release. Thus, by their nature, they are generally unsuitable for fixing in technical specifications. Licensees need the flexibility to adjust monitor setpoints to account for variations in background radiation, and differences in the types and quantities of radioactive materials among separate batches of effluent. Setpoint calculations are based upon administrative and regulatory dose limits, and take into account both radioactive effluent releases to date and projected dose contributions. Typical effluent releases constitute merely a very small fraction of regulatory dose limits. Licensees establish these low setpoints to conform with ALARA obligations under Appendix I to Part 50. *See generally* NRC Regulatory Guide 1.21, "Measuring, Evaluating, and Reporting Radioactivity in Solid Wastes and Releases of Radioactive Materials in Liquid and Gaseous Effluents from Light-Water-Cooled Nuclear Power Plants," Rev. 1 (June 1974) (referencing American National Standards Institute (ANSI) standard 13.10). In addition, all monitors will also have an absolute high alarm setpoint consistent with the 10 C.F.R. Part 20 public dose limit of 100 millirem.

3. *The Petitioners and Their Contention*

Connecticut Coalition Against Millstone (CCAM) and the STAR Foundation jointly petitioned for a hearing on the Millstone license amendment. CCAM, based in Mystic, Connecticut, is an organization that “advocate[s] for safe and renewable energy sources and environmental protection.” *See* Amended Petition (Oct. 27, 2000) at 2. According to the intervention petition, several members of the organization reside within 5 miles of the Millstone facility. The organization attached the affidavit of Joseph H. Besade, who affirms that his home is within 2 miles of Millstone. The STAR Foundation is a nonprofit organization based in East Hampton, New York. The petition states that the foundation’s membership includes families that own property and reside within the Millstone 10-mile emergency evacuation zone.

The Petitioners claim that because of the license amendments their members “will suffer increased risk of hazard from radiological releases from Millstone Units 2 and 3 and consequent adverse health effects with no opportunity for comment or objection.” *See id.* at 2. Their sole contention states that “‘relocating’ the selected radiological effluent Technical Specifications and the associated Bases to the Millstone Radiological Effluent Monitoring and Offsite Dose Calculation manual will deprive the public, and [the Petitioners] of notice of proposed changes to the Millstone radiological liquid and gaseous effluent monitoring instrumentation.” *Id.* at 3. The Petitioners say that the contested amendments eliminate the opportunity for a hearing “to comment and object to changes” — changes that, the contention alleges, “can only be projected to lower standards of radiological effluent monitoring in the era of deregulation and electric restructuring.” *Id.* The Petitioners argue that the license amendments create a greater risk of radiation exposures to the public:

[A]s there will be no opportunity for hearing or public comment, the public will be exposed to greater risk of radiation doses from the routine operations of the Millstone nuclear reactors if NNECO obtains the amendment requested. The Petitioners are prepared to establish through expert testimony that any increase in routine radiological effluent to the air and water by the Millstone nuclear reactors will expose the public to greater risk of cancer, immunodeficiency diseases and other adverse health effects.

Id. at 4.

4. *The Licensing Board’s Decision*

To intervene in an NRC licensing proceeding, a prospective intervenor must allege sufficient “interest” in the proposed licensing action, and describe “how that interest may be affected by the results of the proceeding.” *See* 10 C.F.R.

§ 2.714(a)(2). In other words, the petitioner must have “standing” to intervene.⁷ In addition, a petitioner for intervention must proffer at least one admissible contention for litigation. 10 C.F.R. § 2.714(b). Both the Licensee and the NRC Staff opposed the intervention petition here on two grounds: lack of standing and failure to submit an admissible contention.

The Licensing Board’s 2-1 decision held that the Petitioners had not submitted an admissible contention. Finding no contention, the majority never reached the question of the Petitioners’ standing to intervene. In rejecting the contention, the majority emphasized that the Petitioners had failed to articulate any substantive reason why the radiological effluent procedural details needed to remain in the technical specifications. If these items do not need to be located in the technical specifications, the majority reasoned, then the Petitioners are not entitled as a matter of right to future notice and opportunity for hearing on all potential changes to the low-level radiological effluent monitoring program at Millstone:

The petitioners’ contention . . . makes no claim that there is a statutory or regulatory requirement that the procedural details and associated bases of the Millstone RETS must remain as specific terms of the Millstone operating licenses. Such a claim is an indispensable element of any contention challenging the relocation of material from a plant’s technical specifications to a licensee-controlled document because *there can only be a right to a hearing on future changes to such material if there is a statutory or regulatory requirement that such matters be included in the plant’s technical specifications in the first place.*

LBP-01-10, 53 NRC at 282 (emphasis added). “[T]here is no general right to a hearing for a hearing’s sake,” the majority stressed. *Id.* Petitioners only have a “right” to a hearing on future changes to radiological effluent procedures if these procedures are required, by statute or regulation, to be included in the technical specifications, the majority found. *See id.* In the majority’s view, the Petitioners’ contention did not adequately specify why these effluent procedures needed to remain in the technical specifications.

Disagreeing with the majority, a lengthy dissenting opinion found that the Petitioners had in fact provided a sufficient — albeit “minimal” — argument on the need to maintain radiological effluent procedures in the Millstone technical specifications. *See generally* 53 NRC at 300-13. The dissent also evaluated the Petitioners’ standing and concluded that Petitioner CCAM had demonstrated standing on behalf of its members.⁸

⁷For standing, a petitioner must allege (1) a particularized “injury in fact” (2) that is fairly traceable to the action being challenged and (3) likely to be redressed by a favorable decision. *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998); *see Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998).

⁸In a footnote, the dissent noted that Petitioner STAR had been late in submitting an affidavit by one of its members and that “no good cause” had been shown for the late filing. The dissent indicated that it would, therefore, be inclined to rule against the admission of STAR if this proceeding continued further. *See* 53 NRC at 296 n.14.

On appeal to the Commission, the Petitioners argue that their contention should have been admitted. The NRC Staff and DNC support the Board's decision. We affirm, on the grounds we provide below.

III. ANALYSIS

Below we first review our requirements and standards for admitting contentions into our proceedings. We then address the admissibility of the Petitioners' contention in this case.

1. *Contention Standards*

To be admissible, a contention must specify the particular issue of law or fact the petitioner is raising, and contain: (1) a brief explanation of the bases of the contention; and (2) a concise statement of the alleged facts or expert opinion that support the contention and upon which the petitioner will rely in proving the contention at the hearing. *See* 10 C.F.R. § 2.714(b)(2). The contention should refer to those specific documents or other sources of which the petitioner is aware and upon which he intends to rely in establishing the validity of the contention. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333 (1999) (quotations and citations omitted).

Additionally, a contention must show that a "genuine dispute" exists with the applicant on a material issue of law or fact. 10 C.F.R. § 2.714(b)(2)(iii). The intervenor must do more than submit "bald or conclusory allegation[s]" of a dispute with the applicant. *See* Final Rule, "Rules of Practice for Domestic Licensing Proceedings — Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989). He or she must "read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant's position and the petitioner's opposing view." *Id.* at 33,170.

Our contention rule is strict by design. The Commission toughened it in 1989 because in prior years "licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation." *Oconee*, 49 NRC at 334. "Admitted intervenors often had negligible knowledge of nuclear power issues and, in fact, no direct case to present, but instead attempted to unearth a case through cross-examination." *Id.* (citing Proposed Rule, Contentions, 51 Fed. Reg. 24,365, 24,366 (July 3, 1986)). Serious hearing delays — of months or years — occurred, as licensing boards admitted and then sifted through poorly defined or supported contentions. *See Oconee*, 49 NRC at 334. Congress thus called upon the Commission to make "fundamental changes" in the public hearing process. *Id.* (citing H.R. Rep. No. 97-177, at 151 (1981)).

The Commission responded with the 1989 contention rule revisions, which insist upon some “reasonably specific factual and legal” basis for the contention. *See Oconee*, 49 NRC at 334; *see also* Final Rule, 54 Fed. Reg. at 33,171. Under the rule, presiding officers may not admit open-ended or ill-defined contentions lacking in specificity or basis. *See* 10 C.F.R. § 2.714(b); *see generally* Final Rule, 54 Fed. Reg. 33,168. Petitioners “must articulate at the outset the specific issues they wish to litigate as a prerequisite to gaining formal admission as parties.” *Oconee*, 49 NRC at 388. *See also Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998).

2. *Arguments on Appeal*

We turn now to the Petitioners’ claims on appeal. Because the contested license amendments themselves make no change in any monitoring procedures, the Petitioners rely here, as they did before the Licensing Board, on their loss of future opportunities to challenge — by adjudicatory intervention — licensee-initiated changes in low-level effluent monitoring details. *See* “Connecticut Coalition Against Millstone and STAR Foundation Petition for Review of LBP-01-10 (Apr. 9, 2001) (Appeal Brief) at 4. The Petitioners suggest that without full public participation effluent monitoring “may become unduly lax” and “fail[] to pick up [a] release.” *Id.* at 7. Thus, allegedly there could be “a relatively minor accidental or other failure of equipment, accompanied by a failure to detect and correct as quickly the increased release.” *Id.* at 8 (quoting Dissent, 53 NRC at 296).

The Petitioners’ claims, however, amount to no more than a speculative chain of events leading to potential injury; i.e., if the license amendments issue, then hearing opportunities will diminish, lax monitoring will ensue, and the risk of avoidable radiation releases will increase. What the contention lacks, however, is the necessary minimal *factual or legal basis* for believing that removal of the technical specifications at issue here would significantly increase the public health and safety risk. While it is debatable whether the Petitioners’ allegations of lost hearing opportunities suffice for standing to intervene, an issue we do not decide, the allegations surely fall short of an admissible contention, for they fail to offer any specific explanation, factual or legal, for why the consequences they fear will occur if these particular technical specifications are transferred to the REMODCM. Indeed, the Petitioners’ pleadings evince little familiarity with the actual technical specifications at issue here, or, for that matter, with nuclear power plant effluent monitoring practices and requirements generally.

In short, in seeking to maintain low-level effluent monitoring procedures in the Millstone technical specifications, the Petitioners may not simply complain generally of lost hearing opportunities causing future safety risks. An admissible contention must explain, with specificity, particular safety or legal reasons

requiring rejection of the contested license amendments. As the Board majority emphasized, “there is no general right to a hearing for a hearing’s sake.” 53 NRC at 282. The Petitioners do not have a “right” to intervene in possible future changes to effluent monitoring details if no safety or legal reason compels their retention in the Millstone license.

The Petitioners have not provided the necessary minimal factual or legal basis to suggest that either (a) the effluent monitoring procedures at issue are of such safety significance that technical specifications must continue to include them, or (b) that this Licensee in particular — because, for example, of particular license conditions or deficiencies in its effluent monitoring program — should be required to retain the effluent procedures in its license. We address these points in detail below.

a. Effluent Monitoring Procedures and the Technical Specifications

It is certainly the case that almost every item originally contained in technical specifications has some conceivable connection to safety. It follows, then, that for every Generic Letter the NRC has issued to licensees recommending that a particular set of specifications be relocated to a licensee-controlled document, one could make a theoretical argument that safety might be diminished because these items in the future could be changed without the additional oversight and controls provided by a license amendment. But this general premise is insufficient, by itself, as a ground for intervention.

Simply because a set of procedural items was commonly inserted in technical specifications in the past does not mean that they must remain there. There is “no statutory or regulatory requirement that every operational detail . . . be subject to a technical specification.” *Perry*, 44 NRC at 328. Not all licensee actions or changes in procedures must carry with them an opportunity for public hearing. *See generally id.* at 326-29. The Petitioners’ theory essentially means that *no* item could ever be transferred from the technical specifications because one could always argue that there is a potential, however remote, of a greater possibility of injury if the item in the future can be changed without a full license amendment.

This extreme view would undercut the Commission’s entire technical specifications improvement program — which we describe in some detail above. Our agency has already determined, as a policy matter, that many requirements originally contained in technical specifications can and should be transferred to licensee-controlled documents. Leaner technical specifications, the Commission believes, more effectively “focus licensee and plant operator attention on those plant conditions most important to safety.” *See Policy Statement*, 58 Fed. Reg. at 39,135. Indeed, the former licensee practice of including all manner of Commission requirements in the technical specifications noticeably “resulted in

an adverse . . . impact on safety” by diverting NRC Staff and Licensee attention from the more important requirements. *See* Final Rule, 60 Fed. Reg. at 36,957.

Technical specifications, therefore, should be reserved for those reactor operation “conditions or limitations . . . necessary to obviate the possibility of an abnormal situation or event giving rise to an immediate threat to the public health and safety.” *Id.* (citing *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-531, 9 NRC 263 (1979)). A Commission rule, 10 C.F.R. § 50.36, delineates the kinds of requirements that are of “such controlling importance to safety” that they must remain in the technical specifications.⁹ When the Staff determines under section 50.36 that particular requirements can be transferred out of the technical specifications, it is not deciding that these items have no safety significance whatsoever, but only that they do not fall among those limits and parameters most immediately significant for the protection of public health and safety. Thus, they can be adequately followed, monitored, and enforced by means of licensee-controlled documents. By reducing the total number of technical specifications, the Commission’s policy also aims to reduce license amendment requests and thereby avoid unnecessarily taxing the resources of the NRC and licensees, while at the same time assuring that technical specifications focus on the *most* safety-critical features, posing the greatest immediate threats to public health and safety.

This license amendment proceeding offers the Petitioners the opportunity to come forward and state why the nature of these effluent procedures at issue here is such that they should not be removed from the technical specifications. The Petitioners have not done so. Nowhere, for instance, in either their amended petition or their appeal brief do the Petitioners even refer to the section 50.36 criteria that govern which technical specifications must be retained and which can be relocated to licensee-controlled documents. The license application, in some detail, applies these criteria to the proposed changes to conclude that the procedural details relocated by these license amendments can be taken out of the technical specifications. The Petitioners do not even attempt to rebut the licensee’s analyses. Our contention-pleading rule, however, calls on intervention petitioners to “include references to the specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute.” *See* 10 C.F.R. § 2.714(b)(2)(iii).

It is true, as the dissent below and the Petitioners point out, that the contention rule does not require “a specific allegation or citation of a regulatory violation.” *See* Appeal Brief at 6 (referencing dissent). Thus, contrary to what the Board majority implied (53 NRC at 282-83), the Petitioners had no legal obligation to cite or discuss section 50.36 or any other substantive rule. But the Petitioners

⁹ Additional requirements for technical specifications on effluents are found in 10 C.F.R. § 50.36a.

were obliged to give the “supporting reasons” for keeping effluent requirements in the license. See 10 C.F.R. § 2.714(b)(2)(iii). And it was the Petitioners themselves who argued below that “the provisions that presently appear in the technical specifications *belong there*.” See Transcript at 25. It would be reasonable to expect, therefore, that the Petitioners would address in their briefs the agency’s section 50.36 standards for technical specifications and the Licensee’s application of them. See *id*.

The first and only time the Petitioners mentioned section 50.36 was during a telephone prehearing conference when, in response to questioning, Petitioners’ counsel simply said: “[w]e do argue that these technical specifications belong and should remain in the license . . . specifically 10 C.F.R. § 50.36, does seem to speak directly to this.” *Id.* at 26. Petitioners’ counsel went on to suggest that specifically 10 C.F.R. § 50.36(c)(1)(ii)(A), involving “safety system settings,” prohibits the removal of the effluent monitoring procedures from the technical specifications. She further stated that this argument was “implicit” in the Petitioners’ amended petition. *Id.* at 56.

The Board’s majority decision rejects the notion that the intervention petition implicitly included a section 50.36 claim. We agree. The amended petition contains not the slightest reference to any particular item in section 50.36, and certainly no mention of section 50.36(c)(1)(ii)(A), or any requirements or language associated with that rule. Moreover, the majority found section 50.36(c)(1)(ii)(A) entirely inapplicable to the effluent monitoring at issue in this proceeding. The Petitioners do not contest this finding on appeal, and indeed apparently have dropped altogether any section 50.36-related argument. The appeal does not mention section 50.36, or even any of the considerations that govern whether a matter should be included in the technical specifications.

That leaves the Petitioners without any apparent foundation for their challenge to removal of the contested technical specifications from the Millstone license. Yet, as we have stressed, a contention alleging that an application is deficient must identify “each failure and the supporting reasons for the petitioner’s belief.” 10 C.F.R. § 2.714(b)(2)(iii). Full adjudicatory hearings should be “triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.” *Oconee*, 49 NRC at 334.¹⁰ The Petitioners’ general

¹⁰Of some note is a similar proceeding, *Perry*, 44 NRC 315, which also involved the transfer of specific items — the material specimen withdrawal schedule — from the technical specifications to a licensee-controlled document. In that case, though, any future changes to the withdrawal schedule would continue to require prior Staff approval. The petitioners in *Perry* therefore claimed that this prior Staff approval process was equivalent to the license amendment process, and that any future changes to the withdrawal schedule would represent *de facto* license amendments, requiring notice and hearing opportunities under section 189a of the Atomic Energy Act — a claim ultimately rejected by the Commission. See *Perry*, CLI-96-13, 44 NRC 315 (1996). Here, the Petitioners have not argued that future adjustments to effluent monitoring details would constitute *de facto* license amendments.

(Continued)

references to lost hearing opportunities and lax monitoring in the future do not meet this standard.

b. Generalized Allegations About the Licensee

The Petitioners' various efforts on appeal to overcome their failure to identify a specific illegality or safety flaw in the license amendment application are highly generalized and do not come close to meeting our contention rule. For instance, it is simply not enough to allege generally that the Licensee will "lower standards of radiological effluent monitoring" because we are in an "era of deregulation and electric restructuring." *See* Appeal Brief at 4. Nor can we infer any nefarious intent behind the Licensee's statement that transferring effluent requirements to the REMODCM "will reduce costs" by eliminating the necessity to always obtain a license amendment for any changes. *See id.* at 3 (citing NNECO's cover letter accompanying the license application). Cost reduction is one of the goals of improving technical specifications, but it is a stretch, to say the least, to conclude without more that "[c]ost-cutting and . . . ineffective radiation monitoring go hand-in-hand." *Id.* at 8.

In addition, the contention states that the "amendment request is particularly objectionable in light of the levels of radiological effluent released to the environment by the Millstone reactors." *Id.* at 4. It is unclear, however, what "levels" the Petitioners mean. When asked by the Board in a prehearing conference call whether any such releases violated agency regulations, the Petitioners' counsel said merely that she did not know. *See* Transcript at 24. An affidavit submitted by the Petitioners' expert makes similar unspecific references to "excessive" releases. Our contention rule does not permit "vague, unparticularized contentions," or "notice pleading, with details to be filled in later." *Ocone*, 49 NRC at 338 (citation omitted).

Moreover, it remains unclear what exactly the Petitioners wish to litigate. They seem to object generally to *any* radioactive releases, regardless of level or legality. *See, e.g.*, Transcript at 24 (emphasis added) ("the fact is that it is our position that any radioactive airborne releases are cause for concern, and Mr. Mangano, who provided a supplemental affidavit in this matter, is of the opinion that there is *no*

Entirely on its own, however, the dissent below intimates that future changes to effluent monitoring procedures might "supplement[] the existing operating authority" of the Licensee, and thus might in effect reflect *de facto* license amendments. *See* 53 NRC at 308-09. The dissent's theory does not revive the Petitioners' contention. For one thing, it is a "contention's proponent, not the licensing board, [that] is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions." *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 22. Moreover, because the license amendments do not in any fashion accord the Licensee authority to exceed current limits on radiological effluent rate of release, concentration, or public dose, they cannot be said to "supplement" the Licensee's operating authority in a meaningful sense. Providing flexibility on how to achieve regulatory requirements is not akin to relaxing requirements.

safe level of radioactive airborne release from a nuclear reactor’’). They say they “are prepared to establish through expert testimony that any increase in routine radiological effluent to the air and water by the Millstone reactors will expose the public to greater risk of cancer, immunodeficiency diseases and other adverse health effects.” See Appeal Brief at 4. But routine permissible releases occur virtually daily, and they do not remain at a constant level but go up and down routinely. All such releases are small and must remain within NRC-prescribed limits.

Regulatory limits on effluent concentrations take into account the licensee’s need to make frequent adjustments in releases, while still imposing absolute limits on both the rate of release and the dose to the nearest member of the public. The license amendments at issue here have no bearing on the Licensee’s ability to make these frequent adjustments. If the Petitioners are objecting to all possible routine adjustments in effluent releases, then their claim amounts to an impermissible general attack on our regulations governing public doses at operating nuclear plants. See 10 C.F.R. § 2.758. Petitioners “may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies.” *Ocone*, 49 NRC at 334.

Latching onto language from the dissent below, the Petitioners on appeal suggest that their concern also is with effluents

that . . . would exceed the limits of Appendix I to 10 C.F.R. Part 50, resulting not from the sort of major accident that would produce high-range releases but rather from some other cause, such as a relatively minor accidental or other failure of equipment, accompanied by a failure to detect and correct as quickly the increased release, by virtue of changed surveillance schedules or setpoints.

Appeal Brief at 7-8, *citing* Dissent, 53 NRC at 296. Again, however, the Petitioners offer no basis for associating this hypothetical risk with the transfer of monitoring requirements from the technical specifications to the REMODCM. The current amendments, for example, have nothing to do with setpoints. See note 5, *supra*, and accompanying text. One might endlessly hypothesize scenarios of potential injury at nuclear power plants, but not all such claims trigger licensing actions and agency hearings. “[M]embers of the public cannot be allowed to litigate before the Commission any and all issues that occur to them without demolishing the regulatory process.” *Perry*, 44 NRC at 329 n.37 (citing *Bellotti v. NRC*, 725 F.2d 1380, 1382 (D.C. Cir. 1983)).

The Petitioners point to the Licensee’s statement that the amendments at issue “will not *significantly* increase the type and amounts of effluents that may be released offsite,” and “will not *significantly* increase individual or cumulative occupational radiation exposures.” See Appeal Brief at 3, 6 (emphasis added). From this the Petitioners apparently conclude that there *will be* increases in exposure. *Id.* But the cited statements appear in a section of the license

amendment application discussing whether the license amendments would require an Environmental Review. Under 10 C.F.R. § 51.22, a licensee and the NRC Staff must consider whether there will be a “significant change in the types or significant increase in the amounts of any effluents that may be released offsite,” and whether there will be a “significant increase in individual or cumulative occupational radiation exposure.” See 10 C.F.R. § 51.22(c)(9)(ii). Hence, the license amendment application understandably used “significance” terminology in addressing these specific points. We see no basis to infer from these statements a veiled implication that the amendments will lead to increases in radiation exposures. In any event, the NRC will receive annual reports of effluent monitoring, see 10 C.F.R. § 50.36a(a)(2), and is prepared to take action if necessary.

The Petitioners further question whether the license amendments concern not simply low-level effluent monitoring but also high-range monitors, which can detect potential high-level radiological releases from reactor accidents. See Appeal Brief at 8. They rest this speculation on out-of-context references to comments in the license amendment application’s cover letter, but show no familiarity with the actual provisions of the license amendments. Comments noted by the Petitioners apparently referred to plans to take down a high-range monitor used by Millstone Unit 1, which is being decommissioned. See DNC’s Appeal Brief (4/23/01) at 3 n.6. These license amendments at issue here, however, have no bearing on high-range accident monitors or their surveillance procedures.

Lastly, the Petitioners suggest that the Licensee cannot be trusted to follow regulatory standards. A footnote in their appeal brief refers to “an earlier era of flagrant cost-cutting at Millstone,” when “sample points were wilfully changed in the mid-90s so that reports of chemical discharges would show only negligible traces of pollution.” See Appeal Brief at 8 n.17. The Petitioners say that this “led to state and federal enforcement actions and criminal penalties under the Clean Water Act.” *Id.* In addition, in their amended petition before the Licensing Board, the Petitioners state that in 1999, Northeast Nuclear Energy Company pled guilty in a federal district court to falsifying information to the NRC. See Amended Petition at 3.

In some past cases, the Commission or its hearing boards have admitted contentions based upon claims of poor licensee “character” or “integrity.” We have always insisted, however, that “[f]or management ‘character’ to be an appropriate issue for adjudication in a licensing proceeding, ‘there must be some direct and obvious relationship between the character issues and the licensing action in dispute.’” *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 189 (1999) (citation omitted). We have, for instance, admitted “character”-based issues in a proceeding to transfer total operational authority and control to a new management organization, whose particular and current high-ranking officers allegedly displayed a pattern of

deliberately violating safety regulations. *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25 (1993). Similarly, we found character allegations directly pertinent when, in a license renewal proceeding, the allegations specifically concerned the current director of the facility, and the current organizational structure of the facility, and were supported by expert witnesses alleged to have knowledge of the current management. *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111 (1995).

We have, however, placed strict limits on “management” and “character” contentions. “Allegations of management improprieties or poor ‘integrity’ . . . must be of more than historical interest: they must relate directly to the proposed licensing action.” *Georgia Tech*, 42 NRC at 120. License amendment proceedings are not a forum “only to litigate historical allegations” or past events with no direct bearing on the challenged licensing action. *See Vogtle*, 38 NRC at 36 n.22. Here, the events leading to NNECO’s guilty plea and conviction all took place in the mid-1990s. Importantly, the Petitioners make no effort to show how these historical events have a direct bearing upon the discrete license amendments now before us. The Petitioners have not, for instance, suggested that there are any irregularities in the Millstone effluent monitoring program. Nor have they indicated any pattern of ongoing corporate misconduct at Millstone which reasonably could bear upon the effluent program. There simply has been no link established between the individuals or direct management responsible for falsifying reactor operator examination results years ago, at issue in the NNECO conviction, and Millstone’s effluent monitoring program or the managers currently responsible for overseeing it.

On the contrary, the Petitioners acknowledge that these past events occurred during “an earlier era” at Millstone. *See Appeal Brief* at 8 n.17. They also acknowledge that the ownership and control of Millstone has changed. NNECO is no longer the owner or operator of Millstone Units 2 and 3, the subject of the current amendments. Having provided no indication that there are any current or directly pertinent “character” concerns, the Petitioners state only that they “are not prepared to allow the new owners of Millstone the benefit of a doubt with regard to their radiation emissions.” *Id.* at 9.

To accept the Petitioners’ reasoning would potentially insert management integrity issues into virtually all license amendment proceedings at facilities with prior violations, no matter the nature of the amendment. We cannot allow admission of contentions premised on a general fear that a licensee cannot be trusted to follow regulations of any kind. As a rule, reactor license amendment applications do not “‘throw[] open an opportunity to engage in a free-ranging inquiry into the ‘character’ of the licensee.’” *Zion*, 49 NRC at 189 (citing *Vogtle*, 38 NRC at 32). When “character” or “integrity” issues are raised, we

expect them to be directly germane to the challenged licensing action. No such link has been established here.

IV. CONCLUSION

For the reasons given in this Decision, the Commission *affirms* LBP-01-10.
IT IS SO ORDERED.

For the Commission¹¹

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of December 2001.

¹¹ Commissioner McGaffigan was not present for the affirmation of this Order. If he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 50-213-OLA
(License Termination Plan)

CONNECTICUT YANKEE ATOMIC
POWER COMPANY
(Haddam Neck Plant)

December 5, 2001

COMMISSION PROCEEDINGS: APPELLATE REVIEW

INTERLOCUTORY REVIEW STANDARDS

The Commission generally disfavors interlocutory review. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001); *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994).

COMMISSION PROCEEDINGS: APPELLATE REVIEW

INTERLOCUTORY REVIEW STANDARDS

NRC regulations prescribe strict criteria applied for review of a certified or referred ruling, which is generally reserved for those cases where the ruling:

- (1) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or,
- (2) Affects the basic structure of the proceeding in a pervasive and unusual manner.

See 10 C.F.R. § 2.786(g). *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310 (1998).

COMMISSION PROCEEDINGS: APPELLATE REVIEW

INTERLOCUTORY REVIEW STANDARDS

A mere legal error is not enough to warrant interlocutory review because interlocutory errors are correctable on appeal from final board decisions. *See Private Fuel Storage*, CLI-01-1, 53 NRC at 5; *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314 (1998).

COMMISSION PROCEEDINGS: APPELLATE REVIEW

INTERLOCUTORY REVIEW STANDARDS: SERIOUS AND IRREPARABLE HARM

The threat of future widespread harm to the general population of NRC licensees (as opposed to specific serious, irreparable harm to the Petitioner) is not a factor in interlocutory review, although it might encourage the Commission to review the final decision. *See* 10 C.F.R. § 2.786.

COMMISSION PROCEEDINGS: APPELLATE REVIEW

INTERLOCUTORY REVIEW STANDARDS: SERIOUS AND IRREPARABLE HARM

That the intervenor's claim will ultimately fail on the merits is no ground for granting interlocutory review to the applicant opposing admission of a contention. On the contrary, it may indicate that the applicant is not seriously harmed even if the Board's ruling is in error.

COMMISSION PROCEEDINGS: APPELLATE REVIEW

INTERLOCUTORY REVIEW STANDARDS: PERVASIVE EFFECT ON THE STRUCTURE OF THE LITIGATION

The increased litigation burden caused by the allowance of a contention does not in itself constitute a "pervasive effect" on the structure of the litigation. *See, e.g., Dr. James E. Bauer* (Order Prohibiting Involvement in NRC-Licensed Activities), CLI-95-3, 41 NRC 245 (1995) (refusal to eliminate certain bases of Staff charges was not a pervasive impact); *Sacramento Municipal Utility District* (Rancho Seco

Nuclear Generating Station), CLI-94-2, 39 NRC 91 (1994) (admitting additional basis for contention did not have pervasive effect on adjudication).

COMMISSION PROCEEDINGS: APPELLATE REVIEW

INTERLOCUTORY REVIEW STANDARDS: SERIOUS AND IRREPARABLE HARM

A mere increase in the burden of litigation does not constitute “serious and irreparable” harm warranting interlocutory review. *See, e.g., Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55 (1994). “It is well established in Commission jurisprudence that the mere commitment of resources to a hearing that may later prove to have been unnecessary does not constitute sufficient grounds for an interlocutory review of a Licensing Board order.” *Id.* at 61. *See also Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 138-39 (1987); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 21-22 (1987).

COMMISSION PROCEEDINGS: APPELLATE REVIEW

INTERLOCUTORY REVIEW STANDARDS: NOVEL ISSUES THAT WILL BENEFIT FROM EARLY REVIEW

A 1998 Commission policy statement encouraging the referral to the Commission of “novel issues that will benefit from early review” was directed at the boards, not the litigants. The Commission, however, could also accept discretionary interlocutory review of such an issue at a party’s request in the exercise of its inherent supervisory authority. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998), and *Consolidated Edison Co. of New York* (Indian Point, Unit 2), CLI-82-15, 16 NRC 27 (1982); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-17 (1977); *United States Energy Research and Development Administration* (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 75-76 (1976).

COMMISSION PROCEEDINGS: APPELLATE REVIEW

INTERLOCUTORY REVIEW STANDARDS: NOVEL ISSUES THAT WILL BENEFIT FROM EARLY REVIEW

The Commission assigns considerable weight to the board’s view of whether its ruling will benefit from early review, because licensing boards have a great deal of

discretion in managing the proceedings of cases before them. *See Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-19, 48 NRC 132 (1998)

MEMORANDUM AND ORDER

Applicant Connecticut Yankee Atomic Power Company (“CY”) has asked the Commission to review a July 9, 2001 Licensing Board decision admitting Intervenor Citizens Awareness Network’s (“CAN’s”) Contention 6.1 in a proceeding concerning CY’s License Termination Plan for the Haddam Neck power reactor.¹ In this contention, CAN maintains that doses to children must be taken into account in determining whether residual radiation doses to the public are within regulatory limits. The Licensing Board denied CY’s motion to reconsider or refer this issue for Commission review in a September 17, 2001 order.²

We find that the question presented does not meet the standards for interlocutory appellate review and deny CY’s petition.

I. BACKGROUND

Commission regulations require that residual radiation at a decommissioned site not exceed a total effective dose equivalent (TEDE) of 25 millirem per year to “an average member of the critical group.”³ “Critical group” is defined as “the group of individuals reasonably expected to receive the greatest exposure to residual radioactivity for any applicable set of circumstances.”⁴ “Individual” is also defined as “any human being.” The “critical group” is therefore a hypothetical person or persons who, given the range of all reasonable potential uses for the site, would receive the highest doses of radiation from living or working there. This is often found to be resident farmers, because farmers would spend the most time on the site and outdoors, and would eat food grown on the site.

The disputed contention claims that the dose modeling calculation in CY’s license termination plan is flawed because CY did not calculate doses to children. The “critical group,” CAN argues, is an entire family who might live on the site, rather than just the adult male members of such a family. Other admitted

¹ LBP-01-21, 54 NRC 33 (2001).

² LBP-01-25, 54 NRC 177 (2001).

³ 10 C.F.R. § 20.1402.

⁴ 10 C.F.R. § 20.1003.

contentions attack CY's assumptions concerning the habits of a resident farmer that would affect the radiation dose received.

Although the plain language of the regulation does not restrict the terms "critical group," "individual," or "human being" to mean any specific age, race, or gender, CY argues that the regulation incorporated the Environmental Protection Agency's "Reference Man" concept, which assumes a person is a white male, age 20-30.⁵ CY contends that the critical group at Haddam Neck should be composed of resident farmers, as CY described them in its License Termination Plan, and that the "average" member is therefore an average farmer. Doses to children are therefore irrelevant, it argues.

The Board admitted CAN's contention that the dose modeling calculations were flawed for various reasons, including failing to take children into account, as well as several other contentions on site characterization, work scope, dose calculations, and water contamination.⁶ The Board revisited but did not reverse its ruling regarding children in its September 17, 2001, order. Therefore, the anticipated hearing on dose calculations will examine the doses to at least two groups, resident farmers and resident children.

II. STANDARDS FOR INTERLOCUTORY REVIEW

The Commission generally disfavors interlocutory review.⁷ Our regulations prescribe strict criteria applied for review of a certified or referred ruling, which is generally reserved for those cases where the ruling:

- (1) Threatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or,
- (2) Affects the basic structure of the proceeding in a pervasive and unusual manner.⁸

⁵ See Environmental Protection Agency, proposed Federal Radiation Protection Guidance for Exposure of the General Public ("FRG"), 59 Fed. Reg. 66,414 (Dec. 23, 1994). "These dose conversion factors are appropriate for application to any population adequately characterized by the set of values for physiological parameters . . . collectively known as 'Reference Man.'" 59 Fed. Reg. at 66,423. The FRG goes on to explain that variability in doses due to age and gender is expected to be no more than the margin of uncertainty in the calculations, so that "a detailed consideration of age and sex is generally not necessary." *Id.* In its Statement of Considerations in publishing its Final Rule, "Criteria for License Termination," 66 Fed. Reg. 39,058, NRC stated that it had "evaluated" the EPA document, as well as publications from the International Commission on Radiation Protection and the National Council on Radiation Protection, and found it "reasonable and appropriate to use findings of these bodies in developing criteria for license termination to apply to its licensees." 62 Fed. Reg. at 39,061. As in the regulation itself, the Statement of Considerations does not use the term "reference man" in its discussion of the critical group. See 62 Fed. Reg. at 39,067-68.

⁶ See LBP-01-21, 54 NRC at 105-06.

⁷ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001); *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994).

⁸ 10 C.F.R. § 2.786(g). See also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310 (1998).

A mere legal error is not enough to warrant interlocutory review because interlocutory errors are correctable on appeal from final Board decisions.⁹ Although the NRC Staff supported CY's interpretation of the regulation in the proceedings below, the Staff opposes CY's petition for immediate review on the grounds that the ruling will not work serious irreparable harm to CY or affect the basic structure of the proceeding in a pervasive and unusual manner.

CY does not address either of the alternative criteria for interlocutory review. Instead, it urges the Commission to immediately review the Board's ruling because of its novelty and potentially far-reaching impact. CY argues that the ruling requires a "site specific analysis of age distribution of population" in Connecticut, which potentially affects all NRC licensee sites that will be decommissioned, makes it impossible to use the NRC's RESRAD program without first selecting an adult/child ratio for the site, and destroys uniformity in dose protections.

We find these arguments unpersuasive as grounds for interlocutory review. The claimed harms are not immediate or specific to CY. The threat of future widespread harm to the general population of NRC licensees is not a factor in interlocutory review, although it might encourage the Commission to review the final decision.¹⁰ We also note that the Staff's own analysis shows that there appear to be no other decommissioning sites where this ruling could have an impact before the completion of the hearing process in this case.¹¹ Finally, contrary to CY's position, the Board did not actually rule that CY must make a site-specific analysis of the age distribution of Connecticut.¹² The information in which the Board seems to be interested is the dose to a hypothetical child residing on the site, not a statistical projection of how many and what ages of children will actually reside on the site.

CY additionally argues that CAN's claim will fail on the merits, because no reasonable scenario would result in a hypothetical child receiving greater doses than CY's already conservatively constituted hypothetical farmer. But if this is true, it is only an indication that CY is not seriously harmed, now or later, even if the Board's ruling is in error.

The only harm that CY might incur as a result of the Board's ruling, if it is wrong, will be an unnecessary production at a hearing of statistics on doses to a hypothetical child. But the Board has already admitted several other contentions

⁹ See *Private Fuel Storage*, CLI-01-1, 53 NRC at 5; *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314 (1998).

¹⁰ See 10 C.F.R. § 2.786.

¹¹ See Nuclear Regulatory Commission Staff Response to Petition for Directed Certification (Portion of LBP-01-21), at 4 (Oct. 17, 2001).

¹² In its ruling on the motion for reconsideration, the Board noted that CY had misunderstood its earlier ruling when CY argued that the ruling would require "site specific averages" of the ages of the population. LBP-01-25, 54 NRC at 181.

on which a hearing is anticipated. The Commission has considered and rejected the argument that the increased litigation burden caused by the allowance of a contention has a “pervasive effect” on the structure of the litigation.¹³ We have also rejected the argument that a mere increase in the burden of litigation constitutes “serious and irreparable” harm.¹⁴ In fact, it does not appear that the information sought will necessarily broaden the scope of the hearing greatly because the closely related issues of the extent of radioactive contamination onsite and the resulting doses to a resident adult are already in dispute.

If the evidence shows, as CY claims it will, that doses to children are lower than doses to adults, CY will prevail without the need for an appeal. But even if the evidence shows that doses to children are higher, CY will still have the opportunity after the Board’s final decision to argue before the Commission that our regulations prohibit considering doses to children. Because the hearing is anticipated to encompass both the doses to the resident farmer and to children, it would be simple on final appeal to determine whether the license termination plan complies with our regulations with respect to residual doses to the critical group. Any harm to CY is therefore reparable.

In seeking interlocutory review, CY points to a statement in the Commission’s 1998 *Statement of Policy on Conduct of Adjudicatory Proceedings*, which encouraged boards to refer to the Commission “novel issues that will benefit from early review.”¹⁵ Although this statement refers to a board referral, the Commission may also accept discretionary interlocutory review at the request of a party in the exercise of its inherent supervisory authority where appropriate.¹⁶ But the Commission assigns considerable weight to the board’s view of whether the ruling merits immediate review. Licensing boards are granted a great deal of discretion in managing the proceedings of cases before them.¹⁷ Generally,

¹³ See, e.g., *Dr. James E. Bauer* (Order Prohibiting Involvement in NRC-Licensed Activities), CLI-95-3, 41 NRC 245 (1995) (refusal to eliminate certain bases of Staff charges was not a pervasive impact); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 94 (1994) (“The basic structure of an ongoing adjudication is not changed simply because the admission of a contention results from a licensing board ruling that is important or novel, or may conflict with case law, policy, or Commission regulations. Similarly, the mere fact that additional issues must be litigated does not alter the basic structure of the proceedings in a pervasive or unusual way so as to justify interlocutory review of a licensing board decision” (quoting *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 135 (1987))).

¹⁴ See, e.g., *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55 (1994). “It is well established in Commission jurisprudence that the mere commitment of resources to a hearing that may later prove to have been unnecessary does not constitute sufficient grounds for an interlocutory review of a Licensing Board order.” *Id.* at 61. See also *Shoreham*, ALAB-861, 25 NRC at 138-39; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 21-22 (1987).

¹⁵ *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998).

¹⁶ *Consolidated Edison Co. of New York* (Indian Point, Unit 2), CLI-82-15, 16 NRC 27 (1982); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-17 (1977); *United States Energy Research and Development Administration* (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 75-76 (1976).

¹⁷ *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-19, 48 NRC 132 (1998).

the Commission has accepted “novel issues that would benefit from early review” where the board, rather than a party, has found such review necessary and helpful.¹⁸ Here, the Board considered whether referring this ruling to the Commission would simplify or complicate its job and concluded that immediate review was not desirable.

In addition, it is not clear that the “critical group” issue is suitable for early Commission review. Proper resolution of this issue may turn on both the factual issue of what dose the individual is reasonably expected to receive as well as the legal issue of whether our regulation restricts the “critical group” to a particular age or gender. More factual development may better inform our (or the Board’s) ultimate decision.

Seeing no compelling argument to disagree with the Board, we find that interlocutory review of this issue is not warranted at this time.

III. CONCLUSION

We conclude that CY’s request does not meet our standards for interlocutory review, and we deny its petition for directed certification.

IT IS SO ORDERED.

For the Commission¹⁹

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 5th day of December 2001.

¹⁸ See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459 (2001).

¹⁹ Commissioner McGaffigan was not present for the affirmation of this Order. If he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 72-22-ISFSI

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

December 28, 2001

**RULES OF PRACTICE: ABEYANCE OF PROCEEDING;
SUSPENSION OF PROCEEDING**

In determining whether circumstances justify holding a licensing proceeding in abeyance, we consider whether moving forward with the adjudication will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge from our important ongoing evaluation of terrorism-related policies.

**RULES OF PRACTICE: ABEYANCE OF PROCEEDING;
SUSPENSION OF PROCEEDING**

The Commission has an obligation to achieve expeditious decisionmaking and to go forward with other regulatory and enforcement activities while terrorism-related standards are being reviewed. In our 1998 *Statement of Policy on Conduct of Adjudicatory Proceedings*, we reaffirmed our commitment to efficient and expeditious processing of adjudications. *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998).

**RULES OF PRACTICE: ABEYANCE OF PROCEEDING;
SUSPENSION OF PROCEEDING**

The Commission's longstanding practice has been to limit orders delaying proceedings to the duration and scope necessary to promote the Commission's dual goals of public safety and timely adjudication.

**RULES OF PRACTICE: ABEYANCE OF PROCEEDING;
SUSPENSION OF PROCEEDING; TERRORISM**

Because the Commission disfavors holding proceedings in abeyance where the relief is not narrowly tailored to the goal of promoting adjudicatory efficiency, Utah's request that the entire proceeding be suspended is overbroad. Postponing all proceedings on the license application while standards relating to a single safety aspect — the threat of terrorism — would not advance our goal of efficient decisionmaking.

**RULES OF PRACTICE: ABEYANCE OF PROCEEDING;
SUSPENSION OF PROCEEDING; LATE-FILED CONTENTIONS;
REOPENING RECORD**

Holding an entire licensing proceeding in abeyance is not necessary to ensure that the public will realize the full benefit of NRC's ongoing regulatory review at the facility in question. If a review of the terrorism threat causes the NRC to revise its requirements concerning facility protection at an ISFSI, PFS may well be subject to new regulations. Depending on the nature and timing of any new regulations, Utah may have an opportunity to file late contentions or to reopen the record. *See* 10 C.F.R. §§ 2.714(a), 2.734. Even if PFS has already received its license, the NRC can order that the facility be backfit where it is necessary to protect public health and safety. *See* 10 C.F.R. § 72.62.

MEMORANDUM AND ORDER

On October 10, 2001, the State of Utah petitioned the Commission for immediate relief suspending licensing proceedings in light of the terrorist attacks of September 11, 2001. Utah claims that the proposed Independent Spent Fuel Storage Installation (ISFSI) would be an attractive target for terrorists, and that our licensing proceedings should be halted immediately while the NRC reviews its regulations in response to the heightened terrorist threat. Both the Applicant, Private Fuel Storage, L.L.C. (PFS), and the NRC Staff oppose the petition.

The State of Utah, simultaneously with this petition, asked the Board to admit a late-filed contention concerning the risk of terrorists attacking the facility. On December 13, 2001, the Board denied the request to admit the contention and referred its ruling for Commission review.¹ The Commission is not acting on that ruling in this Order.

We find that the relief requested in Utah's petition — immediately staying these proceedings — is not necessary or appropriate at this time. Because the facility cannot possibly be in a position to receive spent fuel shipments for more than 2 years, there is no immediate threat that this facility can be a target for terrorists. In the meantime, the Commission has undertaken a top-to-bottom review of its regulations concerning physical protection of all licensed facilities and materials to determine if any revisions should be made in light of the September 11, 2001 events. As the following discussion shows, the threat of terrorist attacks against the proposed ISFSI can and will be properly addressed without halting the licensing adjudication.

I. BACKGROUND

A. Physical Protection Requirements for an ISFSI

The Commission sets forth its regulations on physical protection of an ISFSI in 10 C.F.R. Parts 72 and 73. The design for physical protection must include design features to protect the ISFSI against acts of radiological sabotage.² The performance objective of the physical protection system for an ISFSI is to provide high assurance that licensed activities do not constitute an unreasonable risk to public health and safety.³ Specific requirements to meet the performance objective are substantial and include a barrier at the perimeter of the protected area and an additional barrier offering “substantial penetration resistance,” as well as continual surveillance of the perimeter of the protected area.⁴

B. NRC's Response to the Events of September 11, 2001

In response to the September 11, 2001 terrorist attacks, the Commission has taken a number of actions to ensure the security of NRC-licensed facilities and materials, including activation and staffing of the NRC Operations Center on a 24-hour-a-day basis. Immediately following the attacks, the NRC advised nuclear power plant licensees and fuel facilities to go to the highest level of security,

¹ LBP-01-37, 54 NRC 476 (2001).

² 10 C.F.R. § 72.182.

³ 10 C.F.R. § 73.51(b)(1).

⁴ 10 C.F.R. § 73.51(d).

and all promptly did so. In addition, the Commission has had continuous and close coordination with the Federal Bureau of Investigation, other intelligence and law enforcement agencies, the Office of Homeland Security, NRC licensees, and military, state, and local authorities. The Commission has issued security advisories to licensees to update them on the available threat information and to recommend additional security measures. The Commission continues to monitor the situation, and is prepared to make any adjustments to security measures for NRC-licensed activities as may be deemed appropriate.

The Commission believes that its response to these unsettling events has been expeditious and that the current safeguards and physical security programs provide for a very high level of security at NRC-licensed facilities. However, in the aftermath of the terrorist attacks and the continuing uncertainty about future terrorist intentions, we have commenced a thorough review of our safeguards and physical security programs, from top to bottom, including those applicable to independent spent fuel storage installations. The review will involve a comprehensive examination of the programs' basic underlying assumptions.

Historically, the NRC has drawn a distinction between requiring its licensees to defend their facilities against sabotage and requiring them to protect against attacks and destructive acts by enemies of the United States. Even NRC-licensed facilities that are required to meet the most stringent security requirements (because the potential consequences of sabotage are greatest) are not required to protect against enemies of the United States. For example, reactor licensees are required to protect against a prescriptive list of possible threats, referred to collectively as the "design-basis threat."⁵ However, our regulations stipulate that power reactors are not required to be designed or to provide other measures to counteract destructive acts by "enemies of the United States."⁶ The basis for this distinction is that the national defense establishment and various agencies having internal security functions have the responsibility to address this contingency, and that requiring reactor design features to protect against the full range of the modern arsenal of weapons is simply not practical.⁷

The top-to-bottom review of our physical protection regulations will consider these distinctions, which have been underlying principles of the Commission's regulations in this area, and apply them as appropriate. The consideration of any adjustments to licensee, federal, state, and local response capabilities is being conducted in consultation with the appropriate authorities.

⁵ 10 C.F.R. § 73.55, requiring protection against the design-basis threat described in section 73.1(a)(1).

⁶ 10 C.F.R. § 50.13.

⁷ See Licensing of Production and Utilization Facilities; Procedures for Review of Certain Nuclear Reactors Exempted from Licensing Requirements, 32 Fed. Reg. 13,445 (Sept. 26, 1967). See also *Siegel v. AEC*, 400 F.2d 778, 780-84 (D.C. Cir. 1968).

II. DISCUSSION

As described above, the Commission is in the process of reviewing its regulations to determine if revisions should be made in response to the events of September 11. Utah has asked that the instant licensing proceeding be stopped until applicable laws and regulations can be brought into “conformity with present realities.”⁸ It asserts that we have authority to do this under our general obligation to ensure that all licensing decisions protect public health and safety. We find, however, that holding the PFS proceeding in abeyance is not warranted. In two other cases decided today, we similarly decide against postponing licensing proceedings to await ongoing review of the agency’s terrorism-related policies.⁹

In all three cases, we consider whether moving forward with the adjudication will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge from our important ongoing evaluation of terrorism-related policies. None of these considerations, in our view, justifies postponing Licensing Board proceedings in the three cases we consider today, including this one.

A. The PFS Facility Poses No Immediate Threat to Public Safety

There is no immediate threat that the PFS facility will become a target for terrorists because no spent nuclear fuel will be located on the site of the proposed facility for at least 2 years. Many issues remain to be litigated in the ongoing proceedings. According to the most recent schedule issued by the Board, the earliest it could issue its initial decision is September 2002. Even if that decision is favorable to the Applicant, the Commission itself must authorize issuance of the license.¹⁰ The Commission could hold up the license at that time if a revision to the regulations is imminent. In addition, according to PFS, construction of the facility after a license is issued would take more than 1 year. Therefore, even if the licensing, construction, and shipping processes all go forward without further delay, the first storage casks would not arrive on the site for more than 2 years.¹¹

⁸ State of Utah’s Petition for Immediate Relief Suspending Licensing Proceedings (Oct. 10, 2001), at 2.

⁹ See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 385 (2001); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393 (2001).

¹⁰ 10 C.F.R. § 2.764(c).

¹¹ According to the NRC Staff’s estimates, “mid-2004” would be the earliest that the facility could actually receive spent fuel. See “NRC Staff’s Response to the State of Utah’s Petition for Immediate Relief Suspending Licensing Proceedings” (Oct. 25, 2001), at 4 n.8.

A site that currently contains no radiological materials and will not for at least 2 years cannot present an immediate threat to public safety. Therefore, this consideration does not warrant a halt to the current proceeding.

B. Adjudication of Other Issues Must Proceed in a Fair and Efficient Manner

We also find that it is both in the interest of the public and in the interest of fairness to the parties that all the issues raised by this adjudication be resolved efficiently.

1. Commission's Obligation To Achieve Expeditious Decisionmaking

The Commission has a responsibility to go forward with other regulatory and enforcement activities even while terrorism-related standards are being reviewed. In our 1998 *Statement of Policy on Conduct of Adjudicatory Proceedings*, we reaffirmed our commitment to efficient and expeditious processing of adjudications.¹² Our hearing policies seek to “instill discipline in the hearing process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings.”¹³ This is in keeping with the Administrative Procedure Act’s directive that agencies should complete hearings and reach a final decision “within a reasonable time.”¹⁴ While the agency’s top-to-bottom review is pending, there are numerous safety and environmental issues that must be resolved in this adjudication, many with no conceivable connection to terrorism. Under these circumstances, we see no basis for freezing the ongoing licensing proceeding.

2. Commission Narrowly Tailors Delay Orders

The Commission’s longstanding practice has been to limit orders delaying proceedings to the duration and scope necessary to promote the Commission’s dual goals of public safety and timely adjudication.

The Commission’s response to the serious accident at Three Mile Island, Unit 2, on March 28, 1979, illustrates this approach. Immediately after the accident, the Commission chose not to halt ongoing licensing proceedings,¹⁵ but instead temporarily stopped issuing licenses for any new facilities pending its

¹² *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998).

¹³ *Id.* at 19.

¹⁴ See 5 U.S.C. § 558(c).

¹⁵ See, e.g., *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777 (1983).

assessment of the accident.¹⁶ Later, the Commission issued a Statement of Policy announcing that pending consideration of changes in safety requirements and procedures, the Commission itself would decide whether to grant final approval for new construction permits, limited work authorizations, or operating licenses for reactors.¹⁷ All other adjudicatory proceedings, including enforcement and license amendment proceedings, were allowed to continue.¹⁸ The agency also rejected a petition claiming that the TMI-2 incident required that all similar operating reactors be immediately shut down.¹⁹

More recently, in a decision in the *Hydro Resources* proceeding, we overturned a Board order holding portions of the proceeding in abeyance indefinitely.²⁰ There, petitioners challenged an already-issued license on environmental and environmental justice grounds. The license authorized the licensee, Hydro Resources, Inc. (HRI), to conduct *in situ* leach mining at four sites in New Mexico, but provided that HRI would begin operations at one site and could not move on to the next site until it had conducted an acceptable groundwater restoration demonstration at the first. The Board ordered all proceedings concerning mining effects at sites other than the first to be held in abeyance until such time as HRI decided it wanted to mine the other sites. The Commission reversed the Board's order, rejecting the argument that environmental effects of mining the remaining sites would not be "ripe" for adjudication unless and until HRI decided to mine them. The Commission found that the Board's decision both violated principles of expeditious case management and imposed an unacceptable burden on the petitioners by forcing them to wait indefinitely to be heard.

In a similar vein, the Commission has declined to stay proceedings in license transfer cases where parallel proceedings in another forum might moot the transaction.²¹ Because the sale of a power plant requires the approval of a variety of authorities, including the state utilities regulators, the Federal Energy Regulatory Commission, the Securities and Exchange Commission, and the Internal Revenue Service, the whole transaction could fall through if a single

¹⁶This temporary pause in licensing was initiated by an unpublished order dated June 5, 1979. A discussion of the Commission's actions following the TMI-2 accident is included in *Diablo Canyon*, 17 NRC at 784-85.

¹⁷See Interim Statement of Policy and Procedure, 44 Fed. Reg. 58,559 (Oct. 10, 1979).

¹⁸*Id.*

¹⁹See, e.g., *Petition To Suspend All Operating Licenses for Pressurized Water Reactors*, DD-81-8, 13 NRC 767 (1981). This petitioner wanted licenses for all pressurized water reactors suspended or revoked, contending the licenses were invalid because TMI-2 events proved that analyses used to predict the reactors' emergency core cooling systems' performance did not meet the requirements of 10 C.F.R. § 50.46.

²⁰*Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 34-35 (2001).

²¹See, e.g., *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333 (1999) (stay granted while co-owners decided whether to exercise right of first refusal but denied while New York Public Utility Commission proceedings pending); see also *Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225 (2001) (denied request to suspend proceedings on transfer of Units 1 and 2 until after completion of Commission proceeding related to transfer of Indian Point Unit 3); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000) (refusing to suspend license transfer proceedings until Commission examines effects of industry consolidation).

authority withholds its approval. If each agency took turns reviewing a single transfer, however, the whole process would be prolonged by years. By necessity, therefore, the Commission has found that the mere possibility that our proceedings will be mooted by another agency's decision is not sufficient reason to postpone reviewing the application before us.

The Commission will postpone adjudicatory matters in the unusual cases where moving forward would clearly amount to a waste of resources. For example, in a *San Onofre* licensing proceeding, the Appeal Board delayed reviewing the Licensing Board's initial decision because California authorities had already issued a ruling blocking construction of the facility.²² The Appeal Board found that unless the California authorities either reversed their decision or were reversed by a state court, NRC review would simply be futile.

Although the Commission ultimately might change some regulations regarding protections from attacks or sabotage, we do not find that the instant proceeding presents a situation similar to that in *San Onofre* where delay would be appropriate. As noted in Section II.A above, there are many issues unrelated to terrorism that remain to be decided in this litigation.

Moreover, the Commission disfavors holding proceedings in abeyance where the relief is not narrowly tailored to the goal of promoting adjudicatory efficiency. Utah, however, has asked that the entire proceeding be suspended. We think it clear that postponing all further proceedings on the PFS ISFSI application would not advance our goal of efficient decisionmaking.

C. Proceedings Will Not Thwart Regulatory Review

Uncertainty as to the possible outcome of our regulatory review is another factor that leads us to believe that suspending this proceeding is not an appropriate course of action. Utah has asked that the proceedings be stayed until Congress and the Commission have acted to revise the law and applicable regulations as necessary with respect to the increased threat of domestic terrorism. But we find that holding up these proceedings is not necessary to ensure that the public will realize the full benefit of our ongoing regulatory review at the PFS facility.

If a review of the terrorism threat causes the NRC to revise its requirements concerning facility protection at an ISFSI, PFS may well be subject to new regulations.²³ Depending on the nature and timing of any new regulations, Utah may have an opportunity to file late contentions or to reopen the record.²⁴ Even if

²² See *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-171, 7 AEC 37, 39 (1974).

²³ We note that PFS bears the risk that a potential change in the governing law and regulations will force it to revise its security plan or the physical design of the facility and possibly to relitigate some issues. PFS's willingness to bear this risk of regulatory uncertainty plays a part in our decision not to delay the proceedings at this time.

²⁴ See 10 C.F.R. §§ 2.714(a), 2.734.

PFS has already received its license, the NRC can order that the facility be backfit where it is necessary to protect public health and safety.²⁵

III. CONCLUSION

Because moving forward with this proceeding would neither present a threat to public safety nor interfere with our ongoing regulatory review, and halting it would interfere with our goal of adjudicatory efficiency, we decline to suspend the proceeding. Utah's petition is therefore *denied*.

IT IS SO ORDERED.

For the Commission²⁶

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 28th day of December 2001.

²⁵ 10 C.F.R. § 72.62.

²⁶ Commissioner Diaz was not present for the affirmation of this Order. If he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket Nos. 50-369-LR
50-370-LR
50-413-LR
50-414-LR
(consolidated)

DUKE ENERGY CORPORATION
(McGuire Nuclear Station, Units 1 and 2;
Catawba Nuclear Station, Units 1
and 2)

December 28, 2001

The Commission denies a petition by the Blue Ridge Environmental Defense League (“BREDL”) to dismiss, as legally invalid, Duke Energy Corporation’s (“Duke”) application to renew four power reactor operating licenses. The Commission also denies BREDL’s petition to hold the license renewal proceeding in abeyance to await the conclusion of the Commission’s ongoing comprehensive review of the NRC’s terrorism-related rules and policies. The Commission sees no basis for terminating or postponing our license renewal process. The license renewal process will address many issues entirely unconnected to terrorism, will result in no immediate licensing action, and will cause BREDL no injury other than litigation costs. BREDL’s legal challenges to Duke Energy’s application can be considered during the license renewal adjudication.

RULES OF PRACTICE: ABEYANCE OF PROCEEDING; SUSPENSION OF PROCEEDING

In determining whether to hold a proceeding in abeyance, the Commission considers “whether moving forward with the adjudication will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge from our important ongoing evaluation of terrorism-related policies.” See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001).

Where a license renewal proceeding has just begun and is not near a final decision, and where the requested license renewals, if granted, will not take effect for at least another 20 years, the Commission sees no risk of any immediate threat to the public health and safety justifying abeyance.

“[T]he Commission historically has been reluctant to suspend pending adjudications to await developments in other . . . proceedings.” See *Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225, 229 (2001) (declining to suspend a license transfer adjudication pending completion of a similar NRC adjudication involving another nuclear plant at the same location). See also *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 343 (1999) (declining to suspend a license transfer adjudication pending conclusion of a New York Public Service Commission proceeding). For example, the Commission did not hold adjudications in abeyance pending the results of an ongoing reexamination of our rules in the aftermath of the Three Mile Island accident. See Interim Statement of Policy and Procedure, 44 Fed. Reg. 58,559 (Oct. 10, 1979) (in the aftermath of the 1979 TMI accident, the Commission (1) initiated internal reviews to see whether new rules or policies were necessary, (2) allowed licensing boards to move their hearings forward in the meantime, (3) authorized the NRC Staff to take litigating positions even on TMI-related issues, and (4) announced that no actual licenses would issue, absent express Commission authorization, during the pendency of the NRC’s “lessons learned” review). More recently, the Commission was unsympathetic to a licensee’s efforts to place a portion of its own materials license adjudication “on hold” pending its making certain market-driven business decisions. See *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 39 (2001). This general reluctance is firmly grounded in the Commission’s longstanding commitment to efficient and expeditious decisionmaking, as reiterated in its 1998 Adjudicatory Policy Statement (balancing the applicants’ and licensees’ interest in a prompt decision on their applications with the intervenors’ and petitioners’ interest in an opportunity for a hearing). See *Statement of Policy on Conduct of Adjudicatory*

Proceedings, CLI-98-12, 48 NRC 18, 24 (1998); 63 Fed. Reg. 41,872 (Aug. 5, 1998). See also *Hydro Resources*, CLI-01-4, 53 NRC at 38.

The Commission is unpersuaded by BREDL's assertion that the "piecemeal" nature of the adjudication "makes it impossible to perform a complete or effective evaluation of the issues . . . within the scope of the current hearing" and "is wasteful of [the Petitioners'] resources." The Commission has repeatedly rejected such resource-related arguments in prior proceedings, and does so again here. As the Commission stated just this March in *Indian Point*, CLI-01-8, 53 NRC at 229-30, "litigation inevitably results in the parties' loss of both time and money. We cannot postpone cases for many weeks or months simply because going forward will prove difficult for litigants or their lawyers."

**RULES OF PRACTICE: ABEYANCE OF PROCEEDING;
SUSPENSION OF PROCEEDING; LATE-FILED CONTENTIONS
(10 C.F.R. § 2.714(a)(1))**

LICENSE RENEWAL: SUSPENSION OF PROCEEDING

Termination or postponement of license renewal adjudications contravenes the Commission's interest in "regulatory finality" and "sound case management." See *Hydro Resources*, CLI-01-4, 53 NRC at 40. The Commission's initial order in the instant case expressed our commitment to expeditious consideration of license renewal applications. See CLI-01-20, 54 NRC 211, 214-15, 216 (2001). License renewal, by its very nature, contemplates a limited inquiry — i.e., the safety and environmental consequences of an additional 20-year operating period. See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 6-13 (2001). License renewal focuses on *aging* issues, not on everyday operating issues. See *id.* at 7, 9-10. Hence, it is far from clear that upcoming terrorism-related changes in the Commission's rules, if any, will bear on license renewal reviews. But, to the extent the Commission does, during a later stage of this adjudication, modify this agency's safety, environmental, or safeguards rules in a manner that affects issues material to this adjudication, our procedural rules allow for the possibility of late-filed contentions to address such new developments. See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 255 & n.15 (1996), referring to the standards set forth in 10 C.F.R. § 2.714(a)(1). Moreover, if the Commission's generic review leads to new rules applicable here, there will be time enough to apply them.

RULES OF PRACTICE: LICENSING BOARDS; APPELLATE REVIEW; EVIDENCE

COMMISSION PROCEEDINGS: APPELLATE REVIEW

LICENSING BOARDS: RESPONSIBILITIES

The Commission believes it is generally preferable for the Licensing Board to address fact-sensitive questions in the first instance, allowing the Commission ultimately to consider them after development of a full record.

MEMORANDUM AND ORDER

Today the Commission considers a petition by the Blue Ridge Environmental Defense League (“BREDL”) to dismiss, as legally invalid, Duke Energy Corporation’s (“Duke”) application to renew four power reactor operating licenses.¹ In the alternative, BREDL asks us to hold the license renewal proceeding in abeyance to await the conclusion of our ongoing comprehensive review of the NRC’s terrorism-related rules and policies. We see no basis for terminating or postponing our license renewal process, because that process will address many issues entirely unconnected to terrorism, will result in no immediate licensing action, and will cause BREDL no injury other than litigation costs. BREDL’s legal challenges to Duke Energy’s application can be considered during the license renewal adjudication.

I. PROCEDURAL BACKGROUND

This proceeding stems from Duke’s June 13, 2001 application to renew licenses for four nuclear power plants for an additional 20 years of operation, effective at their licenses’ respective expiration dates. The operating licenses for Units 1 and 2 of the McGuire Nuclear Station and Units 1 and 2 of the Catawba Nuclear Station expire in 2021, 2023, 2024, and 2026, respectively. On July 16th, this agency published in the *Federal Register* a notice that it had received Duke’s application (66 Fed. Reg. 37,072) and, on August 15th, a notice of opportunity for hearing on the application (66 Fed. Reg. 42,893). In response to the August 15th notice, BREDL and the Nuclear Information and Resource Service (“NIRS”) each submitted a timely petition to intervene and request for hearing to oppose Duke’s license renewal application. On October 4th, the Commission referred

¹ Although styled a “petition,” BREDL’s pleading is in fact a motion.

those petitions and requests to the Licensing Board Panel. *See* CLI-01-20, 54 NRC 211 (2001).

On October 16th, the Licensing Board issued an unpublished order establishing a schedule for the filing of pleadings. The Board modified this schedule on October 31st (*see* LBP-01-31, 54 NRC 242) and again on November 15th (*see* unpublished Memorandum and Order Granting in Part Request for Additional Extension of Time). Meanwhile, BREDL filed the instant petition, dated October 23d. Duke and the NRC Staff each filed a response opposing the petition, while NIRS filed a response supporting it.

II. DISCUSSION

BREDL seeks to dismiss this proceeding or, alternatively, hold it in abeyance pending both the completion of the first 20 years of operation at Catawba Unit 1 and agency decisions on major anticipated changes in the current licensing basis, i.e., the use of plutonium/mixed oxide (“MOX”) fuel and changes to account for increased security threats.² In support of its two requests for relief, BREDL offers arguments relating to the risk of terrorist attacks,³ the use of plutonium/MOX fuel,⁴ and the NRC Staff’s purportedly improper grant to Duke of an exemption from a filing requirement.⁵

A. Motion To Hold Proceeding in Abeyance

Two other decisions issued today deal with requests, similar to BREDL’s, to hold proceedings in abeyance pending the Commission’s generic consideration of terrorism-related issues. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376 (2001); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393 (2001). Our *Private Fuel Storage* decision explains in detail our general approach: “we consider whether moving forward with the adjudication will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge from our important ongoing evaluation of

² BREDL also alludes to a third possible change in the licensing basis: a decision on the facility license operator. However, aside from a single cursory reference, BREDL does not address this third current licensing basis, nor does BREDL explain its relevance. We therefore reject the matter as insufficiently developed. *See GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 204 n.6 (2000).

³ *See* Petition at 2-3, 11-16. *See also* NIRS Response at 3-6.

⁴ *See* Petition at 1-2, 5-9. *See also* NIRS Response, *passim*.

⁵ *See* Petition at 2, 9-11. We have also considered several less-developed arguments raised by BREDL (*see id.* at 2, 18) and have concluded that they support neither dismissing this proceeding nor holding it in abeyance.

terrorism-related policies.” See CLI-01-26, 54 NRC at 380. None of these considerations justifies a postponement of the current license renewal proceeding.

BREDL asserts that the proceeding should be dismissed or held in abeyance because major changes in security and safeguards requirements at all nuclear power plants are inevitable in the aftermath of the September 11, 2001 terrorist attacks and the Commission’s consequent “top-to-bottom” regulatory review.⁶ In a related argument, BREDL asserts that the NRC cannot claim to have taken the “hard look” required under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, if the agency fails to make a fundamental safety inquiry into the security risks inherent in operating centralized energy sources that can function as radiological weaponry. In addition, BREDL claims that meaningful review of the license renewal application requires consideration of future heightened security costs. According to BREDL, it is impossible to evaluate meaningfully nuclear plant aging and economic issues without considering the impact of increased security measures on the financial viability of nuclear energy.

These are not persuasive arguments for refusing to go forward with a license renewal adjudication. A fundamental reason is that this license renewal proceeding has just begun and is not near a final decision. Duke’s requested license renewals, if granted, will not take effect for at least another 20 years.⁷ Hence, we see no risk here of any immediate threat to the public health and safety.⁸

“[T]he Commission historically has been reluctant to suspend pending adjudications to await developments in other . . . proceedings.”⁹ For example, we did not hold adjudications in abeyance pending the results of an ongoing reexamination of our rules in the aftermath of the Three Mile Island accident.¹⁰ More recently, we were unsympathetic to a licensee’s efforts to place a portion of its own materials license adjudication “on hold” pending its making certain market-driven business decisions.¹¹ This general reluctance is firmly grounded in our longstanding commitment to efficient and expeditious decisionmaking, as

⁶ See generally *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 257 n.3 (2001).

⁷ See Response of Duke Energy Corp. to BREDL’s Petition To Dismiss Licensing Proceeding or, in the Alternative, Hold It in Abeyance, dated Nov. 5, 2001, at 14 n.21.

⁸ Cf. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000) (the Commission rejected a challenge to the sufficiency of its Subpart M regulations “to evaluate adequately the effects of industry consolidation”).

⁹ See *Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-8, 53 NRC 225, 229 (2001) (declining to suspend a license transfer adjudication pending completion of a similar NRC adjudication involving another nuclear plant at the same location). See also *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Units 1 and 2), CLI-99-30, 50 NRC 333, 343 (1999) (declining to suspend a license transfer adjudication pending conclusion of a New York Public Service Commission proceeding).

¹⁰ See Interim Statement of Policy and Procedure, 44 Fed. Reg. 58,559 (Oct. 10, 1979) (in the aftermath of the 1979 TMI accident, the Commission (1) initiated internal reviews to see whether new rules or policies were necessary, (2) allowed licensing boards to move their hearings forward in the meantime, (3) authorized the NRC Staff to take litigating positions even on TMI-related issues, and (4) announced that no actual licenses would issue, absent express Commission authorization, during the pendency of the NRC’s “lessons learned” review).

¹¹ See *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 39 (2001).

reiterated in our 1998 Adjudicatory Policy Statement (balancing the applicants' and licensees' interest in a prompt decision on their applications with the intervenors' and petitioners' interest in an opportunity for a hearing).¹²

BREDL will suffer no cognizable injury from going forward with the hearing process. We are unpersuaded by BREDL's assertion that the "piecemeal" nature of the adjudication "makes it impossible to perform a complete or effective evaluation of the issues . . . within the scope of the current hearing" and "is wasteful of [the Petitioners'] resources." See Petition at 16. We have repeatedly rejected such resource-related arguments in prior proceedings, and do so again here. As we stated just this March in *Indian Point*, CLI-01-8, 53 NRC at 229-30, "litigation inevitably results in the parties' loss of both time and money. We cannot postpone cases for many weeks or months simply because going forward will prove difficult for litigants or their lawyers."

Termination or postponement of license renewal adjudications contravenes the Commission's interest in "regulatory finality" and "sound case management."¹³ Our initial order in the instant case expressed our commitment to expeditious consideration of license renewal applications. See CLI-01-20, 54 NRC at 214-15, 216. License renewal, by its very nature, contemplates a limited inquiry — i.e., the safety and environmental consequences of an additional 20-year operating period.¹⁴ License renewal focuses on *aging* issues, not on everyday operating issues.¹⁵ Hence, it is far from clear that upcoming terrorism-related changes in our rules, if any, will bear on license renewal reviews. But, to the extent the Commission does, during a later stage of this adjudication, modify this agency's safety, environmental, or safeguards rules in a manner that affects issues material to this adjudication, our procedural rules allow for the possibility of late-filed contentions to address such new developments.¹⁶ Moreover, if our generic review leads to new rules applicable here, there will be time enough to apply them.

B. Petition To Dismiss

This proceeding has barely begun, BREDL and NIRS have only recently submitted contentions, and the Board has yet to rule on petitions to intervene or requests for hearing. Under these circumstances, we consider it premature to address contention-like arguments such as those BREDL presents here regarding

¹² See *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 24 (1998); 63 Fed. Reg. 41,872 (Aug. 5, 1998). See also *Hydro Resources*, CLI-01-4, 53 NRC at 38.

¹³ See *Hydro Resources*, CLI-01-4, 53 NRC at 40.

¹⁴ See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 6-13 (2001).

¹⁵ See *id.* at 7, 9-10.

¹⁶ See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 255 & n.15 (1996), referring to the standards set forth in 10 C.F.R. § 2.714(a)(1).

plutonium/MOX fuel and Duke's exemption from a filing requirement. BREDL's "fuel" argument raises a much-litigated environmental law issue: the so-called "cumulative impact" issue.¹⁷ In this proceeding, the issue is styled: whether the NRC Staff is obliged to consider in an Environmental Impact Statement the cumulative effect of the instant license extension action together with an as-yet-unfiled application for an amendment permitting use of plutonium/MOX fuel. BREDL's "exemption" argument raises fact-sensitive questions of when and whether exemption-related issues may be raised in an adjudicatory hearing.¹⁸ We believe it is generally preferable for the Licensing Board to address such questions in the first instance, allowing us ultimately to consider them after development of a full record.

III. CONCLUSION

The Commission *denies* BREDL's petition to dismiss this proceeding or, in the alternative, to hold it in abeyance.

IT IS SO ORDERED.

For the Commission¹⁹

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 28th day of December 2001.

¹⁷ See generally *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976); *Society Hill Towers Owners' Association v. Rendell*, 210 F.3d 168, 180-82 (3d Cir. 2000); *Hydro Resources*, CLI-01-4, 53 NRC at 57-62; *United States Department of Energy (Clinch River Breeder Reactor Plant)*, CLI-82-23, 16 NRC 412, 424 (1982), *rev'd and remanded per curiam on other grounds sub nom. Natural Resources Defense Council v. NRC*, 695 F.2d 623 (D.C. Cir. 1982).

¹⁸ See generally *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 466, 467 n.3 (2001); *Commonwealth Edison Co.* (Zion Nuclear Power Station), CLI-00-5, 51 NRC 90, 94-98 (2000); *Clinch River*, CLI-82-23, 16 NRC at 421.

¹⁹ Commissioner Diaz was not present for the affirmation of this Order. If he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Richard A. Meserve, Chairman
Greta Joy Dicus
Nils J. Diaz
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 070-03098-ML

**DUKE COGEMA STONE &
WEBSTER
(Savannah River Mixed Oxide Fuel
Fabrication Facility)**

December 28, 2001

In this proceeding to authorize construction of a mixed oxide (“MOX”) fuel fabrication facility, the Commission denies the petition of Georgians Against Nuclear Energy and the Nuclear Control Institute to suspend the proceeding, based on the terrorist attacks of September 11, 2001.

**RULES OF PRACTICE: SUSPENSION OF PROCEEDING;
ABEYANCE OF PROCEEDING; TERRORISM**

The Commission has instituted a full-scale review of its terrorism-related rules and policies. The pendency of that review does not call for a halt in licensing proceedings, particularly where (as here) the proceeding is at an early stage and no actual licensing action is imminent.

**RULES OF PRACTICE: SUSPENSION OF PROCEEDING;
ABEYANCE OF PROCEEDING; SEEKING RELIEF WITHOUT
FORMAL PARTY STATUS**

As an intervention Petitioner in the MOX construction authorization request adjudicatory proceeding, GANE was within its rights to bring to the Commission’s

attention any matters that are ripe for Commission, rather than Board, action. This is true regardless of the Board's ultimate ruling that GANE has fulfilled the requirements for standing and raised an admissible contention in order to become a formal party to this proceeding. The filing of a timely petition to intervene provided GANE with the requisite status to take additional actions in this proceeding. We repeatedly have considered petitions or motions filed by persons or groups who have not yet attained formal "party" status through a finding of standing. *See, e.g., Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45 (1998); *cf. Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 330 (1983) (*untimely* intervention petitioner has no status to file second motion concurrently, to disqualify commissioner).

RULES OF PRACTICE: SEEKING RELIEF WITHOUT FORMAL PARTY STATUS; SUSPENSION OF PROCEEDING; ABEYANCE OF PROCEEDING

NCI has neither made a hearing request pursuant to 10 C.F.R. § 2.1205 nor sought permission to participate in this adjudication on any other basis. Therefore, NCI has no legitimate place in this proceeding.

RULES OF PRACTICE: SEEKING RELIEF WITHOUT FORMAL PARTY STATUS; SUSPENSION OF PROCEEDING; ABEYANCE OF PROCEEDING

GANE's request to suspend other proceedings is not cognizable in this individual adjudicatory proceeding.

RULES OF PRACTICE: SUSPENSION OF PROCEEDING; ABEYANCE OF PROCEEDING; TERRORISM

To decide whether to hold this proceeding in abeyance, "we consider whether moving forward with the adjudication will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge from our important ongoing evaluation of terrorism-related policies." *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376, 380 (2001). None of these considerations calls for postponement of the MOX proceeding.

**RULES OF PRACTICE: SUSPENSION OF PROCEEDING;
ABEYANCE OF PROCEEDING**

GANE has advanced no reason that warrants immediate suspension of the MOX CAR proceeding to protect the health and safety or security of its members. GANE fails to show an immediate and specific threat at the site of the proposed MOX facility. Indeed, there will be no construction or operation there for years, even assuming DCS gains the NRC's approval of the license application. DCS would not begin construction of the MOX facility until late in 2002 and will not even *file* its application for possession and use of special nuclear material until July 2002.

**RULES OF PRACTICE: SUSPENSION OF PROCEEDING (INJURY);
ABEYANCE OF PROCEEDING**

The cost and inconvenience of litigating challenges to the DCS application are not the kind of injury that warrants postponing the licensing proceeding. Therefore, GANE is not injured or prejudiced in a cognizable sense simply because it may incur litigating costs and inconvenience from moving forward with the adjudication before the Commission's generic review of terrorism issues is completed. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 385, 390-91 (2001), and references cited therein.

**RULES OF PRACTICE: SUSPENSION OF PROCEEDING;
ABEYANCE OF PROCEEDING; TERRORISM**

COMMISSION AUTHORITY

The Commission's ongoing internal review of terrorism issues is in its early stages, and may or may not result in policy or rule changes pertinent to the current adjudication. Our hearing rules, of course, contain sufficient flexibility to deal with any new developments that occur during the pendency of this proceeding. In the meantime, there is no reason to postpone the MOX fuel proceeding, which will require resolution of many issues having nothing to do with terrorism. Moreover, we have authority to make any resulting modifications to our regulations applicable to both licensees and applicants and to require DCS to make any necessary modifications to its fuel fabrication facility. *See* 42 U.S.C. § 2201(b) and 10 C.F.R. §§ 2.202, 70.32(b), 70.76, and 70.81(a).

**RULES OF PRACTICE: SUSPENSION OF PROCEEDING;
ABEYANCE OF PROCEEDING; TERRORISM**

EFFICIENT LICENSING AND REGULATION

During the time when the NRC is pursuing its top-to-bottom reassessment of its regulations and policies on terrorism, the agency must also continue to meet its statutory responsibilities for licensing and regulation of all nuclear facilities and materials in a timely and efficient manner. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998). Permitting unnecessary delays would contravene the Commission's fundamental duties to the general public, as well as to applicants and licensees.

**RULES OF PRACTICE: SUSPENSION OF PROCEEDING;
ABEYANCE OF PROCEEDING**

EFFICIENT LICENSING AND REGULATION

The Commission has a history of *not* delaying adjudications to await extrinsic actions, absent special needs of efficiency or fairness. *See Private Fuel Storage*, CLI-01-26, 54 NRC at 381-83, and references cited therein; *McGuire & Catawba*, CLI-01-27, 54 NRC at 390-91.

**RULES OF PRACTICE: SUSPENSION OF PROCEEDING;
ABEYANCE OF PROCEEDING**

LICENSE FOR MIXED OXIDE FUEL FABRICATION FACILITY

NATIONAL SECURITY

The public has an additional strong interest in moving forward with this MOX fuel fabrication facility construction authorization request proceeding, specifically, reducing the nation's inventory of plutonium. In the absence of a compelling reason, we will not frustrate national security interests by suspending this proceeding.

MEMORANDUM AND ORDER

On October 10, 2001, Georgians Against Nuclear Energy ("GANE") and the Nuclear Control Institute ("NCI") filed a petition, based on the terrorist attacks of September 11, 2001, to suspend this proceeding to authorize construction of a mixed oxide ("MOX") fuel fabrication facility. We deny the petition.

The Commission has instituted a full-scale review of its terrorism-related rules and policies. But, as we explain in detail in another decision issued today,¹ the pendency of that review does not call for a halt in licensing proceedings, particularly where (as here) the proceeding is at an early stage and no actual licensing action is imminent.

I. BACKGROUND

On February 28, 2001, the consortium of Duke Cogema Stone & Webster (“DCS”) submitted an application for authorization to construct a MOX fuel fabrication facility at the U.S. Department of Energy’s Savannah River, South Carolina, site. After appropriate notices,² the Commission received four petitions to intervene, from GANE, Environmentalists, Inc., Blue Ridge Environmental Defense League (“BREDL”), and Charles and Edna Foster. NCI did not seek to intervene. We referred the matter to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel. *See* CLI-01-13, 53 NRC 478 (2001). All Petitioners except the Fosters subsequently filed contentions. In addition, GANE filed with the Board a “Motion to Dismiss Licensing Proceeding, or, in the Alternative, Hold It in Abeyance” (“Motion”) on Aug. 13, 2001. The Board heard oral argument on standing, admissibility of contentions, and the motion. On December 6, 2001, the Board issued its order ruling on standing and admissibility of contentions. *See* LBP-01-35, 54 NRC 403 (2001). The Board granted the intervention petitions of GANE and BREDL and denied intervention of the remaining Petitioners. Subsequently, the Board denied GANE’s motion. *See* unpublished Memorandum and Order (Ruling on Motion to Dismiss) (Dec. 20, 2001) (“Dec. 20 Order”).

On October 10, 2001, GANE and NCI filed, directly with the Commission, a joint petition, requesting that we suspend this proceeding as a result of the September 11, 2001 terrorist attacks on New York City and the Pentagon.³ GANE and NCI further requested that we suspend proceedings for construction of all

¹ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC 376 (2001). *See also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 385 (2001).

² The NRC Staff announced receipt of the construction authorization request (“CAR”) and environmental report. *See* 66 Fed. Reg. 13,794 (Mar. 7, 2001). Later, the Commission published a Notice of Opportunity for a Hearing under a modified version of our Subpart L procedures. *See* 66 Fed. Reg. 19,994 (Apr. 18, 2001).

³ *See* “Petition by Georgians Against Nuclear Energy and Nuclear Control Institute To Suspend Construction Authorization Proceeding for Proposed Plutonium Fuel (MOX) Fabrication Facility” (Oct. 10, 2001) (“Petition”).

new facilities⁴ until the NRC Staff completes the regulatory review we mandated. DCS and the NRC Staff opposed the petition,⁵ and GANE and NCI filed a reply.⁶ No other party responded to the GANE-NCI petition.

II. PRELIMINARY MATTERS

As an intervention Petitioner in the MOX CAR adjudicatory proceeding, GANE was within its rights to bring to the Commission's attention any matters that are ripe for Commission, rather than Board, action.⁷ This is true regardless of the Board's ultimate ruling that GANE has fulfilled the requirements for standing and raised an admissible contention in order to become a formal party to this proceeding. The filing of a timely petition to intervene provided GANE with the requisite status to take additional actions in this proceeding.⁸

NCI, however, has neither made a hearing request pursuant to 10 C.F.R. § 2.1205 nor sought permission to participate in this adjudication on any other basis. Therefore, NCI has no legitimate place in this proceeding. Consequently, we shall hereafter refer only to GANE as the Petitioner.

III. DISCUSSION

A. GANE's Petition

In the wake of the September 11, 2001 terrorist attacks on New York City and the Pentagon, GANE alleges that the magnitude of the terrorist threat

⁴The only other pending application for a new facility is the Private Fuel Storage, L.L.C. application to construct and operate an independent spent fuel storage installation in Utah. The State of Utah has filed a petition for immediate relief suspending licensing proceedings in the Private Fuel Storage matter similar to GANE's petition here. Today we have also denied Utah's petition, along with a similar request by the Blue Ridge Environmental Defense League in a license renewal matter. See decisions cited in note 1, *supra*.

⁵See "Duke Cogema Stone & Webster's Response to 'Petition by Georgians Against Nuclear Energy and Nuclear Control Institute To Suspend Construction Authorization Proceeding for Proposed Plutonium Fuel (MOX) Fabrication Facility'" (Oct. 22, 2001) ("DCS Brief") and "NRC Staff's Response to Motion To Suspend Proceeding" (Oct. 29, 2001) ("Staff Brief"), respectively.

⁶See "Georgians Against Nuclear Energy and Nuclear Control Institute's Reply to Responses of NRC Staff and Duke Cogema Stone & Webster to Petition To Suspend Construction Authorization Proceeding for Proposed Plutonium Fuel (MOX) Fabrication Facility" (Nov. 1, 2001).

⁷As a general rule, the Commission does not encourage participants in adjudicatory proceedings to seek to bypass the Board by filing motions or petitions directly with the Commission.

⁸DCS argued that GANE's motion is improper because the Board had not yet granted standing to the organization at the time GANE and NCI filed the petition. See DCS Brief at 3. We find this argument unpersuasive. We repeatedly have considered petitions or motions filed by persons or groups who have not yet attained formal "party" status through a finding of standing. See, e.g., *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC 45 (1998); cf. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 330 (1983) (*untimely* intervention petitioner has no status to file second motion concurrently, to disqualify commissioner). Moreover, this issue became moot when the Board granted GANE's intervention petition. See LBP-01-35, 54 NRC 403.

is substantially greater than previously assumed, that additional attacks are foreseeable, and that reactors and fuel cycle facilities are highly vulnerable because they were not designed to withstand severe attacks such as deliberate airborne assaults and attacks by large groups of individuals. *See* Petition at 1, 7. GANE maintains that current NRC regulations are inadequate to protect against a terrorist threat; thus, GANE concludes that the Commission should suspend proceedings in which applicable standards are inadequate to ensure protection of public health and safety until the regulatory review the Commission has mandated is complete.⁹ In short, GANE believes the Commission should not proceed with construction approval review until we have evaluated the adequacy of our regulations to ensure reasonably sufficient protection against a substantial terrorist threat and that our evaluation should include the “entire array of potential credible terrorist scenarios.” *See id.* at 7-8.

GANE also requests reversal of the Commission’s “longstanding refusal” to consider terrorist attacks in environmental impact statements. *See id.* at 2. GANE argues that events such as a crash of an aircraft into the facility can no longer be considered highly unlikely. Further, GANE states that it has challenged, in its contention 12, the legality under NEPA of DCS’s failure to address the environmental impacts of terrorist acts against the MOX facility.¹⁰ *See id.* at 3-4.

B. Suspension of Proceeding

As in the other cases we decide today (*see* note 1, *supra*), “we consider whether moving forward with the adjudication will jeopardize the public health and safety, prove an obstacle to fair and efficient decisionmaking, or prevent appropriate implementation of any pertinent rule or policy changes that might emerge from our important ongoing evaluation of terrorism-related policies.” *See Private Fuel Storage*, CLI-01-26, 54 NRC at 380. None of these considerations calls for postponement of the MOX proceeding.

GANE has advanced no reason that warrants immediate suspension of the MOX CAR proceeding to protect the health and safety or security of its members. As the NRC Staff notes, GANE fails to show an immediate and specific threat at the site of the proposed MOX facility. *See* Staff Brief at 5. Indeed, there will be no construction or operation there for years, even assuming DCS gains the NRC’s approval of the license application. DCS would not begin construction of the

⁹We will consider GANE’s request to suspend *this* proceeding; however, GANE’s request to suspend other proceedings is not cognizable in this individual adjudicatory proceeding.

¹⁰Lastly, GANE argues that the bifurcated structure of NRC licensing review of the MOX facility hampers the effectiveness of sabotage prevention and safeguards measures because the Commission has divorced design issues from operational issues. *See* Petition at 11-12. We note that the Board recently denied GANE’s earlier motion, which challenged the legality of the two-part review of applications for the MOX facility that the Commission outlined in the Commission’s notice of opportunity for hearing (66 Fed. Reg. 19,994 (Apr. 18, 2001)). *See* Dec. 20 Order.

MOX facility until late in 2002 and will not even *file* its application for possession and use of special nuclear material until July 2002. The cost and inconvenience of litigating challenges to the DCS application are not the kind of injury that warrants postponing the licensing proceeding.¹¹ Therefore, GANE is not injured or prejudiced in a cognizable sense simply because it may incur litigating costs and inconvenience from moving forward with the adjudication before the generic review is completed.

The Commission, of course, is well aware of the events of September 11, 2001, and has directed the NRC Staff to undertake a top-to-bottom review of every aspect of our security requirements in light of those events. The Commission's ongoing internal review is in its early stages, and may or may not result in policy or rule changes pertinent to the current adjudication. Our hearing rules, of course, contain sufficient flexibility to deal with any new developments that occur during the pendency of this proceeding.¹² In the meantime, there is no reason to postpone the MOX fuel proceeding — which, after all, will require resolution of many issues having nothing to do with terrorism. Moreover, we have authority to make any resulting modifications to our regulations applicable to both licensees and applicants and to require DCS to make any necessary modifications to its fuel fabrication facility. *See* 42 U.S.C. § 2201(b) and 10 C.F.R. §§ 2.202, 70.32(b), 70.76, and 70.81(a).

During the time when the NRC is pursuing its top-to-bottom reassessment of its regulations and policies on terrorism, the agency must also continue to meet its statutory responsibilities for licensing and regulation of all nuclear facilities and materials in a timely and efficient manner. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998). Permitting unnecessary delays would contravene the Commission's fundamental duties to the general public, as well as to applicants and licensees. The Commission's objectives are

to provide a fair hearing process, to avoid unnecessary delays in the NRC's review and hearing processes, and to produce an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment.

Id. at 19. Consistent with this policy, the Commission has a history of *not* delaying adjudications to await extrinsic actions, absent special needs of efficiency or fairness. *See Private Fuel Storage*, CLI-01-26, 54 NRC at 381-83, and references cited therein; *McGuire & Catawba*, CLI-01-27, 54 NRC at 390-91.

¹¹ *See McGuire & Catawba*, CLI-01-27, 54 NRC at 390-91, and references cited therein.

¹² *See, e.g.*, 10 C.F.R. § 2.714(a) (late-filed contentions); 10 C.F.R. § 2.734 (motions to reopen the record). Our initial scheduling order in this case accounted for the possibility of late contentions. *See CLI-01-13*, 53 NRC at 481, 484-86.

The public has an additional strong interest in moving forward with this proceeding; specifically, reducing the nation's inventory of plutonium. As we recently observed in a scheduling order in this proceeding:

The Commission believes that this proceeding should be completed in a timely and efficient manner because the Applicant is seeking authorization to build a facility that would implement a significant objective of national security and policy: reducing the inventory of plutonium in the nation's nuclear weapons' inventory in accordance with the U.S.–Russian Federal Plutonium Disposition Agreement.

CLI-01-13, 53 NRC at 484. In the absence of a compelling reason, we will not frustrate national security interests by suspending this proceeding.

During the pendency of this proceeding, our generic review of terrorism-related policies will, of course, continue forward. That review may or may not result in changes pertinent to the proposed MOX facility. Moving forward with the proceeding is not incompatible with our ongoing generic review and does not rule out considering the implementation of any newly developed rules as part of the ongoing MOX proceeding if appropriate.

III. CONCLUSION

For the foregoing reasons, the Commission *denies* the petition of NCI and GANE to suspend this construction authorization request proceeding for the proposed MOX fuel fabrication facility.

IT IS SO ORDERED.

For the Commission¹³

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 28th day of December 2001.

¹³Commissioner Diaz was not present for the affirmation of this Order. If he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Charles N. Kelber
Dr. Peter S. Lam

In the Matter of

Docket No. 070-03098-ML
(ASLBP No. 01-790-01-ML)

**DUKE COGEMA STONE &
WEBSTER**
**(Savannah River Mixed Oxide Fuel
Fabrication Facility)**

December 6, 2001

In this Commission-modified Subpart L proceeding involving an application to construct a mixed oxide fuel fabrication facility, the Licensing Board denies the intervention petitions of Petitioners Edna Foster and Environmentalists, Inc., and grants the petitions of Petitioner Georgians Against Nuclear Energy and Joint Petitioners Blue Ridge Environmental Defense League and Donald J. Moniak.

RULES OF PRACTICE: STANDING TO INTERVENE

Under the Commission's Rules of Practice for informal Subpart L materials licensing proceedings, a petitioner requesting a hearing and seeking to intervene must "meet the judicial standards for standing" as the first of two prerequisites for admission as a party to a proceeding. *See* 10 C.F.R. § 2.1205(h).

RULES OF PRACTICE: STANDING TO INTERVENE

Judicial concepts of standing require a petitioner to assert an actual or threatened, concrete and particularized injury that is fairly traceable to the challenged

action and is likely to be redressed by a favorable decision. *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27, 30 (2001); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001); *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998)

RULES OF PRACTICE: STANDING TO INTERVENE

A showing of injury, causation, and redressibility is necessary regardless of whether a petitioner is an individual or an organization seeking to intervene in its own right. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

**RULES OF PRACTICE: STANDING TO INTERVENE
(REPRESENTATIONAL)**

When a membership organization seeks to intervene as the representative of its members, the petitioning organization must show that one of its individual members, who has authorized the organization to represent his interests, has standing to intervene. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 30-31 (1998); *Georgia Tech*, CLI-95-12, 42 NRC at 115. Additionally, the petitioning organization must demonstrate that the interests it seeks to protect are germane to its purposes and that neither the claim it asserts nor the relief it requests requires the participation of an individual member in the proceeding. *Private Fuel Storage*, CLI-98-13, 48 NRC at 30-31.

**RULES OF PRACTICE: STANDING TO INTERVENE
(INTERPRETATION OF PETITION)**

In determining whether a petitioner has standing to intervene, a licensing board must construe the petition in a light most favorable to the petitioner regardless of whether the petitioner is an individual or an organization. *Georgia Tech*, CLI-95-12, 42 NRC at 115.

**RULES OF PRACTICE: STANDING TO INTERVENE (SWORN
AFFIDAVITS)**

There is no regulatory requirement that information establishing a person's membership in an organization be filed in a sworn affidavit in order to establish

representational standing. *See Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354 & n.4 (1999).

**RULES OF PRACTICE: STANDING TO INTERVENE
(INJURY IN FACT)**

Even a minor exposure to radiation, even one within regulatory limits, is sufficient to state an injury in fact. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 247-48 (1996).

**RULES OF PRACTICE: STANDING TO INTERVENE
(INJURY IN FACT)**

An intervention petition that establishes that a petitioner resides near or grows food for his or her consumption on property that could become contaminated with radioactivity in the event of a major accident, satisfies the requirements to establish standing. *See, e.g., Allied-General Nuclear Services* (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 423-24 (1976).

RULES OF PRACTICE: SCOPE OF PROCEEDING

The scope of an agency licensing proceeding is delineated by the Commission's notice of hearing and referral order. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985).

RULES OF PRACTICE: CONTENTIONS (SCOPE)

A fundamental principal of NRC adjudication is that the subject matter of all contentions is limited to the scope of the proceeding. *See Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

In order to be admissible, a contention must specify the precise issue of law or fact being raised. 10 C.F.R. § 2.714(b)(2). In addition, each contention must contain (1) a brief explanation of the bases of the contention; (2) a concise statement of the alleged facts or expert opinion that support the contention; and (3) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. *See* 10 C.F.R. § 2.714(b)(2)(i), (ii), and (iii). Finally,

the contention cannot be one that, even if proven, would be of no consequence to the proceeding and entitle the petitioner to no relief. 10 C.F.R. § 2.714(d)(2)(ii).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

The contention pleading criteria set forth in 10 C.F.R. § 2.714(b)(2) are mandatory and must be scrupulously followed. As the Commission has stated, “[i]f any one of these requirements is not met, a contention must be rejected.” *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991); *accord Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999); *see* Final Rule, Rules of Practice for Domestic Licensing Proceedings; Procedural Changes in the Hearing Process, Statement of Considerations, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

The provisions of section 2.714 were specifically adopted “to raise the threshold bar for an admissible contention” and to prohibit “vague, unparticularized contentions” resulting from “notice pleading with the details . . . filled in later.” *Oconee*, CLI-99-11, 49 NRC at 334, 338.

RULES OF PRACTICE: CONTENTIONS (BURDEN OF PROOF)

It is the burden of the petitioner to come forward with contentions meeting the pleading requirements. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

A licensing board is not free to supply missing information or draw factual inferences on the petitioner’s behalf. *See Palo Verde*, CLI-91-12, 34 NRC at 155-56.

RULES OF PRACTICE: CONTENTIONS

The contention admissibility determination does not involve a decision on the substantive merits of the proffered contentions. Rather, it is a determination that a genuine, legitimate dispute of material fact or law exists with respect to the issue in question such as to warrant a further inquiry by the Board. *See, e.g., Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 (1973).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

A contention is admissible only if it is within the scope of the proceeding as outlined in the Commission's hearing notice and referral order. *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE OF COMMISSION RULE)

A contention attacking or challenging a Commission rule or regulation is inadmissible and that inadmissibility bar applies to contentions proffering, for example, additional or stricter requirements than those that are imposed by the respective regulation. *See* 10 C.F.R. § 2.758; *Oconee*, CLI-99-11, 49 NRC at 334; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 416-17 (1989); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 395 (1987); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982).

NEPA: ENVIRONMENTAL IMPACT STATEMENT (TIERING)

The Commission's environmental regulations provide for the tiering, adoption, and incorporation of environmental impact statements of other federal agencies into the Commission's environmental impact statements. *See* 10 C.F.R. Part 51, Subpart A, Appendix A.1(b).

RULES OF PRACTICE: CONTENTIONS (STAFF PERFORMANCE)

“[A] contention will not be admitted if the allegation is that the NRC Staff has not performed an adequate analysis” because “the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC staff performance.” *Procedural Changes in the Hearing Process*, 54 Fed. Reg. at 33,171.

RULES OF PRACTICE: CONTENTIONS (STAFF PERFORMANCE)

“[C]ontentions must rest on the *license application*, not on NRC Staff reviews,” *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998), and “the issue for decision is not whether the Staff performed well, but whether the license application raises health and safety concerns.” *Curators of the University of Missouri*, CLI-95-8,

41 NRC 386, 396 (1995); *see Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 55-56 (1985); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983).

RULES OF PRACTICE: CONTENTIONS

A contention need not be elaborate to be admissible, so long as it meets the requirements of section 2.714(b)(2).

RULES OF PRACTICE: CONTENTIONS (STAFF REQUEST FOR ADDITIONAL INFORMATION)

Reliance on the fact that the Staff has issued a request for additional information on a particular subject does not, by itself, present a genuine dispute of fact so as to satisfy the admissibility requirements for a contention. *See, e.g., Oconee*, CLI-99-11, 49 NRC at 337.

RULES OF PRACTICE: SUMMARY DISPOSITION

Subsequently filed supplementary information filed by an applicant in response to Staff requests for additional information may provide grist for the summary disposition mill as the proceeding progresses but it cannot be used at the initial contention pleading and contention admissibility determination stage to defeat a contention's admissibility.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

Just as the mere reference to a document does not provide an adequate basis for a contention, the general reference to a document or documents without specific citations to the relevant material in the document is not an adequate response to a contention. *See Calvert Cliffs*, CLI-98-25, 48 NRC at 348.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

Fact-based arguments are one method of complying with the requirements of section 2.714(b)(2). *See, e.g., Oconee*, CLI-99-11, 49 NRC at 342.

NEPA: RULE OF REASON

The applicable legal standard under NEPA is that only reasonably foreseeable environmental impacts arising from the proposed action need be analyzed. *See,*

e.g., Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 739 (3d Cir. 1989). Stated otherwise, environmental impacts from remote and speculative initiating events need not be analyzed. *See, e.g., Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-90-4, 31 NRC 333, 334-35 (1990).

RULES OF PRACTICE: CONTENTIONS (INTERPRETATION)

Any misinterpretation or misapprehension of a petitioner's contentions by the Board in determining whether they meet the requisite regulatory standards for admissibility rests squarely with the petitioner. *See, e.g., Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 15 (2001).

RULES OF PRACTICE: CONTENTIONS (AFFIDAVITS)

A petitioner is required to submit supporting expert affidavits, if any, at the time of the submission of contentions. *See* 10 C.F.R. § 2.714(b)(2)(ii).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

Mere reference to a document, without more, does not provide an adequate basis for a contention. *Calvert Cliffs*, CLI-98-25, 48 NRC at 348. At a minimum, an intervenor is obligated to reference clearly and then summarize the information being relied upon. *See* 10 C.F.R. § 2.714(b)(2)(ii).

RULES OF PRACTICE: CONTENTIONS (STAFF REQUEST FOR ADDITIONAL INFORMATION)

A petitioner's assertion that Staff requests for additional information demonstrate noncompliance with NEPA is an insufficient basis to support a contention. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147, 150 (1993).

MEMORANDUM AND ORDER
(Ruling on Standing and Admissibility of Contentions)

Before the Licensing Board is the question whether any of the Petitioners filing intervention petitions in response to the Commission's notice of opportunity for hearing on the application of Duke Cogema Stone & Webster (DCS) to construct a mixed oxide fuel fabrication facility (MFFF) near Aiken, South Carolina, have standing to intervene. Also before the Board is the question whether any of

the sixty-seven contentions proffered by the Petitioners are admissible in this Commission-modified, 10 C.F.R. Part 2, Subpart L, informal proceeding. In order to be admitted as a party to the proceeding, each Petitioner must establish standing to intervene as well as proffer at least one admissible contention.

For the reasons set out below, Petitioners Environmentalists, Inc. (EI), Georgians Against Nuclear Energy (GANE), and Joint Petitioners Blue Ridge Environmental Defense League and Donald J. Moniak (collectively BREDL), have established their standing to intervene. Petitioner Edna Foster has failed to establish her standing to intervene. Therefore, her intervention petition must be *denied*. Additionally, Petitioner GANE has proffered a number of admissible contentions and Petitioner BREDL has proffered at least one admissible contention; hence, their intervention petitions are *granted*, and they are admitted as parties to the proceeding. Petitioner EI has failed to proffer any admissible contentions. Therefore, EI's intervention petition is *denied*.

I. BACKGROUND

On February 28, 2001, DCS, a government contractor, filed a construction authorization request (CAR) seeking permission to build an MFFF on the United States Department of Energy's Savannah River Site (SRS) in South Carolina. *See* 66 Fed. Reg. 19,994, 19,995 (Apr. 18, 2001). According to the Environmental Report that is part of the DCS application, the 310-square-mile federally owned SRS is a roughly circular tract of land within Aiken, Barnwell, and Allendale Counties bounded for 17 miles on its southwestern border by the Savannah River. *See* DCS Mixed Oxide Fuel Fabrication Facility Environmental Report (Dec. 19, 2000) (Rev. 0) at 4-1 [hereinafter ER]. Within the SRS, the MFFF will be located adjacent to the north-northwest corner of the 395-acre F-Area on a 41-acre site that lies within Aiken County, 5.8 miles from the nearest SRS site boundary. *See id.* at 4-1 to 4-2. The largest nearby population centers are Augusta, Georgia, and Aiken, South Carolina. *See id.* at 4-1. Although the site description in the ER does not disclose either the actual distances between the proposed MFFF and Aiken or any other cities or towns, it states that the "center" of the F-Area lies approximately 25 miles southeast of Augusta and that the towns of New Ellenton, Jackson, Barnwell, Snelling, and Williston, South Carolina are "within" 15 miles of the center of the F-Area. *See id.*

The MFFF is designed to operate for 20 years and convert 36.4 tons of surplus weapons-grade plutonium oxide into mixed oxide (MOX) fuel through a series of chemical and other processes that ultimately blend plutonium dioxide powder with uranium dioxide powder, form the mixture into fuel pellets, insert the pellets into fuel rods, and then bundle the rods into fuel assemblies. *See id.* at 1-2. The MFFF has an annual design throughput of 3.8 tons of plutonium.

See id. After manufacture, it is currently anticipated that the MOX fuel will be shipped to, and subsequently irradiated in, four “mission” reactors at Duke Energy Corporation’s Catawba Nuclear Station (Units 1 and 2) near York, South Carolina, and McGuire Nuclear Station (Units 1 and 2) near Huntersville, North Carolina. *See id.* Although the Department of Energy (DOE) will own the facility, DCS will be the license holder. *See id.* at 1-1. DOE has contracted with DCS to design, construct, operate, and deactivate, although not decommission, the MFFF. After deactivation, the facility will be turned over to DOE for ultimate disposition. *See id.*

Along with the MFFF, two other proposed facilities requiring no NRC licensing will be located at the SRS: a Pit Disassembly and Conversion Facility (PDCF) and a Plutonium Immobilization Plant (PIP). As its name indicates, the PDCF will disassemble the pits from nuclear weapons and, *inter alia*, convert the recovered weapons-grade plutonium into plutonium dioxide for feedstock for the MFFF and the PIP. *See id.* at 1-3 to 1-4. For its part, the PIP will immobilize surplus plutonium into ceramic pucks for insertion into canisters at an existing DOE SRS facility, the Defense Waste Processing Facility, as part of high-level waste packages for subsequent disposal. *See id.* at 1-4. Together, the proposed MFFF along with the other SRS facilities are intended to provide DOE with the means to carry out its surplus plutonium disposition strategy.

After receiving the DCS application, the Commission published a hearing notice on April 18, 2001. *See* 66 Fed. Reg. at 19,994. In addition to affording an opportunity for a hearing on the DCS application, the Commission indicated that because the CAR was “a necessary first step in a process potentially leading to the issuance of a 10 C.F.R. Part 70 materials license, the informal hearing procedures contained in 10 C.F.R. Part 2, Subpart L are generally applicable.” *Id.* at 19,995. The Commission stated, however, that “[t]o enhance the effectiveness of the adjudicatory process . . . additional procedures . . . will be used” in the informal proceeding. *Id.* Specifically, it directed that a single presiding officer, either with or without technical assistants as called for under Subpart L, or a three-judge licensing board as required in formal proceedings under 10 C.F.R. Part 2, Subpart G, could preside over the case, and that Petitioners must file contentions pursuant to Subpart G, 10 C.F.R. § 2.714(b)(2), instead of highlighting germane areas of concern as in Subpart L informal proceedings. *See id.* at 19,996. Although discovery is not permitted in informal Subpart L proceedings, the Commission directed that “limited discovery (by deposition, interrogatory, or both) from non-NRC sources . . . will be permitted.” *Id.* Finally, in place of the presentation procedures of Subpart L, 10 C.F.R. § 2.1235, the Commission restricted all testimony to that of experts filed in affidavit form. In this regard, the Commission directed that any party filing expert witness affidavits must make the expert available for questioning by the presiding officer, retaining

the Subpart L procedure that the parties may propose questions to the presiding officer to ask the expert. *See id.*

In response to the Commission's hearing notice, Petitioners Edna Foster, EI, GANE, and BREDL filed timely hearing requests and intervention petitions.¹ Subsequently, DCS filed answers opposing each petition.² On June 14, 2001, the Commission issued an order referring the four intervention petitions to the Atomic Safety and Licensing Board Panel for appropriate action. *See* CLI-01-13, 53 NRC 478 (2001). In its order, the Commission reiterated the scope of the proceeding and the hearing procedures previously outlined in the hearing notice, stating with regard to the substitute procedures it ordered that "[h]ad we not taken this step, the exclusive use of Subpart L procedures would most likely have led to an entirely paper proceeding in this case." *Id.* at 480. The Commission's referral order also detailed an aggressive proposed schedule for conducting and completing the proceeding. *See id.* at 484-86.

On June 15, 2001, this three-member Licensing Board was established to conduct the proceeding. *See* 66 Fed. Reg. 33,276 (June 21, 2001). The NRC Staff then filed its answer addressing the four intervention petitions as well as a notice pursuant to 10 C.F.R. § 2.1213, indicating that the Staff would participate as a party.³ In accordance with the Commission's referral order and the schedule set by the Licensing Board, Petitioners EI, GANE, and BREDL each filed amendments to their intervention petitions on July 30, 2001,⁴ and DCS and the Staff filed responses.⁵ The same Petitioners each then filed their proffered

¹ *See* Letter from Edna Foster, 120 Balsam Lane, Highlands, North Carolina, to NRC (undated); Environmentalists, Inc. Request for Hearing and Petition to Intervene (facsimile dated May 18, 2001) [hereinafter EI Petition]; Georgians Against Nuclear Energy Request for Hearing (May 17, 2001) [hereinafter GANE Petition]; Blue Ridge Environmental Defense League Request for Hearing Regarding Mixed Oxide (MOX) Fuel Fabrication Facility (May 17, 2001) [hereinafter BREDL Petition].

² *See* Duke Cogema Stone & Webster's Answer to Edna Foster's Request for Hearing (June 5, 2001); Duke Cogema Stone & Webster's Answer to Environmentalists, Inc. Request for Hearing and Petition to Intervene (June 4, 2001) [hereinafter DCS Answer to EI Petition]; Duke Cogema Stone & Webster's Answer to Georgians Against Nuclear Energy's Request for Hearing (June 1, 2001) [hereinafter DCS Answer to GANE Petition]; Duke Cogema Stone & Webster's Answer to Blue Ridge Environmental Defense League's Request for Hearing (May 29, 2001) [hereinafter DCS Answer to BREDL].

³ *See* NRC Staff's Answer to Hearing Request of Donald Moniak, Blue Ridge Environmental Defense League, Georgians Against Nuclear Energy, Environmentalists, Inc., and Edna Foster (June 25, 2001) [hereinafter Staff Answer].

⁴ *See* Environmentalists, Inc. Amendment (July 30, 2001) [hereinafter EI Amended Petition]; Georgians Against Nuclear Energy's Amended Petition to Intervene (July 30, 2001) [hereinafter GANE Amended Petition]; Blue Ridge Environmental Defense League and Donald Moniak Additional Filings on Standing (July 30, 2001) [hereinafter BREDL Amended Petition].

⁵ *See* Duke Cogema Stone & Webster's Answer to Environmentalists, Inc. Amendment to Request for Hearing and Petition to Intervene (Aug. 10, 2001) [hereinafter DCS Answer to EI Amended Petition]; Duke Cogema Stone & Webster's Answer to Georgians Against Nuclear Energy's Amended Petition to Intervene (Aug. 10, 2001) [hereinafter DCS Answer to GANE Amended Petition]; Duke Cogema Stone & Webster's Answer to Blue Ridge Environmental Defense League and Donald Moniak Additional Filings on Standing (Aug. 10, 2001) [hereinafter DCS Answer to BREDL Amended Petition]; NRC Staff's Response to Supplemental Filings on the Issue of Standing (Aug. 10, 2001) [hereinafter Staff Answer to Amended Petitions].

contentions.⁶ DCS and the Staff filed responses.⁷ On September 21, 2001, the Board convened a prehearing conference in North Augusta, South Carolina, and heard argument on the standing of the Petitioners to intervene and the admissibility of each Petitioner's proffered contentions.

II. STANDING

Under the Commission's Rules of Practice for informal Subpart L materials licensing proceedings, a petitioner requesting a hearing and seeking to intervene must "meet the judicial standards for standing," 10 C.F.R. § 2.1205(h), as the first of two prerequisites for admission as a party to a proceeding. As the Commission has frequently reiterated, to demonstrate standing a petitioner must assert an actual or threatened, concrete and particularized injury in fact falling within the zone of interests protected by the statutes governing NRC proceedings that is fairly traceable to the challenged licensing action and is likely to be redressed by a favorable decision. *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27, 30 (2001); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 13 (2001); *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 5-6 (1998). The same showing of injury, causation, and redressability is necessary regardless of whether a petitioner is an individual or an organization seeking to intervene in its own right. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995). When a membership organization seeks to intervene as the representative of its members, however, the petitioning organization must show that one of its individual members, who has authorized the organization to represent his interests, has standing to intervene. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 30-31 (1998); *Georgia Tech*, CLI-95-12, 42 NRC at 115. Additionally, the petitioning organization must demonstrate that the interests it seeks to protect are germane to

⁶ See Environmentalists, Inc. [Contentions] Amendment to Petition to Intervene (Aug. 13, 2001) [hereinafter EI Contentions]; Georgians Against Nuclear Energy Contentions Opposing a License for Duke Cogema Stone & Webster to Construct a Plutonium Fuel Factory at Savannah River Site (Aug. 13, 2001) [hereinafter GANE Contentions]; Blue Ridge Environmental Defense League and Donald Moniak Submission of Contentions Regarding the Proposed MFFF (Aug. 13, 2001) [hereinafter BREDL Contentions].

⁷ See Duke Cogema Stone & Webster's Answer to Environmentalists, Inc. Amendment to Petition to Intervene (Sept. 12, 2001) [hereinafter DCS EI Contention Response]; Duke Cogema Stone & Webster's Answer to Proposed Contentions Filed by Georgians Against Nuclear Energy (Sept. 13, 2001) [hereinafter DCS GANE Contention Response]; Duke Cogema Stone & Webster's Answer to Blue Ridge Environmental Defense League and Donald Moniak Submission of Contentions Regarding the Proposed MFFF (Sept. 12, 2001) [hereinafter BREDL Contention Response]; NRC Staff's Response to Contentions Submitted by Donald Moniak, Blue Ridge Environmental Defense League, Georgians Against Nuclear Energy, and Environmentalists, Inc. (Sept. 12, 2001) [hereinafter Staff Contention Response].

its purposes and that neither the claim it asserts nor the relief it requests requires the participation of an individual member in the proceeding. *Private Fuel Storage*, CLI-98-13, 48 NRC at 30-31. Finally, in determining whether a petitioner has standing to intervene, a licensing board must construe the petition in a light most favorable to the petitioner regardless of whether the petitioner is an individual or an organization. *Georgia Tech*, CLI-95-12, 42 NRC at 115.

In accordance with the terms of the Commission's referral order, CLI-01-13, 53 NRC at 484, the Licensing Board provided the Petitioners an opportunity to amend their intervention petitions, and all except Ms. Foster filed such amendments. Thus, the Petitioners' initial intervention petitions must be read in conjunction with the subsequent amendments in assessing whether the Petitioners have standing. Ms. Foster's initial handwritten petition requests, without more, a hearing on the MFFF and the future use of MOX fuel at Oconee, South Carolina, which she states is located near her. Because Ms. Foster's petition does not particularize any injury caused by the MFFF, it is facially insufficient to establish her standing to intervene and the petition must be denied.

In their intervention petitions, EI, GANE, and BREDL each make extended and extensive presentations on standing. EI states that it is a nonprofit corporation of over forty members organized under the laws of South Carolina dedicated to protecting the health, safety, and welfare of the citizens of South Carolina, preserving the State's natural environment, and preventing environmental pollution by harmful contaminants, including radioactivity. *See* EI Petition at 1. GANE states that it is a Georgian environmental membership organization founded in 1978 whose purpose is to phase out nuclear power, promote conservation and sustainable energy sources, abolish the global use of nuclear weapons, and promote the formation of ethical social policies for the handling and containment of nuclear waste. *See* GANE Amended Petition at 1-2. Finally, BREDL indicates that it is an environmental organization founded in 1984 with chapters and members in North and South Carolina. *See* BREDL Amended Petition, *Aff. of Janet Marsh Zeller* (July 30, 2001) at 1. Because we find that each of these organizations has established its representational standing by demonstrating that one of its members, who has authorized the organization to represent him or her, has standing, we need not freight this Memorandum with an analysis of the Petitioners' various claims of organizational standing. Further, because our determination of representational standing is based upon a common claim of standing by at least one member of each of these organizations based upon the transport of MOX fuel, we need not burden this decision with an analysis of the numerous other claims of standing in the intervention petitions. With respect to the Petitioners' other standing claims, however, it should be noted that DCS does not oppose some of GANE's claims of representational standing, although it challenges the standing of EI, BREDL, and Donald Moniak. *See* DCS Answer to GANE Amended Petition at 1; DCS Answer to EI Amended Petition

at 2-14; DCS Answer to BREDL Amended Petition at 3-13. For its part, the Staff concedes that EI, GANE, and Donald J. Moniak, an individual member of BREDL and its representative here, have standing on some of these other grounds. The Staff, however, argues that BREDL has not established its representational standing on the basis of Mr. Moniak's standing. *See* Staff Answer to Amended Petitions at 2.⁸

In their intervention petition, EI, GANE, and BREDL all claim representational standing on the basis of the harm to one or more of their members from the unwanted radiation dose those members will likely receive by being in close proximity to a shipment of MOX fuel on the same roads over which the MOX fuel will likely be transported from the MFFF to the Catawba and McGuire reactors. In this regard, EI's intervention filings indicate that the release of radioactive materials during transport will adversely affect its members and their interest in, and right to travel on, public highways. *See* EI Petition at 3. Its petition states that because of the uncertainties surrounding the transportation of plutonium and other nuclear materials, it is not possible to predict with accuracy which of its members are most likely to be harmed or the extent of the damage, but that its members will be adversely affected in "[t]heir interest in and right to know which highways and roads are safest for travel in terms of protecting themselves and their families from the dangers of being close to trucks carrying Mixed-oxide fuel." *Id.* at 4. Finally, EI's petition specifically identifies a number of its members who live 10 to 20 miles from the SRS or the mission reactors, including EI members Gregg and Nancy Jocoy who, the petition states, live approximately 10 miles from the Catawba Nuclear Station, travel over the roads that will be used to transport mixed oxide fuel to the reactors, and "are informed and believe" that their interests will be harmed by the construction of the MFFF. *Id.* Along with its petition, EI included the affidavits of Gregg Jocoy and Nancy Jocoy declaring, *inter alia*, that they authorize EI to represent their interest in the proceeding and that the release of radiation during transport of mixed oxide fuel would greatly increase the risk to their health. *See* EI Amended Petition, Aff. of William Gregg Jocoy (May 15, 2001); Aff. of Nancy Lynn Jocoy (May 15, 2001).

In the same vein as EI's intervention pleadings, GANE's petition claims standing by virtue of the harm to its member Susan Bloomfield from the

⁸Even though the Staff concedes that some of the assertions in the BREDL pleadings establish Mr. Moniak's standing as an individual, the Staff argues that BREDL has not established its representational standing on the basis of Mr. Moniak's standing apparently because it concludes that Mr. Moniak has not authorized BREDL to represent his interests in the proceeding. *See* Staff Answer at 14, 24. Mr. Moniak filed a signed and witnessed statement, however, expressly asserting that he was a member of BREDL and that he authorized BREDL to represent his interests in the proceeding. BREDL Amended Petition, Aff. of Donald J. Moniak (July 30, 2001) at 1. Although mislabeled as an "affidavit," Mr. Moniak's statement is merely a declaration because it is not a sworn statement executed before a notary. There is no regulatory requirement, however, that this information must be set forth in an affidavit. *See Shieldalloy Metallurgical Corp.* (Cambridge, Ohio Facility), CLI-99-12, 49 NRC 347, 354 & n.4 (1999). In the circumstances presented, Mr. Moniak's declaration is sufficient to establish his authorization of BREDL to represent his interests in this proceeding.

radiological impact of transporting plutonium in close proximity to her over the highways she travels. See GANE Amended Petition at 3-4. In its petition, GANE proffers that “[a]s demonstrated in Appendix L of the DOE’s Surplus Plutonium Disposal Final Environmental Impact Statement (Nov. 1999), impacts of transporting plutonium under normal conditions include vehicle exhaust and radiological doses of up to 10 mrem/hour at two meters from the vehicle.” *Id.* at 3-5 n.1. GANE’s petition claims that “Ms. Bloomfield wishes to avoid any incremental exposure to radiation, including doses that she may get during uneventful transportation of plutonium” and that “[e]ven a ‘minor’ public exposure may constitute grounds for establishing standing.” *Id.* In a sworn declaration accompanying GANE’s pleadings, Ms. Bloomfield asserts that she is a member of GANE, has authorized GANE to represent her interests in the proceeding, and that she is concerned about future shipments of plutonium on the roads near her home because the “exposure to radiation and vehicle exhaust from these shipments could injure my health.” *Id.*, Aff. of Susan Bloomfield (July 26, 2001) at 1.

Among the multitude of standing claims in its intervention petition, BREDL asserts that its members will be affected by the direct impacts of transportation of MOX fuel over the public highways of North and South Carolina. See BREDL Petition ¶ 7. According to their petition, “BREDL members drive on, live along, and recreate near transport routes that will be used for shipping plutonium fuel” and “[t]he shipping of plutonium fuel from SRS to MOX fuel irradiation facilities will affect members by . . . impacting public health.” *Id.* ¶ 7a. BREDL asserts that “[t]he MOX fuel option substantially increases DOE radioactive material shipments in the area between SRS and irradiation facilities, and thus poses an unnecessary risk of harmful exposure to doses of ionizing radiation during incident free transportation operations.” *Id.* ¶ 7a.i. Joint Petitioners’ intervention filings also include the affidavit of, *inter alia*, Frank Carl stating that he is a member of BREDL, and that he authorizes BREDL to represent his interests in the proceeding. See BREDL Amended Petition, Aff. of Dr. Frank Carl (July 30, 2001) at 1. In his affidavit, Dr. Carl asserts that he resides approximately 6 miles from the Catawba Nuclear Station and 23 miles from the McGuire Nuclear Station and, because of his work and other activities, he frequently drives over various named state and interstate highways that likely will be used to transport MOX fuel to the mission reactors. See *id.* at 1-2. Additionally, his affidavit states that

I will have no way of knowing if I am being exposed to potentially harmful and certainly higher than normal levels of ionizing radiation because the transportation vehicles will not be marked. I will have no way of knowing if I can avoid the routes because they will not

be publicly acknowledged by the U.S. Department of Energy or Duke Cogema Stone and Webster.

Id. at 2.

We find that Petitioners EI, GANE, and BREDL have each demonstrated representational standing by showing that at least one of their respective members has standing, i.e., has stated an injury in fact falling within the zone of interests protected by the Atomic Energy Act, that is fairly traceable to the construction of the MFFF, and is likely to be redressed by a decision favorable to the Petitioners. Initially, EI through its members Gregg and Nancy Jocoy, GANE through its member Susan Bloomfield, and BREDL through its member Frank Carl, have all established that their respective members have authorized the Petitioners to represent their interest in the proceeding. Each of these individuals also has stated an injury in fact. They all have asserted the threatened harm to their health from unwanted doses of ionizing radiation from the MOX fuel that will be transported from the MFFF to the mission reactors over the same public highways the Petitioners' members travel because of their close geographic proximity to the MFFF or the mission reactors. As the intervention petitions indicate, incident-free shipping of plutonium provides a dose of ionizing radiation, albeit small, to anyone next to the transport vehicle and a minor exposure to radiation, even one within regulatory limits, is sufficient to state an injury in fact. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 247-48 (1996). Further, the asserted harm here — injury to the health and safety of Petitioners' members from ionizing radiation — is clearly encompassed by the health and safety interests protected by the Atomic Energy Act.

Nor is there any doubt that the injury alleged by the Petitioners' members is fairly traceable to the construction and subsequent manufacture and shipping of MOX fuel. Because the transport of MOX fuel to the mission reactors over the public highways on which Petitioners' members travel cannot take place without the construction of the MFFF, it cannot fairly be argued that the threatened injury to the Petitioners' members is not caused by the challenged licensing action. Indeed, the unique circumstances surrounding the transportation of MOX fuel over unannounced routes with unannounced schedules in unmarked trucks precludes the Petitioners' members from being able to avoid the asserted harm to their health from the shipment of plutonium over the public highways. Additionally, and most obviously, the asserted injury to the health of the Petitioners' members would be redressed by a decision favorable to the Petitioners denying the DCS construction authorization for the MFFF. Finally, the interests that EI, GANE, and BREDL seek to protect by challenging the DCS construction authorization request are clearly germane to the purposes of the environmental membership organizations and neither the claims asserted in any of their proffered contentions nor the relief sought by the Petitioners requires the participation of an individual member in

the proceeding. Accordingly, EI, GANE, and BREDL have each established their standing to intervene.⁹

In their answers to the Petitioners' intervention petitions, DCS and the Staff oppose the Petitioners' claims of representational standing based upon the standing of their members' exposure to ionizing radiation from the transport of MOX fuel, arguing that the subject of MOX fuel transportation is outside the scope of the proceeding and, therefore, cannot form the basis for Petitioners' standing. See DCS Answer to EI Petition at 7-8; DCS Answer to GANE Petition at 9; DCS Answer to BREDL Petition at 11; Staff Answer at 15, 36, 41. Relying on two earlier Licensing Board rulings, DCS also argues that similar transportation claims have been rejected in the past, while the Staff argues that the assertions of transportation-related injury by the Petitioners' members are too speculative to support claims of standing. See, e.g., DCS Answer to EI Petition at 8-9; Staff Answer at 36. Each of these arguments by DCS and the Staff lacks merit.

As DCS and the Staff should be well aware, the scope of an agency licensing proceeding is delineated by the Commission's notice of hearing and referral order. See *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985). Here the Commission's hearing notice specifically and clearly states that "contentions are expected to focus on the CAR, the December 2000 environmental report, and/or the January 2001 quality assurance plan submitted by DCS." 66 Fed. Reg. at 19,996. It is, of course, a fundamental principle of NRC adjudication that the subject matter of all contentions is limited to the scope of the proceeding. See *Gulf States Utilities Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 51 (1994); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976). Accordingly, by directing in the notice of hearing that contentions must be focused on the DCS ER, the Commission necessarily placed the matters encompassed by the ER within the scope of the proceeding. Among the many matters addressed, the ER deals extensively with the transportation of

⁹The intervention petition of BREDL was filed as a joint petition with Mr. Moniak, a member of BREDL and its representative in this proceeding, also seeking to intervene as an individual. See BREDL Petition ¶¶ 1, 6 n.9. Mr. Moniak's declaration filed as part of the Joint Petitioners' amended petition also makes clear that he is a member of BREDL. See BREDL Amended Petition, Aff. of Donald J. Moniak at 1. As previously indicated (see *supra* pp. 416-17), the Joint Petitioners' intervention filings assert that BREDL members, which necessarily include Mr. Moniak, travel on the public highways over which MOX fuel likely will be transported and thus risk exposure to ionizing radiation from such transport. Additionally, the assertions in the Joint Petitioners' intervention petition make it clear that Mr. Moniak travels on the likely MOX fuel transport routes. See BREDL Petition ¶ 6 & n.10; BREDL Amended Petition, Aff. of Donald Moniak. Therefore, the Joint Petitioners' intervention filings also establish Mr. Moniak's standing on the basis of the transportation of MOX fuel from the MFFF to the mission reactors. In any event and as the Staff, but not DCS (see *supra* p. 415), concedes, the Joint Petitioners' intervention petition establishes Mr. Moniak's standing on the basis, *inter alia*, of his residing and growing food for his consumption in Aiken, South Carolina, some 19 miles from the proposed MFFF, which property, in the event of a major accident at the MFFF, could become contaminated with radioactivity. See, e.g., *Allied-General Nuclear Services* (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420, 423-24 (1976). Accordingly, Mr. Moniak also has established his standing to intervene.

MOX fuel from the MFFF to the mission reactors. For example, section 1.2.6 of the ER states that “[b]ecause one mission reactor site was eliminated since the publication of the SPD EIS [DOE’s Surplus Plutonium Disposition Environmental Impact Statement], the environmental impacts of MOX fuel transport to the mission reactors are reevaluated in this ER.” ER at 1-5. In section 5.4, entitled “Transportation,” a section with eleven subsections, the ER states that “[a]n assessment of the human health risks of the overland transport of radioactive materials is crucial to a complete appraisal of the environmental impacts of the MFFF.” ER at 5-25. The ER then presents an analysis of the impacts of incident-free transportation and those due to transportation accidents, including both nonradiological and radiological impacts. Subsection 5.4.3, entitled “MOX Fuel,” and subsections 5.4.3.1 and 5.4.3.3 address the impacts of incident-free transportation, including the impacts on maximally exposed individuals such as a person stuck in traffic for 30 minutes next to a shipment of MOX fuel receiving a dose of 2 mrem with the dose rising proportionately to the length of exposure. *See* ER at 5-27 to 5-28. Finally, in a 28-page Appendix E, the ER sets out DCS’s transportation risk assessment which reveals that there will be 238 MOX fuel shipments to Catawba and 212 to McGuire, and states that “[b]ecause of the classified nature of SGT shipments, the actual routes used and shipment schedule will not be publicly available.” *Id.*, App. E at E-6; *see id.* at E-21. Thus, contrary to the arguments of DCS, which authored the ER, and the Staff, which is charged with reviewing it, the subject of the transportation of MOX fuel is extensively addressed in the ER, clearly making this a subject within the scope of the proceeding.

DCS’s skeletal argument relying upon two prior Licensing Board standing rulings also is unpersuasive. The factual circumstances of both cited cases are readily distinguishable from the Petitioners’ assertions establishing their standing here. In *Northern States Power Co. (Pathfinder Atomic Plant)*, LBP-90-3, 31 NRC 40, 42-43 (1990), an organization alleged that the health of one of its officers, living a mile off Interstate 90 in Rapid City, North Dakota, 350 miles from the decommissioned Pathfinder plant, would be harmed by an increased risk of cancer from radioactivity from an accident on the assigned interstate route involving truck shipments of low-level waste enroute to the Hanford, Washington disposal site. The Presiding Officer in *Pathfinder* determined that “the link between the injury claimed and the proposed licensing activity[] remains absent,” and the fact that “radioactive waste will be transported if decommissioning is authorized does not *ipso facto* establish that there is a reasonable opportunity for an accident to occur at Rapid City, or for the radioactive materials to escape because of [an] accident or the nature of the substance being transported.” *Id.* at 43. Unlike *Pathfinder*, where the critical causal link between the asserted injury and the licensing activity was found absent, the Petitioners here, as previously explained, have adequately established that nexus. Unlike the Petitioners here, in

Pathfinder there was no assertion that the officer regularly used the same roads as the shipments likely would travel, that a person traveling on the road next to the truck shipment would receive an unwanted dose, albeit small, of ionizing radiation, and that the harm could not be avoided because information about the shipments would not be public. Rather, in *Pathfinder*, the officer merely claimed, without more, that an accident on the interstate near his home by a truck carrying low-level waste would harm him. The officer made no showing of how a transportation accident would happen to occur near his home along hundreds of miles of interstate shipping routes or how, in an accident, radioactivity would be released to the environment, or how, if released, the low-level radioactive material involved could cause him harm at his residence. Putting aside the fact that the Presiding Officer's unreviewed ruling in *Pathfinder* is not binding precedent, the factual circumstances asserted by the Petitioners here clearly establish their standing and these circumstances are not comparable, or even similar, to those asserted in *Pathfinder*.

DCS's reliance on the Licensing Board's ruling in *Exxon Nuclear Co.* (Nuclear Fuel Recovery and Recycling Center), LBP-77-59, 6 NRC 518 (1977), is similarly misplaced. In *Exxon*, a resident of Nashville, Tennessee, sought to intervene in the construction permit proceeding for a proposed reprocessing facility in Oak Ridge claiming that spent fuel shipped by rail would likely travel over the L & N Railroad tracks very near her property, causing her bodily harm if an accident occurred close to her home. *See id.* at 519. In denying standing, the Licensing Board held that the allegation of injury was "entirely speculative in nature, being predicated on the tenuous assumptions that the spent fuel will be shipped by the named carrier and that an accident might occur in the area proximate . . . to her residence." *Id.* at 520. Without reiterating all the Petitioners' standing assertions, it suffices to note that, unlike the standing claims in *Exxon*, the Petitioners' claims of injury from the transport of MOX fuel are far more specific in detailing a real, threatened injury and are neither so conjectural nor problematic as to be speculative for purposes of establishing standing. Although the Petitioners have not established the probability of their members receiving an unwanted dose of ionizing radiation from traveling the same highways over which MOX fuel will be transported between the MFFF and the mission reactors, no such precision is required. In light of the secrecy surrounding the transport of MOX fuel, the Petitioners cannot reasonably be expected to do more. Indeed, the fact that the ER reveals that there will be 450 MOX fuel shipments to the mission reactors over the life of the MFFF serves to validate that the Petitioners' assertions of harm fall well within the realm of threatened injuries sufficient to establish

standing.¹⁰ Accordingly, DCS's reliance on the Licensing Board ruling in *Exxon* is wide of the mark. For the same reasons, the Staff's claims that the Petitioners' standing assertions are speculative are without merit.

III. CONTENTIONS

As earlier indicated, the Commission's hearing notice and referral order modified the informal Subpart L hearing procedures for the MFFF construction authorization proceeding to require that petitioners file contentions pursuant to 10 C.F.R. § 2.714(b). Thus, in addition to establishing standing, each petitioner also must proffer at least one admissible contention in order to be admitted as a party. *See* 10 C.F.R. § 2.714(b)(1). In order to be admissible, a contention must specify the precise issue of law or fact being raised. 10 C.F.R. § 2.714(b)(2). In addition, section 2.714(b)(2)(i), (ii), and (iii) provides that each contention must be accompanied by:

- (i) A brief explanation of the bases of the contention.
- (ii) A concise statement of the alleged facts or expert opinion which support the contention . . . together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
- (iii) Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report.

Finally, pursuant to section 2.714(d)(2)(ii), the contention cannot be one that, even if proven, would be of no consequence to the proceeding and entitle the petitioner to no relief.

The contention pleading criteria set forth in section 2.714(b)(2) are mandatory and must be scrupulously followed. As the Commission has stated, "[i]f any one of these requirements is not met, a contention must be rejected." *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991); *accord Duke Energy Corp.* (Oconee

¹⁰ Moreover, it should be noted that both DCS and the Staff concede that GANE established its representational standing based upon Ms. Bloomfield's standing as an individual residing 20 miles from the MFFF and claiming harm to her health from radioactivity from a major accident at the facility. *See* DCS Answer to GANE Amended Petition at 1; Staff Answer to Amended Petitions at 19-20. These standing concessions of DCS and the Staff would appear to be entirely inconsistent with their arguments here that the harm to Petitioners from the transport of MOX fuel is speculative unless it is accepted that the probability of a major accident at the MFFF spreading radioactivity 20 miles from the facility is significantly less than the probability of the Petitioners encountering a MOX fuel shipment on the highway.

Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999); *see* Final Rule, Rules of Practice for Domestic Licensing Proceedings; Procedural Changes in the Hearing Process, Statement of Considerations, 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989) [hereinafter Procedural Changes in the Hearing Process]. The provisions of section 2.714 were specifically adopted by the Commission “to raise the threshold bar for an admissible contention” and prohibit “vague, unparticularized contentions” resulting from “notice pleading with the details . . . filled in later.” *Oconee*, CLI-99-11, 49 NRC at 334, 338.

Further, it is the burden of the petitioner to come forward with contentions meeting the pleading rules. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-14, 48 NRC 39, 41 (1998). A licensing board is not free to supply missing information or draw factual inferences on the petitioner’s behalf. *See Palo Verde*, CLI-91-12, 34 NRC at 155-56. As emphasized in the *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998), “[a] contention’s proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to satisfy the basis requirement for the admission of contentions in 10 C.F.R. § 2.714(b)(2).” The contention admissibility determination, however, does not involve a decision on the substantive merits of the proffered contentions. Rather, it is a determination that a genuine, legitimate dispute of material fact or law exists with respect to the issue in question such as to warrant a further inquiry by the Board. *See, e.g., Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 426 (1973).

In addition to the contention pleading requirements of section 2.714(b)(2), a number of other long-established principles of NRC adjudication also limit the subject matter of contentions. As previously noted, licensing boards have jurisdiction over those matters that the Commission commits to them in the various hearing notices and referral orders that identify the subject matters of the hearing. *See Catawba*, ALAB-825, 22 NRC at 790; *Marble Hill*, ALAB-316, 3 NRC at 170-71. A contention is therefore admissible only if it is within the scope of the proceeding outlined in the Commission’s hearing notice and referral order. *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983). Secondly, a contention attacking or challenging a Commission rule or regulation is inadmissible and that inadmissibility bar applies to contentions proffering, for example, additional or stricter requirements than those that are imposed by the respective regulation. *See* 10 C.F.R. § 2.758; *Oconee*, CLI-99-11, 49 NRC at 334; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-8, 29 NRC 399, 416-17 (1989); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 395 (1987); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982).

In this proceeding, both the Commission's notice of hearing and referral orders describe the scope of the proceeding. These Commission directives indicate first that the scope of the proceeding is bounded by the environmental and safety findings under 10 C.F.R. § 70.23(a)(7) and (b) that the agency must make in order to approve DCS's application to construct the MFFF. *See* 66 Fed. Reg. at 19,995; CLI-01-13, 53 NRC at 483. As already noted (*see supra* p. 418), the notice of hearing states that the subject matter of admissible contentions must focus on the DCS CAR, ER, and quality assurance plan (QAP). A number of circumstances unique to the MFFF and its relationship to DOE's surplus plutonium disposition program place several additional restrictions on the subject matter of allowable contentions with regard to matters mentioned or referenced in the DCS environmental report. The MFFF is one of the facilities, along with DOE's proposed PDCF, PIP, and its already existing Defense Waste Processing Facility, that together are intended to carry out DOE's plutonium disposition strategy. Pursuant to federal statute, however, the MFFF, unlike the other two DOE proposed facilities, is required to be licensed by the NRC. *See* 42 U.S.C. § 5842 (Supp. V 1999). Because the MFFF is a component of DOE's multifaceted surplus plutonium disposition strategy, DOE has already conducted a number of environmental studies and issued a number of environmental impact statements as part of its overall surplus plutonium disposition program. These documents include two separate EISs — the most recent version, *Surplus Plutonium Disposition Final Environmental Impact Statement* (DOE/EIS-0283) (Nov. 1999) [hereinafter SPD EIS], and its predecessor document, *Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement* (DOE/EIS-0229) (Dec. 1996) [hereinafter PEIS]. In the PEIS, DOE originally analyzed thirty-seven potential disposition alternatives, as well as a no-action alternative (i.e., all weapons-usable fissile material would remain at existing storage sites using appropriate safeguards and security measures) and a no-disposition-action alternative (i.e., all weapons-usable fissile material would remain in centralized storage). In addition, the PEIS analyzed each alternative for the full range of natural resource, human resource, and issue areas pertinent to the long-term storage and disposition alternatives. The PEIS also considered six locations, including the SRS, for the long-term storage of plutonium and evaluated the same sites for the construction and operation of the various facilities needed for the disposition alternatives. *See* ER at 1-6 to 1-7.

After concluding that MOX fuel would be a significant part of the plutonium disposition plan in the PEIS, DOE prepared a subsequent EIS analyzing the alternatives for implementing the MOX fuel strategy, including a no-action alternative. The SPD EIS provides a general description of the MOX fuel facility and the MOX fuel fabrication process, along with a consideration of specific areas within the host site. Further, it considers the environmental impacts associated with transportation of plutonium to the plutonium disposition facilities, transportation

of the MOX fuel to the mission reactors, and transportation of wastes for ultimate disposal. Additionally, consideration of wastes generated at the entire SRS was considered by DOE in the *Savannah River Site Waste Management Final Environmental Impact Statement* (DOE/EIS-0217) (July 1995) [hereinafter SRS Waste Management Final EIS]. Finally, the transportation and disposal of spent MOX fuel at a geologic repository were considered in another EIS prepared by DOE for its proposed Yucca Mountain project in its *Draft Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada* (DOE/EIS-0250D) (July 1999). See ER at 1-5.

These DOE environmental impact statements are obviously relevant to the MFFF because of the role of the MOX fuel facility in DOE's surplus plutonium disposition strategy. In such circumstances, the Commission's environmental regulations provide for the tiering, adoption, and incorporation of environmental impact statements of other federal agencies into the Commission's environmental impact statements. See 10 C.F.R. Part 51, Subpart A, Appendix A.1(b). Although the NRC has yet to issue its EIS for the MFFF, the DCS ER is the foundation document for the agency's EIS, see, e.g., 10 C.F.R. § 51.45(b), and follows the scheme of the Commission's environmental regulations by adopting and incorporating, where appropriate, the various DOE environmental impact statements. See, e.g., ER at 1-3 to 1-9. With the exception of the DCS reanalysis of the impacts of transporting MOX fuel to the mission reactors discussed earlier (see *supra* p. 419), DCS's practice of adopting and incorporating the DOE environmental impact statements into its ER generally does not bring those DOE documents within the scope of this proceeding or open them to challenge in the discrete proceeding on the MFFF.

Thus, for a contention to be admissible, its subject matter must come within the scope of the proceeding as outlined above and meet all of the pleading requirements of 10 C.F.R. § 2.714(b). We review each of the Petitioners' proffered contentions in accordance with these standards.

A. GANE's Contentions

1. *Lack of Consideration of Safeguards and Physical Protection in Facility Design*

GANE's first and second contentions deal, respectively, with the insufficiency of information in the CAR on the design features of DCS's material control and accounting (MC&A), and physical protection systems. Because these two contentions raise similar issues and the contentions are opposed on the same basic grounds by DCS and the Staff, the contentions are addressed together.

In its first contention, GANE asserts that because the CAR lacks sufficient information on design features relevant to implementing MC&A measures capable of meeting or exceeding the Commission's MC&A requirements, the CAR fails to provide any basis for the NRC, as called for in the Staff's MFFF Standard Review Plan (SRP), to be able to "establish that the applicant's design basis for MC&A and related commitments will lead to an FNMCP (Fundamental Nuclear Material Control Plan) that will meet or exceed the regulatory acceptance criteria in Section 13.2.4" of the SRP. GANE Contentions at 3 (quoting SRP § 13.2.5.2 A). Much like its first contention, GANE's second contention asserts that, because the CAR lacks sufficient information on design features relevant to implementing physical protection measures capable of meeting or exceeding the Commission's physical protection requirements, the CAR fails to provide any basis for the NRC to "establish that the applicant's proposed design, location, construction technique, and material for elements of the physical protection system and related commitments will lead to a physical protection plan that will meet or exceed the regulatory acceptance criteria in Section 13.1.4" of the SRP. GANE Contentions at 10 (quoting SRP § 13.1.5.2 A). The bases for these contentions are long and detailed, totaling over ten pages. The factual statements and opinions in the bases of both contentions are supported by the sworn declaration of Edwin S. Lyman, Ph.D, the scientific director of the Nuclear Control Institute. Dr. Lyman holds a Ph.D in theoretical physics as well as a master of science and a bachelor's degree in physics, and for over 9 years has conducted research on security and environmental issues associated with the management of nuclear material and the operation of nuclear power plants. *See* GANE Contentions, Exh. 1. Neither DCS nor the Staff challenges Dr. Lyman's expertise with regard to contentions 1 and 2 or any of the other contentions Dr. Lyman's affidavit supports.

As the basis for contention 1, GANE relies upon a 1992 International Atomic Energy Agency (IAEA) Board of Governors' recommendation and a 1997 report by safeguards experts at the Los Alamos and Sandia National Laboratories intended for potential bidders on the DOE MOX fuel facility contract, indicating that effective safeguard measures must be considered early in the design of new facilities. *See* GANE Contentions at 3-4. Quoting from the latter report, GANE indicates that if safeguards capabilities are not properly designed into the facility it may not be possible to retrofit them to meet requirements without prohibitive costs. *See id.* at 4. From these materials, GANE concludes that a reasonably complete description of the safeguard strategies for the MFFF must be submitted at the design stage and asserts that this same approach is recommended by the Staff in its guidance for the safety evaluation of construction approval in the SRP, which states that the "reviewer should establish that the applicant's design basis for MC&A and related commitments will lead to an FNMCP that will meet or exceed the regulatory acceptance criteria in Section 13.2.4." *Id.* at 5 (quoting SRP § 13.2.5.2 A). In this regard, GANE notes that the Staff's SRP defines "design

bases” as “the information that identifies the specific functions to be performed by an SSC of a facility, and the specific values or ranges of values chosen for controlling parameters as reference bounds for design.” GANE Contentions at 5 (quoting SRP at xviii). GANE next asserts that section 13.2 of the CAR, a brief paragraph entitled Material Control and Accounting, is grossly deficient and lacks the information necessary to reach conclusions regarding the quality of DCS’s design bases for MC&A. *See* GANE Contentions at 5. Rather, according to GANE, the CAR merely states that DCS will provide an FNMCP meeting the Commission’s regulatory requirements with its application for a possession and use license even though other sections of the CAR refer to the location of MC&A systems, but provide no “range[] of values chosen for controlling parameters” as required by the SRP. *Id.* In contrast to the CAR, GANE points to the rigors of the DOE design review described in the 1997 report by the safeguards experts at the national laboratories requiring that “[a]t each main stage of the design process, a safeguards and security vulnerability assessment (VA) shall be performed on the facility design to determine if the design meets the intent of the DOE Orders for preventing and detecting theft or diversion of nuclear materials.” *Id.* at 6. Finally, GANE points to design flaws in the scrap control system of the French MELOX plants, which purportedly are the model for the MFFF, to illustrate the necessity of providing basic MC&A design information at the construction approval stage. *See id.* at 7-9.

As the basis for its second contention, GANE asserts that the necessity of accounting for physical protection considerations in the design of facilities that will store and use special nuclear material is self-evident. *See id.* at 10. GANE contends that facility layout, structural design, and the location of physical barriers are the design elements that play a crucial role in the technical basis for physical protection. *See id.* In this regard, GANE points to the IAEA’s recommendations that physical protection systems should be taken into account in the design of the facility as early as possible to ensure that an adequate system can be applied without compromising safety because in some instances a direct conflict arises between physical protection requirements based on denial of access and safety requirements based upon easy access of emergency personnel. *See id.* at 11. According to GANE, this same principle is incorporated into the Staff’s SRP in its guidance on the safety evaluation for construction approval stating that the reviewer should establish that the design, location, construction technique, and material elements of the physical protection system will lead to a physical protection plan that will meet or exceed the regulatory criteria in section 13.1.4 of the SRP. *See id.* at 12. GANE claims, however, that contrary to this guidance, section 13.2 of the CAR, dealing with physical security, is grossly deficient and merely states, without more, that DCS will provide a physical security plan as part of its application for a license to possess and use special nuclear material. *See id.* GANE notes that although the CAR provides no information on how DCS

took physical protection considerations into account in its plant design, it seeks to take credit for safeguards and security structures in addressing the possibility of damage to the MFFF from accidental explosions in CAR section 5.5.2.7.6.2. *See id.*

DCS and the Staff both oppose the admission of contentions 1 and 2 on the grounds that they are outside the scope of the proceeding. *See* DCS GANE Contention Response at 17-20; Staff Contention Response at 8-13. Specifically, relying upon a portion of the first sentence of 10 C.F.R. § 70.23(b), DCS argues that the scope of this MFFF construction authorization proceeding is limited to whether “the design bases of the principal structures, systems, and components and the quality assurance program provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents.” DCS GANE Contention Response at 17 (quoting 10 C.F.R. § 70.23(b)). According to DCS, MC&A and physical protection systems are, by their very nature, not intended to protect against natural phenomena and accidents. Rather, DCS states such systems are intended to prevent the loss, theft, or sabotage of special nuclear material, so they fall outside the scope of section 70.23(b) and, hence, there is no requirement to describe the design bases for the MC&A and physical protection function in its CAR. *See* DCS GANE Contention Response at 18.

The regulation is not nearly as narrow as DCS argues and section 70.23(b) does not dictate the exclusion of the most basic design information of the MC&A and physical protection systems at the construction authorization stage. In pertinent part, 10 C.F.R. § 70.23(b) states that

[t]he Commission will approve construction of the principal structures, systems, and components of a plutonium processing and fuel fabrication plant on the basis of information filed pursuant to § 70.22(f) when the Commission has determined that the design bases of the principal structures, systems, and components, and the quality assurance program provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents.

Neither 10 C.F.R. Part 70 nor any other part of the Commission’s regulations, however, define the word “principal” or the term “principal structures, systems, or components.”

Here, there is no dispute that the MC&A and physical protection systems for the MFFF are “systems.” In the absence of any regulatory definition, the word “principal” or the term “principal system” must be construed in accordance with its ordinary and common meaning in the context of the subject to which it relates — in this instance “the principal . . . systems . . . of a plutonium processing and fuel fabrication plant.” 10 C.F.R. § 70.23(b). The dictionary defines the adjective “principal,” the grammatical form in which it is used in the regulation, as “most important, consequential, or influential: relegating comparable matters, items, or individuals to secondary rank.” *Webster’s Third New International Dictionary*

1802 (1993). Applying this definition to the word “principal” in the context of a facility that processes tons of weapons-grade plutonium to make MOX fuel, it would appear axiomatic that the MC&A and physical protection systems are most important systems and systems of first rank so as to qualify as principal systems within the meaning of section 70.23(b).

DCS and the Staff argue that the MC&A and physical protection systems are not principal systems within the standard understanding of that term in the industry. *See* Tr. at 241, 262. In the case of a domestic plutonium processing and fuel fabrication facility licensed by the NRC pursuant to 10 C.F.R. § 70.23(b), there is no industry from which to draw a common understanding. This is the first such facility seeking a license from the NRC. Moreover, a comparison to the larger domestic nuclear industry encompassing nuclear reactors and uranium fuel facilities licensed by the NRC is inapt because no other domestic facilities process strategic quantities of weapons-grade plutonium. In any event, the terms at issue must be defined in the context of the facility being licensed. Similarly, any foreign MOX fuel industry is irrelevant to defining the term because such facilities are not licensed by the NRC under 10 C.F.R. § 70.23(b).

In fact, the relevant past domestic experience appears to have been within the province of DOE. As GANE’s first contention indicates in quoting an article by safeguards experts at the national laboratories intended for bidders on the DOE MOX fuel facility contract before congressionally mandated NRC licensing was imposed, DOE required a stringent safeguards and security vulnerability assessment at each stage of the design process. *See* GANE Contentions at 6. This suggests that, in overseeing its plutonium facilities, DOE considers MC&A and physical protection systems to be of a rank tantamount to principal systems under section 70.23(b). Further, in requiring that the NRC license the MOX fuel facility of a DOE contractor, there is no indication in applicable section 3134 of the Strom Thurmond Defense Authorization Act for Fiscal Year 1999, 42 U.S.C. § 5842 (Supp. V 1999) or its legislative history, that Congress intended a less stringent regulatory approach than would be applied by DOE. Hence, contrary to the argument of DCS and the Staff, the MC&A and physical protection systems of the MFFF are principal systems within the meaning of section 70.23(b).

Nor is there merit in DCS’s argument that the design bases of MC&A and physical protection systems of the MFFF need not be considered at the construction authorization stage under section 70.23(b) because these systems do not protect against natural phenomena and accidents, but instead are intended to prevent the loss and theft of special nuclear material. As the plain meaning of the regulation itself indicates, section 70.23(b) is not as limited as DCS’s argument would have it. Indeed, DCS’s argument would effectively read out of the regulation the requirement of a reasonable assurance determination for the quality assurance program. That program also does not protect against natural phenomena and accidents, but instead is intended to provide confidence that other

structures, systems, and components (SSCs) will perform satisfactorily. In much the same manner, the MC&A and physical protection systems are interrelated and interdependent upon other facility SSCs and, in the context of a plutonium processing fuel fabrication plant processing tons of weapons-grade plutonium, the design bases of the MC&A and physical protection systems must retain their functionality to make a reasonable assurance determination of protection against natural phenomena and the consequences of potential accidents. Accordingly, the design bases of the MC&A and physical protection systems of the MFFF are not precluded from consideration under section 70.23(b), and GANE contentions 1 and 2 are within the scope of the proceeding.

Because contentions 1 and 2 also meet all the requirements of 10 C.F.R. § 2.714(b)(2), these GANE contentions are admissible. Each contention adequately identifies the issue raised, provides a full explanation of the bases for the contention, and details the facts, expert opinion, and documents supporting GANE's position that shows a genuine dispute exists with DCS over the sufficiency of the design-bases information in the CAR for the MC&A and physical protection systems. A final cautionary note concerning these contentions is in order. Although neither DCS nor the Staff has brought this matter to the attention of the Licensing Board, section 13.1.4.3 of the Staff's SRP for the MFFF states that the "NRC has determined that public disclosure of the details of the physical protection system for a MOX facility could affect common defense and security and should be classified as Confidential National Security Information." Thus, these two contentions may require invocation of the procedures of 10 C.F.R. Part 2, Subpart I, even though this proceeding is being conducted pursuant to 10 C.F.R. Part 2, Subpart L, not Subpart G.

2. *Inadequate Seismic Design*

GANE's third contention states:

In Sections 1.3.5 through 1.3.7 of the CAR, DCS specifies the design criteria for the MOX Fuel Fabrication Facility to withstand any potential geological hazard. DCS claims that "conservative design criteria" have been established. *Id.* at 1.3.6-23. This assertion is not supported, because DCS has not performed a seismic analysis that is either adequate in scope or adequately documented.

GANE Contentions at 13.

Like its first two contentions, GANE's basis for its third contention is long and detailed. The factual statements and opinions set forth in the basis are supported by the sworn declaration of Peter Burkholder, a seismologist. Mr. Burkholder holds a master of science degree in seismology and has over 10 years' experience conducting and supporting seismological research in various parts of the world.

See id., Exh. 2. DCS does not challenge Mr. Burkholder’s expertise with regard to GANE contention 3.

As the basis for contention 3, GANE initially explains that the seismic hazard at a site depends upon the likelihood of a significant seismic event and the expected site response to such an event. *See id.* at 13. With respect to the former, GANE relies upon a recent April 2001 study by Pradeep Talwani and William T. Shaeffer, entitled “Recurrence rates of large earthquakes in the South Carolina Coastal Plain based on paleoliquefaction data,” that it asserts provides evidence that, contrary to the geologic section of DCS’s CAR, the frequency of major seismic events in the South Carolina coastal plain is higher than previously thought and that major events need not be limited to the Charleston seismic zone. *See id.* at 14, Exh. 5. As GANE states, “contrary to what the CAR says, major events may have occurred much closer to the SRS than the Charleston Seismic Zone.” GANE Contentions at 15. Next, GANE asserts that although DCS claims to analyze the relationship between geologic structure and seismic sources within the site region, DCS’s representations cannot be evaluated because of the lack of references in the seismology section of the CAR. *See id.* Specifically, GANE asserts that most of the tables and figures in section 1.3.6.2 of the CAR do not contain references to any published work and for those figures that do indicate some source of information, no citation to a reference document is provided from the list of references. *See id.* Further, GANE claims that other referenced reports are not publicly available so that it is impossible to verify DCS’s assertions in the CAR regarding site geology. *See id.* Similarly, GANE notes that DCS purports to list the significant earthquakes within 200 miles of the SRS but DCS has provided no sources used to construct the data table in the CAR, so it is unverifiable. *See id.* In this regard, GANE states that a comparison with the “U.S. Geological Survey’s Preliminary Determination of Epicenters” monthly listing catalog shows that DCS’s listing is inaccurate and incomplete at least for the period 1974 onwards. *See id.* at 15-16. From this, GANE concludes that the recent evidence of prehistoric earthquakes and the failure to list all recent seismic events indicate that the CAR does not adequately account for the risk of a major event. *See id.* at 16.

With respect to site response, GANE explains that the shaking experienced at a particular location during an earthquake is dependent upon, *inter alia*, the distance of the event, the regional geology and topography, and local geology and topography. *See id.* GANE states that, although the CAR cites a number of site response studies within the SRS, DCS does not state that a quantitative site response study has been done for the MFFF but only indicates some tests will be done in the future. *See id.* at 16-17. GANE concludes, therefore, that DCS has not established the potential for soil liquefaction for the MFFF. *See id.* Additionally, GANE points to the Staff’s February 28, 2001, RAI to DCS indicating that the Probabilistic Seismic Hazard Assessment (PSHA) for the MFFF is incomplete

and asserts that GANE concurs with the need for clarification on all points mentioned in the RAI. *See id.* at 17. GANE also states that the Staff's Standard Review Plan for nuclear power plants, NUREG-0800, provides that applicants should develop a site-specific design spectrum. *See id.* According to GANE, DCS has not developed a site-specific design spectrum for the MFFF but instead is using one computed in 1997 for the entire SRS, and DCS has not provided in the CAR detailed methodologies or references of spectral shape changes applied to the starting spectrum for data from site-specific studies. *See id.* Finally, GANE asserts that DCS's approach to the PSHA in the CAR is insufficiently conservative. *See id.* Specifically, GANE points to DCS's estimate of a 2700-year return period of a certain seismic event derived from nonpublic Westinghouse Savannah River Company reports even though the National Seismic Hazard Mapping Project estimates a return period of 1200 years for the same event at the SRS. *See id.* at 17-18.

DCS argues that GANE's seismic contention is inadmissible. *See* DCS GANE Contention Response at 21. According to DCS, even if GANE's allegations are accepted as true, it has provided no basis for believing that any changes in the design-basis earthquake are necessary, and therefore, GANE has failed to identify a genuine dispute of a material issue of fact or law as required by the regulations. *See id.* For its part, the Staff supports the admission of GANE's third contention, asserting that "it identifies with sufficient particularity material disputes between GANE and DCS which merit further inquiry." Staff Contention Response at 14. In supporting the admission of the contention, the Staff notes that "[a]t this time, various seismic design issues remain to be resolved before the necessary probabilistic seismic hazard assessment (PSHA) can be completed for the proposed MOX facility." *Id.* In this regard, the Staff states that "[w]hat (if any) impact the alternative earthquake scenario proposed by Talwani *et al.* (2001) will have on the PSHA remains to be determined." *Id.*

As the Staff correctly indicates, GANE's third contention meets the pleading requirements of section 2.714(b)(2) and thus is admissible. The contention clearly identifies the issue raised, claiming that the seismic analysis in the CAR used by DCS to support the design criteria for the MFFF is inadequate in scope and inadequately documented. The basis for the contention then sets forth the facts, expert opinion, and documents that show a genuine dispute exists between GANE and DCS on the adequacy of the analysis with respect to the location, frequency, and return frequency of major and other seismic events and the sufficiency of the documentation of these matters in the CAR. DCS's argument that, because GANE has not demonstrated that there needs to be any change in the design-basis earthquake, it has failed to identify a genuine dispute of a material issue of fact or law overlooks the fact that a supported, legitimate challenge to the validity of the seismic analysis in the CAR necessarily draws into question and casts doubt on the continuing soundness of DCS's conclusion regarding the design-basis

earthquake underlying its design criteria. Only after GANE's challenge to DCS's seismic analysis is resolved on the merits can it be determined if the design-basis earthquake is correct. The determination of whether a contention is admissible, however, is not concerned with the ultimate outcome of the merits dispute as DCS's argument seemingly would have it. Rather, the determination at the contention admissibility stage is concerned only with whether a real, meaningful controversy is presented and adequately supported. Here, GANE contention 3 does that.

In addition to its overarching argument, DCS also parses the basis of GANE's contention into seven parts and, with respect to each part, sets forth its view of the facts and argues that no genuine issue of material fact is raised. In each individual instance, however, just as in the case of its overarching argument, in claiming its position is correct, DCS argues the substantive merits of the factual dispute. To repeat, at this stage of the proceeding, the focus is solely on whether the contention raises a legitimate issue that rests on an adequate foundation. Accordingly, GANE contention 3 is admissible.

3. *Inadequate Licensing Review by NRC Staff*

In its fourth contention, GANE asserts that the NRC lacks the necessary recent, relevant experience to regulate plutonium fuel processing activities so as to effectively protect the public and the environment from harm. *See* GANE Contentions at 18. As the basis for contention 4, GANE states that it has been more than 20 years since the Cimarron plutonium processing plant operated in Oklahoma. *See id.* Next, GANE states that, although it accepted the CAR, ER, and QAP for docketing, the Staff is not equipped to review the DCS application, particularly given the short time line set for the Staff to complete its review. *See id.* As support, GANE points to a July 11, 2001, letter from the agency's Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Materials Safety and Safeguards (NMSS), to DOE, requesting training for agency Staff in plutonium processing environments, especially processing environments with weapons-grade plutonium, and seeking to procure the training without going through NRC's administrative processes in order to save an estimated 6 months' time. *See id.* at 19; *id.*, Exh. 4. According to GANE, the Staff appears to have undertaken the technical review of the key conceptual stage of the MOX facility while lacking the requisite technical expertise or timely obtaining the training. *See* GANE Contentions at 19. DCS and the Staff oppose the admission of GANE contention 4, in effect, on the grounds that it raises an issue that is not within the scope of the proceeding. *See* DCS GANE Contention Response at 27; Staff Contention Response at 15.

Both DCS and the Staff are correct that the contention is inadmissible. As the Commission stated in amending the contentions rule, "a contention will not be

admitted if the allegation is that the NRC Staff has not performed an adequate analysis” because “the sole focus of the hearing is on whether the application satisfies NRC regulatory requirements, rather than the adequacy of the NRC staff performance.” Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,171. Therefore, “contentions must rest on the *license application*, not on NRC Staff reviews,” *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998), and “the issue for decision is not whether the Staff performed well, but whether the license application raises health and safety concerns.” *Curators of the University of Missouri*, CLI-95-8, 41 NRC 386, 396 (1995); see *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 55-56 (1985); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-728, 17 NRC 777, 807 (1983). Accordingly, the Staff’s asserted inexperience and lack of training with respect to plutonium processing environments, specifically weapons-grade plutonium processing environments, and hence its competence to review DCS’s application to construct the MFFF, are irrelevant to the sufficiency of DCS’s application and whether the application complies with the agency’s regulations. Thus, GANE contention 4 raises an issue that is not litigable as beyond the scope of the proceeding.

4. Incorrect Designation of Controlled Area

GANE contention 5, a safety contention, and contention 8, an environmental contention, are essentially identical and rely upon the same basis. The two contentions are therefore consolidated as contention 5. In contention 5, GANE asserts that even though it does not have control over the whole SRS, DCS incorrectly designates the entire SRS as the controlled area of the MFFF in violation of the NRC’s regulations requiring the controlled area to be an area outside the restricted area, but inside the site boundary, in which DCS can limit access for any reason. As a result of the improper controlled area designation, GANE states that DCS (1) improperly characterized members of the public as MFFF workers for the purposes of calculating radiological doses to the public during normal operations and accidents; (2) incorrectly minimizes in its ER the environmental impacts of the MFFF on the public; and (3) adversely affects the adequacy of the physical security measures, resulting in inadequate design bases for the MFFF to support construction. See GANE Contentions at 19-20.

As the basis for contention 5, GANE points to the section of the ER that states DCS plans to use the site boundary of the SRS as the controlled area boundary for the MFFF. See *id.* at 20. Relying on the description of the SRS in the ER, GANE notes that the SRS is an approximately circular tract occupying 310 square miles or some 198,000 acres, while the MFFF will be located only on a 41-acre site, some much smaller portion of which will be surrounded by a

conventional perimeter intrusion detection and assessment system fence forming a protected area within the SRS. *See id.* GANE then cites 10 C.F.R. § 20.1003, which requires the controlled area to be within the control of the licensees, and asserts that the largest area around the MFFF that is within the control of DCS consists of the protected area that lies within the boundary of the fence around the facility. *See id.* Next, quoting from two Staff RAIs, GANE states that its concern with DCS's declaration of the controlled area is supported by the Staff. In the first, a June 18, 2001, RAI on the ER, the Staff indicates that the ER should state that the NRC considers SRS workers who are not closely and frequently connected to the licensed activity and who are outside the MFFF restricted area, yet within the controlled area boundary, to be members of the public. *See id.* In the second, a February 28, 2001, RAI on the CAR, the Staff indicates that DCS should revise its description of the controlled area boundary to include only those areas to which DCS can limit access for any reason and change its description of the SRS workers deemed to be members of the public. *See id.* at 20-21. Finally, GANE points to DCS's July 12, 2001, answer to the Staff's RAI in which DCS argues that the agency has changed its policy by enacting a new 10 C.F.R. § 70.61, so that workers at other SRS facilities within the controlled area of the SRS may be considered workers for purposes of assessing doses from the operation of the MFFF. *See id.* at 21. In response, GANE states that, contrary to DCS's claim, the NRC has not changed the definition of a controlled area and, therefore, DCS has no legal basis for defining the controlled area boundary of the MFFF as the boundary of the entire SRS. *See id.* DCS argues the contention is inadmissible because it is based upon an incorrect legal interpretation of controlled area. *See* DCS GANE Contention Response at 28-30. The Staff argues the contention is inadmissible for, in effect, failing to state an adequate basis and for merely relying upon Staff RAIs. *See* Staff Contention Response at 15-16, 18-19.

Contrary to the arguments of DCS and the Staff, contention 5 is admissible. The contention is brief and straightforward in meeting the pleading requirements of 10 C.F.R. § 2.714(b)(2). It sets forth a specific statement of the issue controverted in asserting that DCS has incorrectly designated the entire SRS as the controlled area for the MFFF. It then sets forth a statement of the basis supporting that issue showing that a genuine dispute exists with DCS over an issue of material fact or law. Specifically, GANE relies on 10 C.F.R. § 20.1003 that defines the term "controlled area" and asserts that DCS does not have control over the entire SRS, but rather only over the area of the MFFF site surrounded by the plant fence. GANE then explains that DCS's improper designation of the controlled site has led DCS to improperly characterize members of the public as MFFF workers in the CAR and ER for purposes of calculating radiological doses to the public during normal operation and accident conditions. A contention need not be elaborate to be admissible, so long as it meets the requirements of section 2.714(b)(2), which contention 5 does here.

Even though it does not control all of the SRS, DCS nevertheless argues that GANE's contention 5 misinterprets the term "controlled area" in the Commission's regulations and claims that "the MOX Facility controlled area will be controlled by DCS through an Agreement, or 'protocol,' with the DOE that will, among other things, provide for limitation of site access in the event of an emergency." DCS GANE Contention Response at 28. According to DCS, the NRC "specifically sanctioned" this approach in amending 10 C.F.R. Part 70, and it points to two sentences from the Statement of Considerations accompanying the rule change as support. *See id.* at 28-29 & n.76. The two sentences from the Statement of Considerations relied upon by DCS, however, do not support its argument. Specifically, the Statement of Considerations states that

[t]he licensee can set the controlled area at any location around its facility as long as it maintains control of that area *as specified in Part 20* and retains the authority to exclude or remove personnel and property from the area. If the controlled area included the nearby Department of Energy (DOE) facilities, then NRC would consider the personnel working at those facilities to be "workers" for the purposes of the performance requirements of Section 70.61, provided the conditions of § 70.61(f)(2) are met.

Domestic Licensing of Special Nuclear Material; Possession of a Critical Mass of Special Nuclear Material, 65 Fed. Reg. 56,211, 56,212 (Sept. 18, 2000) (emphasis added). DCS's reading of these statements overlooks the "as specified in Part 20" language used by the Commission. Part 20, of course, necessarily includes the definition of controlled area contained in 10 C.F.R. § 20.1003 as is made abundantly clear by the amended first sentence of 10 C.F.R. § 70.61(f), which states that "[e]ach licensee must establish a controlled area, as defined in § 20.1003." And, as GANE contention 5 notes, controlled area is defined in section 20.1003 as "an area, outside of a restricted area but inside the site boundary, access to which can be limited by the licensee for any reason." Most simply put, DCS's purported "control" of access to the SRS by way of an agreement with DOE limiting SRS site access in the event of an emergency arguably is not coextensive with the "for any reason" language of the regulation. DCS has not argued, nor can it reasonably do so, that DOE will cede to DCS the authority to close the entire SRS "for any reason," given that the site includes a major state highway, CSX railroad tracks, and a public trash dump. Hence, for the same reason set forth in the bases of GANE contention 5, DCS's argument is unpersuasive.

Similarly, the Staff's argument that contention 5 is inadmissible because it merely references Staff RAIs is wide of the mark. Although reliance on the fact that the Staff has issued an RAI on a particular subject does not, by itself, present any genuine material dispute, *see, e.g., Oconee*, CLI-99-11, 49 NRC at 337, that clearly is not what GANE has done here. Rather, the bases for GANE's contention are the facts asserted about DCS's use in the ER and CAR of the entire

SRS for the controlled area of the MFFF and the Commission's regulations that GANE asserts prohibit DCS's actions. GANE has only used the Staff RAIs as confirmation of its reading of the regulations, a perfectly legitimate use of such materials. Accordingly, consolidated contention 5 is admissible.

5. *Inadequate Safety Analysis*

GANE's sixth contention asserts:

The Safety Analysis (SA) submitted as part of the DCS Construction Authorization Request (CAR) is seriously flawed and provides neither a comprehensive assessment of all potential accident consequences nor a credible assessment of all potential accident likelihoods. The SA does not provide information of sufficient detail and quality to enable the NRC to make a determination pursuant to 10 C.F.R. § 70.23(b) that "the design bases of the principal structures, systems and components [of the MFFF] . . . provide reasonable assurance of protection against natural phenomena and the consequences of potential accidents."

In particular, the SA fails to correctly identify and carry out consequence assessments for accident scenarios with "bounding" consequences. The applicant's failure to identify the actual bounding accident scenarios implies that it has underestimated the consequences of these scenarios, and hence may not have applied engineered and/or administrative controls to the extent necessary to meet the performance requirements established in 10 C.F.R. § 70.61 and the defense-in-depth requirements of 10 C.F.R. § 70.64(b). In addition, the SA incorrectly considers the controlled area boundary of the MFFF to be coincident with the SRS site boundary when evaluating accident impacts to the public, which leads to projected doses to the public considerably below the correct values. Hence, the CAR SA fails to demonstrate that the MFFF as designed is likely to be in compliance with 10 C.F.R. Part 70. NRC should therefore deny authorization of MFFF construction based on this document.

GANE Contentions at 21-22.

Much like the issue statement of the contention, the basis for the contention is long and detailed, consisting of five pages in which the factual statements and opinions are supported by the sworn declaration of Dr. Lyman. *See id.* at 22-26; *id.*, Exh. 1. Initially, the contention basis sets out the regulatory standard under 10 C.F.R. §§ 70.22(f) and 70.23(b) for judging the adequacy of DCS's safety analysis and the objective of the safety analysis as set forth in section 5.4.3.1 E of the Staff's SRP, which, in turn, looks to the performance requirements of 10 C.F.R. § 70.61 and the defense-in-depth requirements of 10 C.F.R. § 70.64(b). *See id.* at 22-23. Applying these standards, GANE challenges the "bounding" accident analyses in DCS's safety analysis and concurs with the Staff's assessment stated in its June 8 and 21, 2001, RAIs that DCS has not provided an adequate justification of its choice of bounding accidents nor provided sufficient information to determine the quantitative likelihood of the analyzed accidents. *See id.* at 23. GANE then details two illustrative examples of the shortcomings of DCS's safety assessments.

First, GANE states that, in the case of an internal fire addressed in section 5.5.3.2 of the CAR, DCS does not analyze a bounding case with respect to the source term and, in the case it does analyze — a fire in the plutonium dioxide buffer storage unit — its assumptions for bounding an airborne release fraction, an airborne respirable release number, and leak path factor are questionable and require more detailed justification. *See id.* at 23-24. In this regard, GANE asserts that the assumed value of the respirable airborne release fraction for plutonium dioxide powder exposed to fire is taken from NUREG/CR-6410. An examination of the origins of that value, however, indicates that (1) it is based upon a single set of experiments from the 1960s on a powder of unknown specifications with no correlation to the powders to be used at the MFFF and (2) NUREG/CR-6410 itself cautions that differences in powders make the study's results of questionable value to other applications. *See id.* at 24. As a second illustrative example, GANE asserts, in effect, that DCS has failed to provide adequate information to support the assumption that its HEPA filters will continue to operate normally during an accident involving a fire. Relying upon a 1994 DOE study of HEPA filters in design-basis accidents indicating that there are large gaps and limitations in the data on filter performance that introduce significant errors in the estimates of filter efficiencies, GANE asserts that even if conditions are precisely known, the performance of filters during accidents is uncertain. Because DCS has not provided even basic information about accident conditions relevant to HEPA filter performance, GANE asserts that it is impossible to determine quantitatively the likelihood that the filters will survive and thus meet the performance requirements of 10 C.F.R. § 70.61. *See id.* at 24-25. In this regard, GANE points to the Staff's June 21, 2001, RAI stating that HEPA filters are unlikely to survive an explosion of the magnitude implied by the CAR and indicates that if the filters are degraded, the accident event would not meet the performance requirements of 10 C.F.R. § 70.61. *See id.* at 25. GANE concludes that the severity of such an accident would be consistent with the Staff's preliminary findings contained in the August 10, 2001, response to the Petitioners' standing supplements, that an explosion in the absence of fully functioning HEPA filters would cause a dose 20 miles from the MFFF to approach the 5- to 25-rem range. *See id.* at 26.

With the exception of the portion of the contention regarding the controlled area boundary, the Staff supports the admission of the contention. *See Staff Contention Response* at 16-17 & n.20. For its part, DCS opposes the admission of GANE contention 6 on the grounds that it lacks an adequate basis. *See DCS GANE Contention Response* at 30-34. DCS claims that the basis for the contention is insufficient, arguing that "GANE states that the NRC Staff has posed numerous RAIs related to the ER and CAR safety assessments" but "RAIs by themselves are not a sufficient basis for a contention." *Id.* at 31. Next, DCS argues that GANE has not provided any facts, expert opinion, or other documentation that call into question the acceptability of DCS's analysis. *See id.* Finally, DCS argues

that the DOE paper calling for the use of conservative values for HEPA filter efficiencies in design-basis accident analyses relied upon by GANE does not raise any genuine issue of material fact. In this regard, DCS states, with a reference to its response to the Staff's RAI, that it used conservative values for HEPA filter efficiencies in its accident analysis by assuming that filter efficiency was reduced from 99.95% to 99% and that GANE has provided no basis for questioning that value. *See id.* at 32-33.

GANE contention 6 meets the requirements of 10 C.F.R. § 2.714(b)(2) and is admissible. The contention adequately identifies the issue controverted, provides an explanation of the basis for the contention, and details the facts, expert opinion, and documents that support GANE's position which, in turn, show that a genuine dispute exists with DCS on the adequacy of the accident analysis in DCS's safety analysis. DCS's argument concerning GANE's use of Staff RAIs both mischaracterizes GANE's contention and misapplies the law. Although the fact that the Staff has issued RAIs to DCS by itself does not support the admission of a contention, *see Oconee*, CLI-99-11, 49 NRC at 337, GANE has not merely relied, without more, upon the fact that the Staff issued RAIs to DCS on this issue. Rather, as should be obvious from a reading of the basis for the contention, GANE has used the substance of the RAIs as additional support for its articulated position. With respect to DCS's claim that the contention lacks expert support, DCS apparently overlooks Dr. Lyman's sworn declaration supporting the facts and opinions set forth in contention 6 and GANE's reliance on the limitation in NUREG/CR-6410 with regard to the accuracy of any conclusions that can be drawn from the data relied upon by DCS.

Similarly, with regard to DCS's last argument, the factual assertions and opinions in GANE's challenge to the validity of DCS's accident analysis and HEPA filter assumptions are supported, *inter alia*, by its expert Dr. Lyman. That challenge, as spelled out in the basis of contention 6, taken as a whole, directly questions the validity of DCS's HEPA filter assumption and the lack of information provided in the CAR to support these assumptions and clearly sets up a dispute as to the adequacy of the accident analysis. Indeed, at oral argument, DCS effectively conceded a lack of information in the CAR relating to HEPA filter performance in accident conditions of the kind claimed by GANE as precluding a quantitative analysis of HEPA filter efficiencies. *See Tr.* at 321-22. Moreover, subsequently filed supplementary information filed by DCS in response to Staff RAIs may provide grist for the summary disposition mill as the proceeding progresses but it cannot be used at the initial contention pleading and contention admissibility determination stage to defeat a contention's admissibility. Finally, for the reasons discussed with regard to the admissibility of GANE contention 5, the Staff's objection to the admissibility of the controlled area boundary portion of contention 6 is without merit. Accordingly, contention 6 is admissible.

6. Impacts of Using MOX Fuel in the Catawba and McGuire Reactors

In its seventh contention, GANE asserts that the ER is deficient because it does not provide an adequate analysis of the impacts of irradiating MOX fuel in the Catawba and McGuire reactors. *See* GANE Contentions at 27. As the basis for the contention, GANE notes that the Catawba and McGuire reactors have ice condenser containments and that, in addressing the environmental impacts of burning MOX fuel in these reactors, the ER references DOE's SPD EIS. *See id.* GANE asserts that DOE's analysis is inadequate because it fails to take into account significant new information contained in an April 2000 technical report prepared for the NRC by Sandia National Laboratories, "Assessment of the DCH [Direct Containment Heating] Issue for Plants with Ice Condenser Containments," NUREG/CR-6427 (SAND 99-2553) (Apr. 2000), showing that ice condenser plants are at least two orders of magnitude more vulnerable to early containment failure than pressurized water reactors with large dry or subatmospheric containments. *See id.* at 28-29; *id.*, Exh. 7. Relying on an article by Dr. Lyman, "Public Health Risks of Substituting Mixed-Oxide for Uranium Fuel in Light-Water Reactors," to be published in an upcoming issue of *Science and Global Security*, GANE claims that the Sandia findings are of particular concern because the public health consequences of a severe accident with containment failure and core dispersal are significantly increased with MOX fuel due to the greater concentrations of plutonium and other actinides compared to low-enriched uranium cores. *See* GANE Contentions at 28-29; *id.*, Exh. 8. DCS and the Staff argue that GANE contention 7 is inadmissible as outside the scope of the proceeding. *See* DCS GANE Contention Response at 34-35; Staff Contention Response at 17-18.

As previously indicated, DCS's reference in its ER to DOE's analysis from the SPD EIS of the environmental impacts of irradiating MOX fuel in reactors with ice condenser containments does not open DOE's analysis to challenge in this proceeding. Although it is one part of DOE's larger surplus plutonium disposal program, the scope of the instant proceeding is limited to the construction authorization for the MFFF, and the impacts of burning MOX fuel in the mission reactors is outside that scope. Accordingly, the contention is inadmissible. As the ER states, however, the "[s]afety and environmental impacts of design basis and beyond-design basis accidents will be analyzed by the mission reactor licensee as part of the 10 C.F.R. Part 50 reactor license amendment process," ER at 5-43. The Staff agrees that consideration of the impacts of such accidents will be part of the mission reactor license amendment process and the Staff's NEPA review so that the subject may be an appropriate one for contentions in the mission reactor license amendment proceedings. Tr. at 331-32.

7. *Inadequate Cost Comparison*

GANE's contention 9 declares that the ER fails to provide a discussion of the costs of the proposed MFFF or make a comparison to the costs of other alternatives. *See* GANE Contentions at 31. As the basis for contention 9, GANE quotes 10 C.F.R. § 51.45(c) to the effect that an environmental report is required to include "consideration of the economic, technical, and other benefits and costs of the proposed action and of alternatives." *Id.* GANE then asserts that DCS's ER violates this regulatory requirement by failing to discuss the economic costs and benefits of the proposed MOX facility or offering any comparison of the economic costs of other alternatives. *See id.* Finally, GANE's contention lists the various omitted costs that should be included in the ER and notes that, to the extent DCS intends merely to rely upon DOE's SPD EIS, the information in that impact statement has been superceded by more recent information from DOE. *See id.* DCS argues that GANE contention 9 represents an impermissible challenge to NRC regulations and does not raise a material issue of law or fact within the scope of the proceeding, so it is inadmissible. *See* DCS GANE Contention Response at 35-36. The Staff supports the admission of the contention. *See* Staff Contention Response at 19-20.

As the Staff asserts, contention 9 is admissible. DCS argues that, because the first sentence of section 51.45(c) uses the word "shall" in directing that an environmental report include an analysis of the environmental effects of the proposed action and alternatives, while the second sentence only uses the word "should" in calling for the consideration of the economic costs and benefits of the proposed action and alternatives, the inclusion of the economic costs and benefits of the proposed action and alternatives in its ER is permissive, not mandatory. DCS's interpretation of section 51.45(c) is unpersuasive. As a review of the history of section 51.45(c) reveals, prior to its amendment in 1996, the general language requiring the inclusion of the economic benefits of the proposed action and alternatives in an environmental report was contained in the first sentence of the provision containing the mandatory word "shall." *See* 10 C.F.R. § 51.45(c) (1996). The 1996 amendment divided the first sentence of subsection (c) into two separate sentences. The amendment then added an exception for environmental reports prepared for facilities seeking a license renewal at the beginning of the new second sentence that continued to contain the language about economic benefits. In amending the regulation, the Commission did not indicate that any change was intended in the mandatory nature of the economic costs and benefits requirement of section 51.45(c) other than for environmental reports for facilities seeking a license renewal. *See* 61 Fed. Reg. 28,467 (June 5, 1996). Indeed, if the entire economic costs and benefits provision was intended to be made permissive as DCS would have it, there would have been no need for the Commission to provide the specific and express exception for license renewal in the newly created

second sentence. Accordingly, the provision of section 51.45(c) providing for the inclusion in an environmental report of the economic costs and benefits of the proposed action and alternatives is mandatory as GANE's contention asserts.

Further, DCS's argument that the part of GANE contention 9 concerning the continuing validity of the cost data in DOE's SPD EIS is somehow an attack on DOE policy decisions and outside the scope of the proceeding is equally unavailing. DCS, not DOE, is required to meet the requirements of section 51.45(c) in its ER on the MFFF. The information on the MFFF necessary to meet the requirements of that section obviously is information that is well within the scope of the proceeding. Moreover, GANE's assertions that there is more recent DOE cost information than that contained in DOE's SPD EIS is not an attack on DOE's policy decisions. Rather, it is nothing more than an indirect reference to 10 C.F.R. § 51.45(e) that the information in an environmental report submitted pursuant to section 51.45(c) "should not be confined to information supporting the proposed action but should also include adverse information." Accordingly, GANE's ninth contention meets all the requirements of 10 C.F.R. § 2.714(b)(2) for an environmental contention and, therefore, is admissible.

8. *Inadequate Discussion of Transportation Impacts*

GANE's tenth contention asserts that DCS's reliance in its ER on the inadequate analysis in DOE's SPD EIS of the environmental impacts of transporting plutonium to the SRS through Georgia from the western states does not comply with the requirement of NEPA that all foreseeable impacts be analyzed. GANE Contentions at 31-32. As the basis for its contention, GANE repeats numerous comments on various aspects of the transportation of plutonium that the State of Georgia filed on DOE's draft SPD EIS. *See id.* at 32-41. DCS and the Staff oppose the admission of the contention on the grounds that the transportation issues raised are beyond the scope of the proceeding. *See* DCS GANE Contention Response at 36-37; Staff Contention Response at 20.

Like GANE's contention 7 concerning the impacts of burning MOX fuel in the Catawba and McGuire reactors, this contention dealing with the transportation of plutonium to the SRS is outside the scope of the proceeding. For the reasons discussed earlier (*see supra* p. 419), the subject of the shipment of MOX fuel from the MFFF to the mission reactors is within the scope of this proceeding. GANE contention 10, however, concerns the shipment of plutonium to the SRS, which is not a subject DCS reanalyzed in its ER. *See* ER at 1-5. The transportation of plutonium to the SRS is addressed in DOE's SPD EIS and, *inter alia*, deals with plutonium shipments to DOE's proposed PDCF which, in turn, supplies plutonium oxide feedstock to the MFFF. *See* ER at 1-3 to 1-5. The scope of the instant proceeding is limited to the construction authorization of the MFFF and

the subject of contention 10 falls outside that scope. Accordingly, the contention is inadmissible.

9. ER Fails To Address Waste Stream from Aqueous Polishing

In its eleventh contention, GANE claims that the ER understates the impacts of the waste stream from the aqueous polishing process used to remove gallium, fails to acknowledge problems with the same process in Europe, and adds to the radioactive waste already at the SRS without designing any plan for managing the waste as required by NEPA. *See* GANE Contentions at 41. Stripped to its essentials, GANE states in its basis for contention 11 that DOE's 1999 SPD EIS analyzed only a dry process called ARIES to purify the plutonium pit feed material of gallium and other contaminants. *See id.* at 42. The ER now indicates, however, that the MFFF will use an aqueous polishing process to remove gallium, americium, and uranium from the weapons-grade plutonium. *See id.* According to GANE, the aqueous process will create some 81,000 gallons of liquid high-alpha waste per year that contains nearly 80,000 curies of radioactivity, primarily from americium-241, for a total of over a million curies during the life of the facility. *See id.* at 42-44. GANE indicates that DCS has proposed no plan to deal with the large volume of this particular non-high-level waste as required by NEPA, but instead indicates that it will utilize DOE's high-level waste tanks in the F-Area tank farm at the SRS. *See id.* at 42. GANE next asserts that the aqueous polishing process is based upon similar processes at Cogema's MELOX and LaHague facilities in France and, even though DCS "cite[s] experience gained there and processes used there as bases for the plutonium fuel factory at SRS," all the "data relevant to design, performance, waste volume and management, and environmental and worker safety for COGEMA's French operations are secret and unavailable to the public." *Id.* at 41-42. GANE then refers to the study and monitoring by Greenpeace and WISE-Paris of contamination in the North Atlantic from the LaHague plant and claims that in order to comply with NEPA and 10 C.F.R. Part 70, the environmental data from the French facilities must be made available. *See id.* at 42. DCS and the Staff both claim that, because GANE has failed to provide an adequate basis for contention 11, it is inadmissible. *See* DCS GANE Contention Response at 37-40; Staff Contention Response at 21.

There is no doubt that contention 11 could be better organized and stated more clearly and precisely so that the contention provides an easier roadmap to follow. Nonetheless, the central part of the contention indicating that the ER fails adequately to address and analyze the impacts from the high-alpha waste stream produced from the MFFF and the supporting basis for the issue meet the minimum requirements for admissibility set forth in 10 C.F.R. § 2.714(b)(2). Thus, contrary to the arguments of DCS and the Staff, that portion of contention 11 is admissible.

In opposing contention 11, DCS argues that GANE inaccurately characterizes the record in that its ER provides that the wastes from the aqueous polishing process will be transferred to the SRS F-Area tank farm under DOE's jurisdiction and that neither DCS nor the NRC has responsibility or jurisdiction over the wastes once they leave the MFFF. *See* DCS GANE Contention Response at 38. DCS also argues that the environmental impacts associated with the SRS High Level Waste System, including the F-Area tank farm, are described in DOE's 1995 SRS Waste Management Final EIS in which DOE analyzed the management and treatment of the approximately 35 million gallons of existing high-level waste at the SRS as well as an additional 7.1 million gallons projected to be generated under various scenarios. Because the MFFF will generate less than 100,000 gallons of high-alpha liquid waste per year for 20 years, DCS claims the environmental impacts of the MFFF waste are bounded by existing analyses. *See id.* at 39.

DCS's argument ignores the primary thrust of GANE's contention that neither DOE's SPD EIS nor the ER analyzes and addresses the annual 80,000-gallon, non-high-level, high-alpha liquid waste stream containing nearly 80,000 curies of americium-241 as required by NEPA. The fact that the waste ultimately will be turned over to DOE, and therefore is not within the jurisdiction of either DCS or NRC once the waste leaves the MFFF, does not relieve DCS of its obligation, in the absence of any DOE analysis of the high-alpha waste, to analyze and address in the ER the environmental impacts of the wastes it generates. Although DCS argues that the environmental impacts of the SRS High Level Waste System, including the F-Area tank farm, are described in DOE's SRS Waste Management Final EIS,¹¹ that EIS deals with high-level waste, not the kind of non-high-level, high-alpha liquid waste generated by the MFFF and, as Appendix B, Table B.13-2 of that EIS shows, the F-Area tanks do not contain americium-241. Indeed, DCS has not challenged GANE's assertion that DOE's SPD EIS does not address the disposition and impacts of the high-alpha waste stream.¹² Similarly, DCS's "proverbial drop in the bucket argument" concerning the quantity of waste generated by the MFFF in relation to the 35 million gallons of high-level waste already at the SRS again does not address the principal focus

¹¹ In citing DOE's 1995 SRS Waste Management Final EIS, DCS does not provide even a volume number, much less a section or page number, to the purportedly relevant portions of the document that it claims describe "[t]he environmental impacts associated with the SRS High Level Waste (HLW) system, including the F-Area Tank Farm . . ." DCS GANE Contention Response at 39. Just as the mere reference to a document does not provide an adequate basis for a contention, *see Calvert Cliffs*, CLI-98-25, 48 NRC at 348, the general reference to a document or documents without specific citations to the relevant material in the document is not an adequate response to a contention.

¹² Although DCS neither cites nor otherwise references DOE's SPD EIS in opposing GANE contention 11, it appears DOE briefly describes in that EIS a "plutonium-polishing process." *See* SPD EIS at 2-35. Assuming that process is comparable to the MFFF aqueous polishing process, the SPD EIS does not appear to be consistent with the description in DCS's ER of the disposition and treatment of the high-alpha waste stream (i.e., americium-241). *See* ER at 5-20.

of GANE's contention that the environmental impacts of a high-alpha waste stream containing americium-241 has not been appropriately addressed. Perhaps this is why the ER, in contrast to DCS's contention response, states only that "any impacts to the environment *should* be bounded by those evaluated in the previous DOE EISs." ER at 5-20 (emphasis added). Accordingly, that portion of GANE contention 11 asserting that DCS's ER understates the impacts of the waste stream from the aqueous polishing process is admissible.

10. Failure To Analyze Malevolent Acts of Terrorism

GANE contention 12 states that NEPA requires the analysis of foreseeable environmental impacts and asserts that the ER fails to analyze the foreseeable impacts of malevolent acts of terrorism and insider sabotage causing a beyond-design-basis accident. See GANE Contentions at 45. As the basis for the contention, GANE relies upon an internal memorandum of the State of Georgia criticizing DOE's response to the State's comments on DOE's draft SPD EIS, indicating, *inter alia*, that the State is unconvinced by DOE's assertions that malevolent acts are only conjecture and do not present a credible scenario for serious accidents. See *id.* at 47-48. Further, GANE contends that for the malevolent act scenario to go unaddressed could lead to dire consequences for the people and environment of South Carolina and Georgia because

[t]errorism scenarios abound in the nightly news. Assault weapons and rocket launchers may be purchased by members of the civilian population not only on the black market but at weapons trade shows. News stories abound of employees at nuclear facilities around the world stealing special nuclear materials, to prove that they CAN or at least that's what they say when caught.

Id. at 48. DCS opposes the admission of the contention, arguing that it raises matters that need not be considered under NEPA. See DCS GANE Contention Response at 40-41. For its part, the Staff argues that the contention lacks an adequate legal basis and thus is inadmissible. See Staff Contention Response at 22.

GANE contention 12 meets the standards of 10 C.F.R. § 2.714(b)(2) for an admissible environmental contention. The contention states the precise issue raised, i.e., pursuant to NEPA, DCS's ER must analyze the environmental impacts of terrorist acts causing a beyond-design-basis accident because such terrorist acts are reasonably foreseeable. It complies with section 2.714(b)(2)(i) and (ii) by providing a brief explanation of the basis and an outline of the basic facts supporting the contention. In this regard, GANE references an internal memorandum of the State of Georgia stating the State's view that terrorist acts against nuclear interests are credible and not conjecture, and then sets out a

simple, fact-based argument to the effect that terrorist scenarios and the means by which such schemes are executed are now foreseeable as they are regular fare in the news. Such fact-based arguments are one method of complying with the requirements of section 2.714(b)(2). *See, e.g., Oconee*, CLI-99-11, 49 NRC at 342 (“[d]ocuments, expert opinion, or at least a fact-based argument are necessary”). Finally, and as required by section 2.714(b)(2)(iii), GANE’s contention provides sufficient information to show a genuine dispute with DCS over whether the ER, as the foundation document for the Staff’s environmental impact statement, complies with NEPA because it fails to analyze the environmental impacts of foreseeable terrorist acts causing a beyond-design-basis accident.

Citing *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973), DCS asserts, without any analysis, that “NEPA does not require an assessment of the environmental impacts of terrorism.” DCS GANE Contention Response at 41 & n.107. *Shoreham*, a reactor construction permit proceeding, involved an appellate challenge to the exclusion of the issue of foreign sabotage from the proceeding and the argument that the Licensing Board’s decision was deficient because the risks of foreign and industrial sabotage should have been factored into the Board’s cost-benefit analysis under NEPA. *See Shoreham*, ALAB-156, 6 AEC at 851. In upholding the exclusion of this issue, the Appeal Board held that the rationale for 10 C.F.R. § 50.13, which obviates the need for design features in reactors to protect against attacks by foreign enemy governments or individuals, applied to the Commission’s NEPA responsibilities as well. *See id.* By its terms, however, section 50.13 applies only to production and utilization facilities and is inapplicable to the MFFF. Nor is there a comparable regulatory provision covering material license facilities, specifically fuel fabrication facilities. Accordingly, *Shoreham* is inapposite.

Although the rationale for 10 C.F.R. § 50.13 that the *Shoreham* Appeal Board found applicable to the agency’s NEPA responsibilities so as to preclude consideration of the environmental impacts caused by foreign sabotage at a nuclear reactor would appear to be equally applicable to all other facilities regulated by the NRC, the simple fact remains that the Commission has never promulgated a parallel regulation covering 10 C.F.R. Part 70 facilities such as the MFFF. Consequently, for the Licensing Board to apply the rationale for 10 C.F.R. § 50.13 to the agency’s responsibilities under NEPA here, requires a leap that is tantamount to writing a comparable regulation for Part 70 facilities and then applying the rationale for that new regulation to the agency’s NEPA responsibilities for the MFFF. Such an action would involve the Board in making policy decisions that are the exclusive domain of the Commission and require the Board to exceed its assigned role in the Commission’s adjudicatory system.

DCS and the Staff agree, and as GANE’s contention indicates, the applicable legal standard under NEPA is that only reasonably foreseeable environmental impacts arising from the proposed action need be analyzed. *See Tr.* at 352; Staff

Contention Response at 22; *see, e.g., Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 739 (3d Cir. 1989). Stated otherwise, environmental impacts from remote and speculative initiating events need not be analyzed. *See, e.g., Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station)*, CLI-90-4, 31 NRC 333, 334-35 (1990). Although agreeing on the applicable legal standard, both DCS and the Staff also argue that terrorist acts are not foreseeable. *See, e.g., Tr.* at 354-55, 357-58, 362.

GANE's contention was filed on August 13, 2001. Regardless of how foreseeable terrorist acts that could cause a beyond-design-basis accident were prior to the terrorist attacks of September 11, 2001, involving the deliberate crash of hijacked jumbo jets into the twin towers of the World Trade Center in New York City and the Pentagon in the Nation's capital, killing thousands of people, it can no longer be argued that terrorist attacks of heretofore unimagined scope and sophistication against previously unimaginable targets are not reasonably foreseeable. Indeed, the very fact these terrorist attacks occurred demonstrates that massive and destructive terrorist acts can and do occur and closes the door, at least for the immediate future, on qualitative arguments that such terrorist attacks are always remote and speculative and not reasonably foreseeable.

Obviously, the Board cannot close its eyes to the recent terrorists acts or the Commission's immediate response that nuclear facilities, including fuel facilities, maintain the highest level of security readiness. Nor is it controlling that the events of September 11 occurred subsequent to the filing of GANE's contention and are not specifically included in it. The contention speaks generically of foreseeable terrorist acts causing a beyond-design-basis accident and more is not required. In this regard, however, it should be noted that GANE sought leave to amend the factual basis for the contention and also requested the Board to take judicial notice of the recent terrorist attacks. *See Tr.* at 351. Having found that the contention is admissible, the Board notes that DCS and the Staff are still free to challenge quantitatively the likelihood of such a terrorist-initiated event in an attempt to demonstrate that it is remote and speculative.

DCS also argues that because the consequences of a terrorist-caused accident are similar to other types of accidents addressed in its ER and other impact statements, there is no reason separately to address terrorist acts. *See DCS GANE Contention Response* at 41. Although in some circumstances DCS's argument may have currency,¹³ the accidents analyzed in the ER for the MFFF, as well as those in the CAR, are not similar to a beyond-design-basis accident caused by terrorist acts of the type recently witnessed. All of DCS's accident scenarios assume filtration efficiency for each HEPA filter of at least 99%. *See ER*,

¹³ *See, e.g., Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2)*, ALAB-819, 22 NRC 681, 698-99 (1985), *aff'd in part*, CLI-86-5, 23 NRC 125 (1986), *aff'd in part and rev'd on other grounds sub nom. Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d Cir. 1989).

App. F at F5-F6; CAR § 11.4.9.2. Stated otherwise, in all of DCS's accident scenarios, both HEPA filters continue to function and DCS has not analyzed the impact of any accident in which one or both HEPA filters are incapacitated. In such circumstances, DCS's argument is unpersuasive. Finally, both DCS (Tr. at 355) and the Staff (Staff Contention Response at 22) argue that contention 12 is inadmissible because GANE has not shown that it is foreseeable that a MOX facility will be the target of a terrorist attack. The test under NEPA, however, is only reasonable foreseeability, not perfect prescience.

Even though GANE contention 12 raises the issue of a terrorist-caused beyond-design-basis accident as an environmental contention under NEPA, and not as a safety contention, it nonetheless raises an extremely important policy question. In such circumstances, the Board normally would certify the question of the admissibility of this contention to the Commission pursuant to 10 C.F.R. § 2.1209(d). In this instance, however, DCS has vigorously opposed the admission of all of GANE's contentions and the grant of its intervention petition and DCS has the opportunity to place the issue squarely before the Commission in an appeal from the grant of GANE's intervention petition. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998). Thus, the certification by the Board of this matter is unnecessary.

11. Lack of Probabilistic Risk Assessment

GANE's last contention, number 13, asserts that the ER satisfies neither NEPA nor the NRC's regulations because it contains an inadequate assessment of the probability and consequences of accidents. *See* GANE Contentions at 48. As the basis for contention 13, GANE first states that the accident analysis in the ER is inadequate because it is not supported by a detailed license application describing how the MFFF will be operated and, without such information, the risk assessment is merely speculative. *See id.* at 48-49. Next, GANE asserts that the ER violated 10 C.F.R. § 51.45(c) because it does not quantify the probability of accidents or explain why it is not practicable to quantify them. *See id.* at 49. DCS opposes the admission of the contention, arguing that it is legally incorrect and also mischaracterizes the ER. *See* DCS GANE Contention Response at 41-43. The Staff argues the contention is inadmissible for being "too vague and general," apparently meaning it fails to meet the requirements of 10 C.F.R. § 2.714(b)(2). *See* Staff Contention Response at 23.

Both of GANE's asserted bases for contention 13 are insufficient to support the contention. GANE cites no NEPA or Commission regulatory provision requiring that the ER be supported by a detailed license application describing how the facility will be operated. Further, contrary to GANE's assertion, 10 C.F.R. § 51.45(c) does not support its contention. In pertinent part, section 51.45(c) states that the "analyses for environmental reports shall, to the fullest extent

practicable, quantify the various factors considered” and “[t]o the extent that there are important qualitative considerations or factors that cannot be quantified, those considerations or factors shall be discussed in qualitative terms.” This unambiguous regulation implementing the Commission’s responsibility under NEPA, *see* 10 C.F.R. § 51.10(a), does not by its terms mandate the preparation of a probabilistic risk assessment. Further, no other Commission environmental or safety regulation requires DCS to prepare a probabilistic risk assessment for the MFFF. Moreover, contrary to GANE’s assertion, the ER states why DCS provides qualitative rather than quantitative statements of accident risks. *See* ER, App. F at F-6. Accordingly, contention 13 is inadmissible because it lacks an adequate basis showing that a genuine dispute exists on a material issue of law or fact as required by section 2.714(b)(2)(iii).

B. BREDL Contentions

BREDL’s 77-page contention filing begins with a 12-page introduction stating, *inter alia*, that its contentions are written “with an eye towards endorsing the NRC’s own ‘plain language policy’ ” so as to be readily understandable. BREDL Contentions at 11. BREDL then states that its “[c]ontentions are grouped into categories to avoid duplication involved with citing rules as well as redundancy in the facts and narratives [*sic*] discussions. In this manner, contentions are more discrete and easily identified, with related contentions are [*sic*] grouped in a systematic matter.” *Id.* Although the announced scheme for drafting and arranging its contentions is admirable, BREDL’s execution falls far short of its goal. The separation of purported issue statements from the asserted factual and legal bases for the contentions, combined with frequent numbering and other identification errors, and the presentation of seemingly disjointed statements instead of any real connecting narrative or explanation has made it extremely difficult in many instances for the Licensing Board to understand and match the supposed bases with the issues. Thus, any misinterpretation or misapprehension of BREDL’s contentions by the Board in determining whether they meet the requisite regulatory standards for admissibility rests squarely with BREDL. *See, e.g., Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 15 (2001).

1. Contention Group 1: Gross Violations of Radioactive Waste Management Rules

The first group of BREDL contentions consists of five parts, labeled 1A through 1E. In its first contention, BREDL asserts that DCS’s proposal to transfer waste to DOE’s contiguous SRS F-Area tanks for processing, storage, and disposal is

a violation of NRC regulations. *See* BREDL Contentions at 13. As a basis for the contention, BREDL asserts that the MOX facility will generate a new form of waste (high-alpha-activity waste), which will be transferred to DOE. BREDL contends that this transfer to the F-Area tank farm will create an unlicensed waste facility in violation of 10 C.F.R. § 20.2001. *See id.* at 15. DCS argues that the contention is inadmissible because there is no regulatory violation and thus no genuine dispute over any material issue of fact or law. DCS also asserts that the contention is beyond the scope of the proceeding because it fails to assert any deficiencies in the ER, QAP, or the identification of the design bases of the principal SSCs. *See* DCS BREDL Contention Response at 17-18. The Staff asserts the contention is inadmissible because there is no factual or legal basis for the contention. *See* Staff Contention Response at 28-29.

BREDL's first contention raises no genuine issue of fact or law as required by 10 C.F.R. § 2.714(b)(2)(iii). In pertinent part, section 20.2001(a) provides that "[a] licensee shall dispose of licensed material only . . . [b]y transfer to an authorized recipient as provided in . . . part[] 70 of this chapter." In turn, 10 C.F.R. § 70.42(b)(1) allows a licensee to transfer special nuclear material to DOE if such action is not prohibited by its Part 70 license. Consequently, BREDL's contention is footed upon a patently incorrect reading of an unambiguous regulation. Section 70.42(b) is clear on its face that such a transfer of waste to DOE is permitted under the Commission's rules. The contention does not assert that the regulation is unclear so as to provide for alternative readings that would create a genuine dispute. Additionally, BREDL's citation to the definition of "contiguous sites" in 10 C.F.R. § 70.4 as a legal basis for the contention does nothing to make it admissible because the contention fails to explain how this definition is even relevant. *See* BREDL Contentions at 14. Accordingly, the contention is inadmissible.

In contention 1B, BREDL asserts that DCS submitted "contradictory and therefore inaccurate reports," in violation of 10 C.F.R. § 70.9, which requires the information submitted by an applicant to be "complete and accurate in all material respects." *Id.* at 13-14. As the basis for this contention, BREDL claims that the information submitted by DCS contains contradictory language because, on the one hand, the ER states that the "greatest impact of operations at the [MOX] fuel fabrication facility will be the amount of waste generated," but on the other, the CAR states that a "very small amount" of generated waste will be transferred to the SRS. *Id.* at 15. DCS and the Staff argue that there is no factual or legal basis for the contention, asserting that BREDL has taken the two statements out of context. *See* DCS BREDL Contention Response at 18-19; Staff Contention Response at 29-30. DCS also asserts that the contention is beyond the scope of the proceeding because it does not assert any deficiency in the CAR, ER, or QAP. *See* DCS BREDL Contention Response at 19.

Contention 1B is inadmissible. First, the contention fails to set forth “a specific statement of the issue of law or fact to be raised” as required by section 2.714(b)(2). BREDL’s contention is vague and open-ended, failing to identify a specific substantive safety or environmental issue that would entitle BREDL to legal relief. In addition, BREDL’s contention does not provide an adequate basis as required by section 2.714(b)(2)(i). The contention purports to quote a sentence from the ER, but it fails to provide any citation for the referenced passage. Further, it fails to provide any explanation as to how or why these statements contradict one another, which is not self-evident. Indeed, as DCS and the Staff state, BREDL has taken the statements out of context.

BREDL’s contention 1C asserts that the ER fails to identify numerous adverse impacts of radioactive waste generation in violation of 10 C.F.R. § 51.45(b), all of which relate to past actions and alleged failures of various DOE waste initiatives. *See* BREDL Contentions at 13-14. For example, BREDL alleges that DCS has failed to identify numerous adverse impacts of the radiological waste disposal plan, failed to describe “notable features of the management system,” failed to address or acknowledge mismanagement of waste at the SRS, and failed to identify a “plethora of failures and financial boondoggles associated with attempts to resolve the problem.” *Id.* at 15-18. In addition, BREDL claims that DCS has not described its present and future compliance with the “SRS Federal Facility Agreement,” and has failed to acknowledge key process uncertainties in managing high-level liquid radioactive waste at SRS. *See id.* at 17-18.¹⁴ BREDL also alleges that the waste problem at SRS is exacerbated because DCS has adopted a false baseline of “zero,” ignoring the effects of the already present 36 million gallons of waste at the F-Area tank farms that will not be removed until 2028. *See id.* at 16-17. BREDL asserts that these issues are “gross violation[s] of all aspects of NEPA,” and a failure to comply with 10 C.F.R. § 70.9, which requires that “[i]nformation provided to the Commission by an applicant for a license . . . be complete and accurate in all material respects.” *Id.* at 15. DCS and the Staff both assert that this contention is beyond the scope of the proceeding. *See* DCS BREDL Contention Response at 19-20; Staff Contention Response at 30.

Because this contention focuses exclusively on DOE’s general management of waste at the SRS, it is beyond the scope of the instant proceeding that deals solely with the construction authorization for the MFFF. As previously noted (*see supra* p. 424), the issues concerning the management of waste of the SRS are addressed in DOE’s SRS Waste Management Final EIS. Thus, the contention is inadmissible.

¹⁴ BREDL has labeled two items as d.vi on page 17.

BREDL's fourth contention submits that "DOE committed gross violations of the National Environmental Protection [*sic*] Act . . . by knowingly publishing false, misleading and inaccurate information in legal NEPA documents." BREDL Contentions at 13. As a legal basis for the contention, BREDL lists, without more, 10 C.F.R. § 51.45(b) and (e), and all parts of NEPA. *See id.* at 14. The contention then asserts various supposed inadequacies with DOE's SPD EIS and other DOE documents. DCS and the Staff argue that this contention is beyond the scope of the proceeding. *See* DCS BREDL Contention Response at 20-21; Staff Contention Response at 30-31. DCS and the Staff are correct. Like the third contention in this group, this contention is beyond the scope of the proceeding addressing deficiencies in DOE's NEPA process and other related DOE activities.

In the final contention of this group, BREDL asserts that the ER and CAR are inadequate because they are "dominated by deficiencies." BREDL Contentions at 13. As its legal basis, the contention merely lists all parts of NEPA and 10 C.F.R. § 70.9. *See id.* at 14. Regarding alleged deficiencies in the CAR, the contention claims DCS fails to: (1) define the disposal route for evaporator bottoms; (2) provide for sampling of the "stripped uranium stream"; (3) specify the quantity of principal radionuclides in liquid and gaseous effluents released to unrestricted areas; and (4) specify "details" of the design requirements for the high-alpha liquid waste transfer line. *See id.* at 20. With regard to references in the ER, the contention claims that DOE's proposed F-Area Infrastructure Upgrades will include constructing a liquid waste pipeline from the MFFF to the F-Area outside the facility that has never been analyzed under NEPA. *See id.* DCS argues that the "[r]equestors' statements that these details are not provided is an improper challenge to 10 C.F.R. § 70.22(f)" and that the contention is factually incorrect. DCS BREDL Contention Response at 21. The Staff asserts that this contention is inadmissible because the legal and factual bases for the contention are inadequate. *See* Staff Contention Response at 25.

With the exception of the environmental portion of the contention concerning the unanalyzed impacts of the high-alpha liquid waste transfer line, this contention is inadmissible. None of the asserted deficiencies claimed by BREDL in that part of the contention concerning the CAR raises a genuine dispute of material law or fact with DCS. Contrary to BREDL's first assertion, DCS's CAR demonstrates a disposal route for the evaporator bottoms. This waste will ultimately be discharged by the MFFF in the high-alpha liquid waste stream for management by DOE. *See* CAR Figure 10-1 at 10-21. With respect to its second assertion, the CAR indicates that the stripped uranium stream will in fact be sampled as it undergoes isotopic dilution prior to transfer to the high-alpha waste tanks. *See id.*; CAR § 10.1.4.1.1. The third assertion is also factually inaccurate because, as the CAR indicates, there are no radionuclide discharges from the MOX facility from normal operations into the environment, and the gaseous discharges that occur are addressed in the CAR. *See* CAR §§ 10.1.1, 10.2.1.2. Similarly, BREDL's last

assertion concerning deficiencies in the CAR is incorrect because DOE, not DCS, will construct the waste pipeline to the F-Area outside the MFFF, so the CAR need not include such information. Accordingly, these parts of the contention are inadmissible. Unlike the portions of BREDL contention 1E alleging deficiencies in the CAR, the portion of the contention asserting that the ER is deficient for failing to address the environmental impacts of the proposed high-alpha liquid waste stream pipeline meets the minimum requirements to be an admissible contention. In this portion of its contention, BREDL notes that page 1-3 of the ER indicates that a liquid waste pipeline will be constructed from the MFFF to the DOE F-Area tank farm. *See* BREDL Contentions at 20. BREDL also asserts that in January 2001 it formally requested DOE to analyze the impacts of the waste stream in a supplemental EIS, and DOE refused. *See id.* at 19-20. BREDL then claims that the impacts from the pipeline have never been analyzed as required by NEPA. *See id.* at 20. Thus, like the admissible portion of GANE contention 11 asserting that neither DOE nor DCS has appropriately analyzed the impacts of the high-alpha waste stream from the aqueous polishing process as required by NEPA, this portion of BREDL contention 1E is also admissible for the same reasons. Because of the similarity of the two issues, this portion of BREDL contention 1E is consolidated with the admissible portion of GANE contention 11.

2. Contention Group 2: NRC Violations of NEPA

The second group of contentions consists of four parts labeled 2A through 2D. The first contention asserts that “NRC failed to implement NEPA early in the process by issuing a timely notice of intent to prepare an [EIS]” and failed to consult with the Defense Nuclear Facilities Safety Board (DNFSB),¹⁵ resulting in bias in the scope of the proceeding in favor of DCS. BREDL Contentions at 21.¹⁶ BREDL relies on NEPA, 10 C.F.R. §§ 51.15(a), 51.25, and 51.26(a), and Council on Environmental Quality (CEQ) regulations as the legal bases for the contention, asserting that NRC should have issued a notice of intent to prepare an EIS shortly after DOE prepared its SPD EIS record of decision (ROD), and that it should have included input from the DNFSB in the ER. *See id.* at 21-22. DCS asserts that this contention fails to raise any issues within the scope of this proceeding and fails to provide a basis for its assertion that the Staff has violated NEPA. *See* DCS BREDL Contention Response at 24-25. DCS, along with the Staff, also argues that the contention is inadmissible because BREDL has failed to articulate the necessary basis to establish any genuine dispute of law or fact. *See id.* at 24; Staff Contention Response at 32 & n.41.

¹⁵The DNFSB was created by Congress to monitor DOE’s nuclear facilities. *See* 42 U.S.C. §§ 2286, 2286g (1994).

¹⁶In the original filing, this page was labeled as “1 of 30.” Because it falls in numeric sequence as page 21, we refer to it as such.

BREDL has submitted an inadequate basis for the contention because it has not identified a genuine dispute of material law or fact as required by section 2.714(b)(2)(iii). First, neither section 51.26(a) nor the applicable CEQ regulations specify any particular deadline for the publication of a notice of intent.¹⁷ In any event, the requisite notice was issued in March 2001, and BREDL does not detail how the NRC failed “to provide a clear record of decision to provide an EIS.” BREDL Contentions at 25; *see* 66 Fed. Reg. 13,794 (Mar. 7, 2001). Similarly, there is no requirement that the DNFSB be consulted in the NRC’s NEPA scoping process. The language of 10 C.F.R. § 51.28(a)(3) states:

The appropriate NRC staff director shall invite the following persons to participate in the scoping process:

....

(3) Any other Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.

According to 42 U.S.C. § 2286a(1), the mandate of the DNFSB is to “ensure that public health and safety are adequately protected” by reviewing standards, designs, operational data, and construction of facilities. Therefore, the DNFSB has no obvious “special expertise” regarding environmental matters, and as such was not required by the regulations to be invited to the Staff’s scoping meetings on the EIS. Hence, BREDL fails to establish a basis as required by section 2.714(b)(2)(i) for that part of its contention claiming the DNFSB was illegally excluded, and it has proffered no justification why such consultations would be beneficial or shown that the DNFSB has “special expertise.”

Contentions 2B through 2D are similarly flawed. Contention 2B states that the “NRC and Applicant collaborated to identify the scope of the Environmental Report outside of NEPA provisions, resulting in segmentation of the NEPA process, which again benefits the Applicant in ways contrary to NEPA.” BREDL Contentions at 21. As a factual basis for this contention, BREDL points to various correspondence between DCS and the Staff regarding the scope of the ER and EIS. *See id.* at 24. DCS and the Staff argue that this contention is inadmissible because BREDL has failed to assert a genuine issue of material fact or law. *See* DCS BREDL Contention Response at 26; Staff Contention Response at 32 & n.42.

In contention 2B, BREDL fails to identify any provision in the regulations that prohibits this type of communication between DCS and the Staff. Contrary to BREDL’s assertion, 10 C.F.R. § 51.40(a) “encourage[s]” the Staff to confer

¹⁷ 10 C.F.R. § 51.26(a) states that

[w]henver the appropriate NRC staff director determines that an environmental impact statement will be prepared by NRC in connection with a proposed action, a notice of intent will be prepared as provided in § 51.27 and will be published in the *Federal Register* as provided in § 51.116, and an appropriate scoping process (*see* §§ 51.27, 51.28, and 51.29) will be conducted.

with a prospective applicant before the ER is submitted. Accordingly, contention 2B raises no genuine issue of material law or fact as required by section 2.714(b)(2)(iii) and is inadmissible.

BREDL contention 2C alleges that the “NRC began a de facto NEPA staff review before any time schedule for such review was published.” BREDL Contentions at 21. As legal support, BREDL proffers CEQ regulations regarding the timing for the commencement of an EIS, along with “10 C.F.R. Part 51, Subpart A.” *See id.* at 22. DCS and the Staff assert that the contention lacks basis and specificity, and raises no genuine issue of material law or fact. *See* DCS BREDL Contention Response at 26-27; Staff Contention Response at 32.

This contention fails to meet the section 2.714(b)(2)(iii) requirement that a petitioner assert a genuine issue of material law or fact with adequate basis and specificity to support the claim. Contrary to BREDL’s assertion, 10 C.F.R. § 51.15(a) does not preclude the Staff from beginning a NEPA investigation before the publication of a schedule, stating only that the Staff “shall . . . establish a time schedule for all or any constituent part of the NRC staff NEPA process,” to be followed to the “maximum extent practicable.” Nor has BREDL identified any CEQ regulation that precludes the Staff’s actions. This contention is thus inadmissible.

Contention 2D asserts that the “NRC changed its criteria for Environmental Justice issues under NEPA without informing the public. . . .” BREDL Contentions at 21. In support of the contention, BREDL submits that a December 11, 2000, letter to DCS from the Staff demonstrates a change in the NRC-defined scope of the EIS in favor of DCS in violation of 10 C.F.R. § 51.26(a), which requires that the scope of an EIS be determined following the NEPA-mandated scoping process. *See id.* at 27 & n.9. DCS and the Staff argue that there is no genuine dispute of material fact or law alleged by the contention as required by section 2.714(b)(2)(iii). *See* DCS BREDL Contention Response at 27; Staff Contention Response at 32.

DCS and the Staff are correct that the contention is inadmissible. As noted by DCS, the letter cited by BREDL indicates that the environmental justice criteria were changed because of a factual error.¹⁸ Thus, this contention fails to raise a genuine issue of material fact or law as required by section 2.714(b)(2)(iii).

¹⁸ *See* Letter from Melanie A. Galloway, Chief, Enrichment Section of the Division of Fuel Cycle Safety and Safeguards, Special Projects Branch, NMSS, to Robert H. Ihde of DCS (Dec. 11, 2000), Attach. at 1-2. The letter states, in pertinent part,

DCS has also requested guidance on whether to follow the Environmental Justice guidance in [the SRP] . . . or the guidance provided as an attachment to the NRC letter dated 5/3/00. The SRP states that the Description of the Affected Environment should include “[s]ocioeconomic information, including that for low-income and minority populations within a 50 mile radius.” This dimension is incorrect. DCS should follow the [NMSS] Policy and Procedures letter 1-50, Rev. 2, which states that “if the facility is located outside the city limits or in a rural area, a 4 mile radius (50 square miles) should be used.”

Moreover, BREDL has neither asserted nor described how such a purported change in criteria would affect the DCS NEPA analysis.

3. Contention Group 3: Conflicts of Interest

This group of contentions has three parts, collectively labeled 3A through 3C. The first contention in this group asserts that the “NRC has a Conflict of Interest in this proceeding because it has received, receives, and pursues receiving DOE funding to support licensing activities for the Russian MOX program” BREDL Contentions at 31. As the legal basis for this contention, BREDL cites the “Energy Reorganization Act [of 1974].” *Id.* DCS and the Staff submit that the contention is inadmissible because it fails to assert an adequate basis and is beyond the scope of the proceeding. *See* DCS BREDL Contention Response at 28; Staff Contention Response at 33-34. DCS and the Staff are correct. The issue of the NRC’s involvement in the Russian MOX program is clearly beyond the scope of the proceeding as set forth in the Commission’s Hearing Notice. *See* 66 Fed. Reg. at 19,996.

Contention 3B asserts that “NRC hired as its NEPA contractor an organization — Argonne National Laboratory (ANL) — with obvious conflicts of interest . . . to conduct the EIS.” BREDL Contentions at 31. As a legal basis, BREDL refers to a CEQ regulation, 40 C.F.R. § 1506.5(c), which states that the lead agency should choose a contractor with a cooperating agency to avoid any conflicts of interest. Additionally, without an explanation of how it specifically relates to the contention, BREDL also asserts as a legal basis the “Atomic Energy Act of 1954. Section 2. Findings. (g)” which, according to BREDL, asserts that “[f]unds of the United States may be provided for the development and use of atomic energy under conditions which will provide for the common defense and security and promote the general welfare.” *Id.* As the factual basis for the contention, BREDL argues that ANL is a DOE-funded and supervised laboratory that operates within the jurisdiction of the Chicago Operations Office, “the same office implementing the contract between DOE and [DCS].” *Id.* at 33. Additionally, ANL “received millions of dollars” in funding from DOE and “has a federally approved institutionalized commitment to advancing the cause of nuclear power.” *Id.* DCS and the Staff argue that this contention is inadmissible for failing to raise a genuine issue of material fact or law or an issue that is within the scope of this proceeding. *See* DCS BREDL Contention Response at 28; Staff Contention Response at 33-34.

This contention lacks the necessary basis and specificity required by section 2.714(b)(2). BREDL has not cited any parts of the ER that it believes are inaccurate due to the alleged bias of ANL. In addition, BREDL has not submitted any expert affidavits or other documentary evidence in support of its position regarding “the Applicant’s activities in pursuing a plutonium fuel economy that

contradicts U.S. policy.” *Id.* at 31. BREDL states that it “intends to find one or more experts to testify” in support of the contention “[i]f this contention is accepted by the Panel.” *Id.* A petitioner is required, however, to submit supporting expert affidavits at the time of the submission of contentions. *See* 10 C.F.R. § 2.714(b)(2)(ii). Additionally, bald assertions such as “[t]he fact that ANL views itself as a supporting role for DOE in and of itself should disqualify it from the process,” fail to raise any issues or provide an adequate basis in support of the contention. *Id.* at 34. Accordingly, contention 3B is inadmissible.

Contention 3C asserts that “[t]he Applicant has a clear conflict of interest in terms of being involved with U.S. foreign/nonproliferation policy and also having a vested interest in parallel efforts in Russia. . . .” *Id.* at 31. In support, BREDL references, without more, an unspecified “attachment.” *Id.* DCS and the Staff argue that the contention fails to raise a genuine dispute of law or fact and thus is inadmissible. *See* DCS BREDL Contention Response at 29; Staff Contention Response at 34.

This contention sets forth an issue beyond the scope of this proceeding. Additionally, the contention has an inadequate legal or factual basis as required in section 2.714(b)(2)(iii). Any issues pertaining to the federal government’s nonproliferation policy clearly go to matters beyond the scope of the DCS CAR, ER, or QAP. Moreover, mere reference to a document, without more, does not provide an adequate basis for a contention. *Calvert Cliffs*, CLI-98-25, 48 NRC at 348.

4. Contention Group 4: Qualifications

Group 4 consists of two contentions regarding the qualifications of the NRC Staff, labeled 4A and 4B. The first contention reads “[t]he NRC lacks the necessary expertise in the field of industrial-scale plutonium processing to adequately determine whether public health and safety will be protected and to issue a license assuring this.” BREDL Contentions at 35. The second contention asserts that “[s]hortages in critical skills threatens [*sic*] to weaken NRC’s future ability to protect public health and our environment.” *Id.* As a legal basis for both contentions, BREDL references “10 C.F.R. 70, Atomic Energy Act, and all other previously cited regulations requiring NRC to protect health and safety.” *Id.* DCS and the Staff both claim that these contentions raise issues beyond the scope of the proceeding. *See* DCS BREDL Contention Response at 29-30; Staff Contention Response at 34-35.

Like GANE contention 4 challenging the competence of the NRC Staff, these two contentions are inadmissible for the same reasons (*see supra* pp. 432-33). The issue of the Staff’s competence is not litigable in agency licensing proceedings and is clearly beyond the scope of the proceeding.

5. *Contention Group 5: Unresolved Issue of Authority of Applicant To Apply for and Hold License*

This group of contentions consists of five parts, labeled 5A through 5E. The first, second, and third contentions in this group each raise financial assurance issues regarding DOE's funding of the MFFF. Contention 5A declares that "[b]ecause DOE functions as the financial assurance entity, will own the MFFF, it should either be the applicant or a co-applicant for the Construction License." BREDL Contentions at 38. The second contention states that "DOE is not an [*sic*] historically reliable source of financing." *Id.* As a result, according to BREDL's third contention, the "DOE contract with Applicant is a limiting factor in the ability of the Applicant to meet NRC license requirements . . . and therefore is a safety issue to be examined in this proceeding." *Id.* As a legal basis for all three contentions, BREDL asserts that "Yucca Mountain does provide precedence [*sic*] for direct licensing of DOE," and in addition, it asserts provisions of 10 C.F.R. Part 70 regarding financial assurance. *Id.* With regard to contention 5A, DCS asserts that the contention is beyond the scope of the proceeding because it fails to identify any deficiencies in the CAR, ER, or QAP. According to DCS, the contention also poses no genuine issue of law or fact because BREDL has not provided any facts or expert opinion in support of the contention. *See* DCS BREDL Contention Response at 30. The Staff argues that the contention is inadmissible because BREDL has not proffered an adequate legal or factual basis. *See* Staff Contention Response at 35-36.

Contention 5A is inadmissible for failing to meet the basis requirement of section 2.714(b)(2)(i). BREDL cites no statute or regulation requiring DOE to be an applicant or co-applicant in this proceeding. Indeed, contrary to BREDL's claim, Congress has authorized DOE's contractor to be licensed by the NRC. *See* 42 U.S.C. § 5842(5). Similarly, BREDL's contention B has not provided any "historical" information or evidence that supports its allegation that DOE has been financially unreliable in the past, other than bald assertions such as the MFFF "could be mothballed like many other DOE facilities in the past" if the DCS contract extension renewal falls through and another contractor takes over operation of the MFFF, and previous DOE contracts have involved "long cost overruns and time delays." BREDL Contentions at 40. More importantly, because DCS is a government contractor and DOE funds the MFFF project contract from funds appropriated from Congress, the contention, to the extent it seeks to challenge DOE's funding of DCS's contract, seeks to raise issues clearly beyond the scope of the proceeding.

A similar result must obtain for contention 5C. BREDL has failed to provide an adequate explanation or any examples as to why the DOE contract with DCS is a "limiting factor" that could contribute to health and safety issues at the MFFF. For example, BREDL argues that the base contract awarded to DCS

only encompasses design and licensing activities and that DOE's retention of "stop work" authority over the MFFF combined with the unilateral contract extension provisions could "affect the safety and viability of the MFFF" if a different contractor, unfamiliar with the design, construction, operation, or decommissioning of the MFFF was commissioned to finish the project. BREDL Contentions at 39. These aspects of the contract, according to BREDL, "add[] a level of risk to the design and licensing process that constitutes a Configuration Management and Quality Assurance safety issue to be examined" in light of DOE's "record of long cost overruns and time delays — [in which] obvious 'cutting corners' safety issues are raised." *Id.* at 39-40. Contention 5C is inadmissible for lack of the requisite basis and specificity required by section 2.714(b)(2). BREDL neglects to describe or append the contract provisions at issue or explain why they would be limiting factors that could cause health and safety issues at the MFFF. Additionally, BREDL fails to provide examples of "cost-cutting" measures that should be examined in this proceeding, nor does it provide expert testimony or other support for the potential health and safety risks that could result from cutting corners. BREDL's assertions that it "intends to find one or more experts" in the areas of high-consequence safety operations, the economics of deactivation, and federal budgeting, *id.* at 38, do not meet the contention pleading requirements that require adequate support for each contention at the time it is filed. *See* 10 C.F.R. § 2.714(b)(2)(ii). Accordingly, this contention is inadmissible.

Contentions 5D and 5E state, respectively, that the "Applicant is financially obligated to pay the costs of deactivation above and beyond DOE's allowance of \$10 million, but has yet to provide financial assurance," and that the "Applicant is presently liable to being held in Breach of Contract, which adds further uncertainty to the project." BREDL Contentions at 38. BREDL again asserts as its legal basis for the last two contentions the "Yucca Mountain precedence [*sic*]," and 10 C.F.R. Part 70. *Id.*

Contention 5D is inadmissible because it fails to satisfy the basis and specificity requirements of section 2.714(b)(2). BREDL furnishes no factual or other support for its assertion that \$10 million is insufficient for deactivation of the MFFF or its claim that DCS has only considered a "nearly flawless operation[] and a simple deactivation process, an assumption that defies the record of plutonium processing facilities." *Id.* at 40. Nor does BREDL explain how information from the records of other plutonium plants would demonstrate that there may be such problems in the future at SRS. The only purported support set forth by BREDL is that of "recent reports in nuclear trade journals" and an asserted "legally required cost-report on plutonium disposition" that BREDL alleges was concealed from Congress by DOE. *Id.* at 40-41. As noted before, mere citation to a document without an adequate explanation of how such information substantiates the issue statement is inadequate to support a contention. *See Calvert Cliffs*, CLI-98-25,

48 NRC at 348. As such, the contention is inadmissible for lack of basis and specificity.

With respect to contention 5E, BREDL again has failed to set forth an adequate legal or factual basis for its contention as required by section 2.714(b)(2). BREDL asserts that “the Applicant could easily be held in breach of contract because of the lack of a contract modification since the alleged withdrawal of Virginia Electric Power Company from its role in providing irradiation services at its North Anna Unit 1 and North Anna Unit 2 nuclear reactors.” BREDL Contentions at 41. BREDL then purports to quote the contract, stating that:

The Contractor may only propose to replace a mission reactor if: (1) the reactor has been shutdown [*sic*] for economic reasons; or (2) the NRC or the utility company has required the reactor to be shut down for safety reasons, and in either case, the shutdown will preclude accomplishment of the plutonium disposition mission schedule. Failure of the Contractor to provide an approved replacement mission reactor sufficient to accomplish the plutonium disposition mission schedule shall be considered a breach of this contract.

BREDL Contentions at 41. BREDL suggests that DCS “declined to identify this to the NRC in the CAR and associated documents” and that a breach of contract would “add[] further uncertainty to the [MFFF] project.” *Id.* at 38, 41.

Nowhere in its recitation does BREDL point out concrete details that support its notion that the purported breach of contract adds uncertainty. Nor does BREDL provide expert affidavits or other evidence to demonstrate how a breach of contract would affect the MFFF. Indeed, it appears from the language quoted by BREDL that any actionable breach of contract flows only from the failure to provide replacement reactors, and BREDL has not alleged that DCS has failed to provide replacement reactors. Moreover, it is unclear what the term “uncertainty” means in this context because BREDL provides no facts describing a health or safety risk that could occur because of such breach. Accordingly, this contention is inadmissible for failing to meet the requirements of section 2.714(b)(2).

6. Contention Group 6: Compliance Reporting

This “group” consists of only one contention, labeled 6A. BREDL argues that “[t]he applicant failed to identify and describe its environmental and safety compliance record to NRC,” and “[i]nstead, DCS described the regulatory compliance history of the Savannah River Site Operating Contractor Westinghouse Savannah River Site.” *Id.* at 42. As a legal basis, BREDL quotes fully the text of 10 C.F.R. § 51.45(d), and requests “[f]ull disclosure of the environmental, safety, and health compliance records of all major and minor partners in DCS.” *Id.* DCS asserts that BREDL’s reading of section 51.45(d) evidences a “misunderstanding” of the regulation. *See* DCS BREDL Contention Response at 33-34. The Staff asserts that there is no factual basis for

the contention and that the contention is beyond the scope of the proceeding. *See* Staff Contention Response at 36-37.

The contention fails to satisfy the requirements of section 2.714(b)(2)(iii) because there is no genuine issue of material fact or law in dispute. BREDL has simply misapprehended section 51.45(d), which states in pertinent part that:

The environmental report shall list all Federal permits, licenses, approvals and other entitlements which must be obtained in connection with the proposed action and shall describe the status of compliance with these requirements. The environmental report shall also include a discussion of the status of compliance with these requirements.

It is clear that section 51.45(d) contains no requirement for DCS to provide information regarding its own or other entities' status of compliance with activities or projects unrelated to the MOX facility, and BREDL has not proffered a plausible alternative legal interpretation. Thus, the contention is inadmissible.

7. *Contention Group 7: Plutonium-Fueled Reactor Hazards*

This contention is structured differently from the rest of the contentions submitted by BREDL. It consists of several paragraphs of background facts relating to "nuclear reactor safety issues," which are followed by attachments totaling over twenty pages of material describing NRC performance reviews, news articles, and press releases regarding the Duke Catawba and McGuire reactors. *See* BREDL Contentions at 42-69.¹⁹ DCS and the Staff argue that this contention is beyond the scope of this proceeding. *See* DCS BREDL Contention Response at 35-36; Staff Contention Response at 37-38.

Like GANE contention 7 (*see supra* pp. 440-41), this contention is beyond the scope of the proceeding. As previously discussed, the environmental impacts of the irradiation of MOX fuel in mission reactors will be addressed in later license amendment proceedings regarding the McGuire and Catawba reactors. Accordingly, the contention is inadmissible.

8. *Contention Group 8: Department of Energy NEPA Violations (Outside of Waste Management at MFFF)*

This group consists of six separate contentions labeled 8A through 8F, all of which address certain aspects of DOE's NEPA evaluations regarding the plutonium disposition program. *See* BREDL Contentions at 70. The first contention alleges that DOE has failed to implement provisions in the PEIS. Specifically, BREDL states that DOE has failed to upgrade plutonium pit storage

¹⁹There are two pages numbered 42 in the Petitioners' contention filing.

at the Pantex Nuclear Weapons Plant, and has failed to provide for long-term storage of nonpit plutonium at the SRS. *See id.* Contention 8B asserts that “DOE irreparably biased the SPD EIS towards MOX through the premature solicitation of a MOX contractor.” *Id.* Contention 8C alleges that “DOE has abandoned its [ROD] for the SPD EIS and has failed to issue a supplemental EIS to evaluate the impacts of major changes in addition to the liquid radwaste stream at the MFFF.” *Id.* Contention 8D submits that “the Plutonium fuel/MOX option greatly increases the risk of plutonium theft, diversion, and reuse and DOE greatly underestimated the risk of nuclear explosives being developed from reactor plutonium.” *Id.* Contention 8E asserts that “DOE failed to identify the dual-use nature of both the PDCF and the MFFF, and both facilities have the potential to be converted into use for plutonium pit fabrication.” *Id.* Finally, the last contention alleges that “DOE’s analysis failed to identify or greatly understated the real hazards of plutonium processing.” *Id.* As a legal basis for all six contentions, BREDL asserts “[t]he entirety of NEPA, but particularly those sections involving adequate analysis, supplemental environmental impact statements, use of accurate information, public participation requirements, limited actions before a decision, prejudicial behavior, and triggering mechanisms for NEPA analysis.” *Id.* at 70-71. No expert affidavits are offered, and the main factual support for these contentions is citations to various pages of a February 6, 2001, article entitled “Plutonium: The Last Five Years,” written by Mr. Moniak. *See id.* at 71. In addition, for contention 8A, BREDL relies on certain portions of its earlier May 18, 2001, intervention petition. *See id.* DCS and the Staff argue that the contentions are beyond the scope of this proceeding. *See* DCS BREDL Contention Response at 37-40; Staff Contention Response at 39.

As DCS and the Staff argue, these contentions are clearly beyond the scope of the proceeding. All of these contentions suggest a defect in the DOE NEPA process. As previously explained with respect to GANE contention 10, alleging inadequacies regarding the DOE SPD EIS (*see supra* pp. 441-42), such issues are not litigable in this proceeding because DCS, not DOE, is the Applicant, and it is the DCS CAR, ER, and QAP that are under scrutiny in this proceeding, not the DOE SPD EIS.

9. Contention Group 9: Inadequate Radiological Protection of Public

This contention group consists of two contentions, 9A and 9B. Contention 9A claims that the “Applicant used inappropriate control area boundaries and therefore mischaracterized members of the public as occupationally exposed workers.” BREDL Contentions at 72. Contention 9B states that the “applicant failed to submit an Emergency Management Plan for the MFFF because of the inappropriate definition of a control area.” *Id.* As a legal basis, BREDL cites 10

C.F.R. §§ 20.1003 and 70.61(f). Section 20.1003, as noted by BREDL, defines “public dose” as

the dose received by a member of the public from exposure to radiation or radioactive material released by a licensee, or to any other source of radiation under the control of the licensee. Public dose does not include occupational dose or doses received from background radiation, from any medical administration the individual has received, from exposure to individuals administered radioactive material . . . or from voluntary participation in medical research programs.

Similarly, “occupational dose” is defined as

the dose received by an individual in the course of employment in which the individual’s assigned duties involve exposure to radiation or radioactive material from licensed and unlicensed sources of radiation, whether in the possession of the licensee or other person. Occupational dose does not include dose received from background radiation, from any medical administration the individual has received, from exposure to individuals administered radioactive materials . . . from voluntary participation in medical research programs, or as a member of the public.

Based on these definitions, BREDL asserts that DCS incorrectly defined its control area as being the entire SRS, an area that even DOE has difficulty protecting from trespassers. This is because the control area includes a road open to public travel, a hurricane evacuation route, a CSX railroad line, and the Three Rivers Regional Landfill and Recycling Center. *See* BREDL Contentions at 72-73.

DCS argues that the contentions are an improper challenge to NRC regulations, and that there is no basis for the claims made with respect to the DOE-controlled area. According to DCS, DOE currently controls access to the SRS and DCS will be establishing a “protocol” with DOE that will integrate the MFFF with the existing SRS control plan to limit access to the SRS in an emergency. *See* DCS BREDL Contention Response at 40-42. The Staff agrees with DCS that both contentions are inadmissible for lack of basis. *See* Staff Contention Response at 39-41.

Contention 9A is essentially the same as GANE contention 5 which has already been admitted to the proceeding. For the same reasons (*see supra* pp. 434-36), this contention is admitted and is consolidated with GANE contention 5.

Contention 9B, on the other hand, is inadmissible because it is premature, and hence beyond the scope of this construction authorization proceeding. The asserted basis for the contention is DCS’s claim that an emergency plan is not necessary. *See* BREDL Contentions at 73. Thus, BREDL is, in effect, asserting that DCS has failed to submit an emergency plan because DCS has mischaracterized the controlled area as the entire SRS and, according to BREDL, a properly characterized controlled area would require DCS to file an emergency

plan. Even if BREDL is correct, however, 10 C.F.R. § 70.22(i)(1)(ii) does not require the submission of an emergency plan until DCS files an application for a possession and use license. Accordingly, BREDL will have the opportunity to intervene and submit a contention on the issue of whether or not DCS is required to submit an emergency plan for the MFFF in a future proceeding on DCS's application for a possession and use license.

10. Contention Group 10: Lack of Complete and Accurate Information

BREDL's final group consists of three contentions, labeled 10A through 10C, each alleging deficiencies in the DCS license application. Contentions 10A and 10B declare that the "Applicant failed to submit detailed information sufficient for fact checking and analysis of the proposal," and that the CAR is filled with "dead-end references." BREDL Contentions at 74. As a result, contention 10C indicates that the "Applicant has displayed a clear intent to minimally cooperate with NRC." *Id.* BREDL cites as its legal basis 10 C.F.R. § 70.9(a), which requires that all information from the Applicant "be complete and accurate in all material respects." *Id.* BREDL's purported factual bases for contentions 10A, 10B, and 10C consist of some seventeen statements labeled "a through d" and "b through l" without any designation as to which contentions the various letter-designated statements apply. In general, these assertions make broad statements such as "the Applicant is contractually obligated to DOE to minimize the amount of new information for the process and optimize use of old information," and "the Applicant submitted a CAR characterized primarily by lack of detail," as shown by the fact that the NRC Staff submitted an 86-page RAI involving 239 questions. *Id.* DCS argues that the contentions are inadmissible because they do not raise any genuine issues of material law or fact. *See* DCS BREDL Contention Response at 42-53. For its part, the Staff claims, in effect, that the contentions all lack adequate bases. *See* Staff Contention Response at 41-43.

All three of the contentions in this group are inadmissible because they are nothing more than vague assertions based on broad generalizations. As such, all the contentions contravene 10 C.F.R. § 2.714(b)(2). Moreover, BREDL fails to provide adequate support for its issue statements by failing properly to identify and explain the significance of the inadequacies in documents submitted by DCS to the Staff in support of the CAR. For example, BREDL asserts that the "Applicant failed to identify the historic deep boreholes in the area," but fails to provide any supporting documentation or explanation as to why this information is important. BREDL Contentions at 76. Even when BREDL purports to specify supporting material, it is incompletely cited. For example, BREDL refers to "[i]nformation provided by SRS NNSA Administrator Sterling Franks during a July 9, 2001 Tour of SRS" as its sole source for the assertion that "DOE is actively reviewing potential MOX feedstock options to compensate for the delay in the PDCF." *Id.*

at 75 & n.3; *see* 10 C.F.R. § 2.714(b)(2)(ii). Accordingly, contentions 10A, 10B, and 10C are inadmissible.

C. EI's Contentions

EI filed a total of twenty-two contentions, labeled A through V. Contentions A through F were submitted as part of its May 18, 2001, request for hearing, and contentions G through V were filed as an August 13, 2001, amendment to the original petition. *See* EI Petition at 7-8; EI Contentions at 2-6. With minor exception, all of EI's contentions consist of a single short paragraph beginning with an abbreviated statement of a purported issue, followed by one or more brief sentences. The purported legal basis appears in contention V, stating that "[a]ll the contentions relate to the NEPA while a majority of them also relate to the Atomic Energy Act (AEA), since most of them are concerned with radiation's effect on people."²⁰ EI Contentions at 6. Additionally, in contention V, EI indicates that an attached map of a 1974 accidental tritium gas release at one of the DOE SRS facilities supports contentions M, O, P, U, and W, although none of EI's pleadings contain a contention W. *See* EI Contentions at 6; *id.*, Attach. EI provides no affidavits of experts in support of any of its contentions.

Due to the similarity of subject matter of many of the contentions, there is no need to unnecessarily lengthen this decision further by addressing each contention individually. Therefore, the contentions are addressed in five groups. In general, DCS and the Staff agree that EI's contentions are all inadmissible for lack of basis and specificity. *See* DCS EI Contention Response at 17-36; Staff Contention Response at 43-53.

1. Contentions A, B, C, G, O, and P — Other Facilities

The common denominator for contentions A, B, C, G, O, and P is EI's assertion that information from previous NRC proceedings and/or other facilities should be utilized by DCS in the CAR and/or ER. Initially, contention A asserts that "[t]here is a lack of information regarding operations similar to those planned by

²⁰In full, contention V states:

The attached map supports EI's contentions M, O, P, U, W, and the Affidavit of Basil Garzia.

All the Contentions relate to the NEPA while a majority of them also relate to the [AEA] since most of them are concerned with radiation's effect on people.

The unavailability of a Safety Analysis Report and an Environmental Impact Statement related to the MOX Facility and the MOX project done by the Nuclear Regulatory Commission (NRC) is of concern to E.I. In its May 18th Petition [*sic*] to Intervene, E.I. called attention to there being a NEED FOR THE NRC to "prepare its own 'detailed statement' of environmental costs, benefits and alternatives", (See paragraph [*sic*] 6 and 7 of Petition)

EI Contentions at 6.

the Applicants.” EI Petition at 7. It proffers the example that “the Nuclear Fuel Services plant in West Valley, New York is not discussed and yet this facility reclaimed uranium and plutonium from spent nuclear fuel for use in Mixed-oxide fuel,” while “the Applicants chose instead references which depended heavily on predictions and estimates rather than real operating experience.” *Id.*

Contention A is inadmissible for failing to meet the basis and specificity requirements of section 2.714(b)(2). There is no regulatory requirement that an applicant discuss all potentially relevant historical material that has been submitted to the NRC by other applicants. Further, EI does not specify what information from the West Valley reprocessing facility proceeding has potential relevance to this MOX proceeding. Nor does EI specify the information that is allegedly absent from the CAR or ER that should be included. Rather, EI merely states that “many of the areas of concern being faced by the Applicants is [*sic*] available from a number of sources, including the transcript of the NRC licensing proceedings held between 1973 and 1976.” *Id.* As previously noted, a simple reference to a large number of documents does not provide a sufficient basis for a contention. *See Calvert Cliffs*, CLI-98-25, 48 NRC at 348. At a minimum, an intervenor is obligated to clearly reference and then summarize the information being relied upon. *See* 10 C.F.R. § 2.714(b)(2)(ii).

Contentions B, C, and G, are similar in content to contention A. They state that DCS’s CAR and ER are deficient for failing to consider other “relevant material,” but, like contention A, fail to note specifically what is missing and how this deficiency affects any particular safety or environmental concern. Contention B declares that the “Applicants failed to make use of the evidence contained in the transcripts of the Barnwell Nuclear Fuel Plant, a uranium and plutonium recovery facility planned by Allied General Nuclear Services,” of which “an extensive record of evidence exists regarding a majority of the same issues now being considered.” EI Petition at 7. Contention C maintains that the “Applicants don’t use evidence from the transcripts of licensing proceedings related to the two Duke nuclear plants, which have been proposed for MOX fuel use.” *Id.* Lastly, contention G asserts that DCS has inadequately evaluated the health effects on the “local population” from “routine operation” of the MFFF because it has not considered the relevant evidence contained in the transcripts regarding Allied General’s proposed uranium and plutonium recovery facility that contained “sources of information which have been tested by cross-examination.” EI Contentions at 2. As was the case with contention A, contentions B, C, and G are inadmissible for failing to meet the basis and specificity requirements of section 2.714(b)(2).

Similarly, in contentions O and P, EI asserts that the DCS CAR and ER fail to satisfy NEPA requirements because DCS should consider findings and experiences of facilities similar to the MFFF. In this regard, contention O claims that the “Applicants fail to explain fully what equipment is required in terms of

overcoming the accidents, leaks, worker exposures or exposure to the public,’’ and should have considered similar events at West Valley, SRS, the Westinghouse plant in South Carolina, and Cogema in France. *Id.* at 4. Similarly, contention P states that the Applicant has not explained how the existing evidence from Cogema has been factored into the evaluation of health effects as a result of normal operations or accidents. *See id.*

Both contentions are inadmissible for failing to meet the requirements of section 2.714(b)(2). With respect to contention O, EI fails to reference the portions of the DCS ER and CAR that are allegedly inadequate. Further, the relevance of the relationship between the DCS MOX facility and the other facilities, and the supposed safety significance of the missing information is not established by the contention. Nor is there any explanation in the contention of the relevance of the attached map that traces tritium gas releases during an accident at the SRS. Thus, contention O is inadmissible.

For similar reasons, contention P fails to meet the section 2.714(b)(2)(iii) admissibility requirements. EI does not specify the portions of the documents that it believes are inadequate in claiming that Cogema experiences should have “been factored into [DCS’s] evaluation of health effects.” *Id.* EI is required by the rules to “include references to the specific portions of the application . . . [and] the identification of each failure and the supporting reasons for the petitioner’s belief,” 10 C.F.R. § 2.714(b)(2)(iii), which EI has not done. Accordingly, contention P is inadmissible.

2. Contentions D, E, and M — Financial Assurance

Contentions D, E, and M concern issues regarding the financial effects of the MFFF on the residents of South Carolina. Contention D asserts that DCS has not considered the 1966 findings of the National Academy of Sciences Committee on Geologic Aspects of Radioactive Waste Disposal or the reviews from the 1970s by geologists with the United States Geological Survey. According to EI, “[w]ithout consideration of these findings, it is not possible to estimate the economic losses which could result from approval being given to the [DCS] CAR.” EI Petition at 8. Contention D is inadmissible for failing to state an adequate basis as required by section 2.714(b)(2)(i). In the contention, EI fails to indicate what parts of the above-mentioned documents are relevant or provide any explanation of why these materials are relevant.

Contention E asserts that the Applicant has “failed to look at the possible outcomes of their facility from the viewpoint of business owners in the State . . . and have not adequately addressed other financial issues and questions.” *Id.* This contention also fails to meet the basis requirement of section 2.714(b)(2)(i). EI provides no reference to any regulations that are applicable, nor points to any portion of the CAR or ER that are allegedly deficient. Nor has EI proffered

sufficient facts or expert opinion to support the contention. Its two simple statements asserting that “[s]ome [effects] may be close to the proposed facilities, others along routes over which radioactive shipments travel,” and that DCS “ha[s] not adequately addressed other financial issues and questions,” *id.*, are woefully inadequate to meet the contention pleading requirements.

Contention M claims that the

Applicants’ evaluation of the possible and actual detrimental effects to South Carolina residents from the proposed MOX Facility, in terms of environmental harm, damaged health, safety problems, financial and business losses, is invalid because full consideration has not been given to South Carolina’s unique situation of having all the fresh MOX fuel shipments taking place within its border. . . . This defect in both the CAR and ER is of particular significance in relation to the terrorist issue.

EI Contentions at 3. In support of this contention, EI asserts that the National Academy of Sciences warned in its 1995 report on the “Management and Disposition of Excess Weapons Plutonium” that if significant portions of fresh fuel are mobilized as particulate matter, the public health risks would be substantial. *See id.* Additionally, an attached map is claimed to support the contention. *See id.* at 6.

Contention M is also inadmissible. EI has referenced no specific provisions in the ER or CAR that it asserts are inadequate or incorrect as required by section 2.714(b)(2)(ii). Although the contention indicates that there will be “environmental harm, damaged health, safety problems, and financial and business losses,” EI neglects to describe these harms or explain how they arise from the construction of the MFFF, as required to establish an adequate basis pursuant to section 2.714(b)(2)(i). *See id.* at 3. This is also the case with respect to EI’s mention of “the terrorist issue.” Moreover, EI’s citation to a study performed by the National Academy of Sciences and an attached map fails to save the contention because it fails to indicate why the study or the map is relevant to the contention.

3. Contentions F, K, R, V, and Q — DOE EISs

Contentions F, K, R, V, and Q are grouped together due to their similarity in raising issues concerning DOE’s various EISs. Contention F refers to the “4-page section on Transportation” contained in the ER, and alleges that the only reference identified by DCS is the DOE SPD EIS. EI Petition at 8. EI contends that “[t]his practice of using the reports of the agency promoting a nuclear project has been going on for years” and “[i]n this case, the Applicants are limiting the information used to what the DOE has to use as the basis of its decisions.” *Id.* EI asserts that the DOE EIS is “defective” because it relies “heavily” on its own reports and those done by Westinghouse and other DOE contractors. *See id.*

Contention F is inadmissible. As explained previously (*see supra* p. 424), agency regulations expressly allow the use of previously prepared EISs by other agencies. Thus, any challenge to a MOX-related DOE EIS is beyond the scope of this proceeding. For the same reasons, contentions K and R are inadmissible. Contention K states, in pertinent part, that “[t]he piece-meal approach taken in the overall project of disposing of excess weapons plutonium by removing the pits from nuclear bombs . . . has resulted in one of the numerous examples of the Applicants failing to comply with the National Environmental Policy Act (NEPA).” EI Contentions at 2. Contention R claims that “[t]here is no section in either the ER or CAR which identifies the specific benefits and costs of fabricating MOX fuel nor of the overall plan of disposing of excess weapons plutonium” *Id.* at 5. DOE, however, has already addressed the issue of alternatives to the MFFF in its SPD EIS. Thus, these contentions are all beyond the scope of the proceeding.

Contention Q also seeks to raise an issue beyond the scope of the proceeding. In this contention, EI states that “[t]he Applicants, in Section 4.4 Hydrology of the ER, have failed to demonstrate that radionuclides leaked from the MOX Facility or some related operation could not migrate downward to the aquifers,” because DCS is “depending on the liquid effluent system of the Department of Energy’s (DOE),” which “system has not been through the NRC’s licensing process.” *Id.* at 5. As indicated with respect to BREDL contention 1A (*see supra* p. 449), DCS is authorized to transfer waste to DOE pursuant to 10 C.F.R. §§ 20.2001(a)(1) and 70.42(b)(1). Thus, there is no violation by DCS in transferring waste from the MOX facility. Furthermore, the ER addresses the potential for radionuclide impacts to groundwater and concludes no radionuclide wastes from the MFFF will be released to the environment from normal operations. *See* ER at 5-11. Finally, as already noted in regard to contentions F, K, and R, the issues addressed in previous DOE EISs are beyond the scope of this proceeding. Hence, the general issue of waste at the SRS as raised by contention Q is beyond the scope of the proceeding because it is addressed in the DOE EISs.

For similar reasons, contention V fails to meet the admissibility requirements of section 2.714(b)(2)(iii). As previously noted (*see supra* note 20), contention V expresses concern over the unavailability of the Staff EIS and SAR at this point in the proceeding. As the Commission stated in its Notice of Hearing, however, the “[p]etitioners will not be permitted to wait for the NRC staff to issue its safety evaluation report or environmental impact statement before formulating contentions.” 66 Fed. Reg. at 19,996. Accordingly, contention V does not raise a litigable issue within the scope of the proceeding, and it is inadmissible.

4. Contentions H, N, S, T, and U — Potential Health Effects

These five contentions outline purported inadequacies in the CAR and ER regarding alleged potential health effects from the MFFF. In contention H, EI asserts that the “Applicants’ evaluation of the health effects to local populations . . . is invalid because the assumptions made in regard to the use of HEPA filters in Appendix F, Section F.5 and F.6 do not meet the guidelines of the NRC.” EI Contentions at 2. This contention is inadmissible because it lacks an adequate basis as required by section 2.714(b)(2)(i). Not only does the contention neglect to identify what NRC regulations or guidelines DCS has allegedly violated, it also fails to explain why the challenged DCS assumptions do not “meet the guidelines of the NRC.” *Id.*

Contention N claims that the “Applicants’ evaluation of the health effect to the local population from routine operation of the MOX Facility is invalid because its ER fails to give adequate attention to the pathways by which groundwater could become contaminated due to such unsuitable geological conditions of the SRS area as having a shallow water table or as a result of SRS activities in the past.” *Id.* at 3. EI suggests that the Applicant should have relied upon the findings in the 1967 United States Department of the Interior study “Geology and Groundwater of the SRP and Vicinity, SC” and the 1966 NAC report on “Geologic Aspects of Radioactive Waste Disposal,” which were both prepared for the Atomic Energy Commission. *See id.* at 3-4. The last part of the contention maintains that neither DOE nor DCS has complied with NEPA because they have not fully considered alternatives for locating the MOX facility elsewhere or alternative methods of disposing of weapons-grade plutonium. *See id.* at 4.

Each of the three issues raised by contention N are unsupported by an adequate basis. With regard to the first part of the contention asserting that DCS’s ER fails to give adequate attention to the health effects from the MOX facility, EI does not identify either the sections of the ER that it challenges or the NEPA provisions that allegedly have been violated by DCS. Moreover, no detrimental health effects created by contaminated groundwater are described in relation to the purported inadequacies in the ER. With respect to the allegation that the ER fails to give adequate attention to groundwater pathways, EI provides no specifics, just generalities. Thus, the first part of the contention lacks the required basis and specificity required by section 2.714(b)(2). With respect to the second part of the contention concerning DCS’s failure to consider the 1967 Department of the Interior study or the 1966 NAC report, EI makes no showing as to why these materials are relevant to this contention or what material from the documents should be included in the DCS ER. Indeed, EI does not even identify the meaning of the acronym “NAC” in one of the references. Further, there is no NEPA or agency regulatory requirement to include every relevant document or piece of information in an environmental report. And contrary to

EI's assertion, DCS has discussed groundwater in its ER. *See* ER at 5-10 to 5-11. Without an explanation why the ER is inaccurate, this part of the contention fails to establish a genuine issue of material fact or law in dispute. *See* 10 C.F.R. § 2.714(b)(2)(iii). Lastly, alternatives to MOX fuel use and alternate locations for the MOX facility are addressed in the DOE SPD EIS, and thus are beyond the scope of the proceeding. Hence, no parts of the contention satisfy the pleading requirements for contentions. Accordingly, contention N is inadmissible.

Contention S states that DCS has failed in the ER to take into account that children and babies suffer more health damage from radiation exposure than adults, pointing to section 5.2.10.1 of the ER to demonstrate the absence of such consideration. EI alleges that “[t]his along with numerous other defects in the Applicants reports make their evaluations of the health impacts from the MOX facility invalid.” EI Contentions at 5. Similarly, contention T claims that the ER is inadequate because it “fail[s] to take into consideration that there are members of the public who spend time/or travel within the SRS boundaries,” citing ER § 5.2.10.2. *Id.*

Both of these contentions are inadmissible as failing to meet section 2.714(b)(2)(ii) and (iii) requirements. With respect to contention S, EI fails to demonstrate through any expert opinion or supporting documentation that children and babies suffer more damage than do adults. Further, based on the location of the MFFF within the SRS (*see supra* p. 410), EI has not indicated why children and babies should be considered in such a dose calculation. Moreover, EI has not provided any support to demonstrate that DCS has performed the dose calculations incorrectly. Finally, it is also unclear what “other defects in the Applicant’s reports” have caused alleged errors in the DCS ER. *Id.* at 5. Similarly, in connection with contention T, EI fails to provide any expert opinion or any other supporting documentation to show that people who spend time or travel through the SRS are more adversely affected than other individuals or proffer any evidence demonstrating why the DCS analysis is inaccurate. Therefore, contentions S and T are inadmissible.

EI's contention U states that the “lack of coverage on the subject of fires and their potential for spreading radioactive particulate matter is a flaw which makes the Applicants’ evaluations of safety and health impacts invalid. This ties in with the deficiencies regarding emergency planning” *Id.* at 5-6. The portion of the contention dealing with the issue of fires lacks an adequate basis as required by section 2.714(b)(2)(i). EI has failed to provide any information outlining why an accident involving fire is not bounded by the accidents already analyzed by DCS in the ER. The portion of the contention concerning “emergency planning,” seeks to raise an issue beyond the scope of the proceeding. In this regard, the contention is similar to BREDL contention 9B in that it indicates that DCS is required to submit an emergency plan for a construction authorization license. As noted earlier, however (*see supra* pp. 462-63), if an emergency plan is necessary,

it need not be filed until DCS files an application for a possession and use license. Accordingly, this contention is inadmissible. *See* 10 C.F.R. § 70.22(i)(1)(ii).

5. Contentions I, J, and L — Cumulative Effects at SRS

These three contentions assert inadequacies in DCS’s consideration of the cumulative effects of radioactivity at SRS. In contention I, EI asserts that the CAR and ER “fail to adequately consider the long-term effects of the MOX facility” because the “impacts of decontamination and decommissioning are omitted.” EI Contentions at 2. EI cites to section 5.6.1 of the CAR as support for the contention. This section entitled “Description of Principal SSCs and Required Support Systems,” has no apparent connection, however, with the subject of decommissioning, and EI has not provided an explanation to establish such a relationship. Indeed, the DCS ER does not even discuss the topic of decommissioning because, as noted in the ER, DOE rather than DCS is responsible for the decommissioning of the MFFF. *See* ER at 5-20 to 5-21. Additionally, EI has not produced any evidence or expert opinion to show that the “deactivation” of the MFFF contributes to the long-term effects of the facility. Merely stating that DCS failed to “adequately consider” long-term effects is not enough to satisfy the basis and specificity requirements of section 2.714(b)(2). Accordingly, the contention is inadmissible.

Much like contention I, contention J claims that the DCS evaluation of impacts on the health of local residents is invalid due to inadequate consideration of the cumulative effects of radiation, given that “nuclear operations [have been taking] place at the SRS since the 1950’s.” EI Contentions at 2. This contention lacks an adequate basis and, therefore, is inadmissible. EI not only fails to cite any portions of the ER or CAR that it believes are inadequate, but ER sections 5.6.1 through 5.6.4 describe four different types of cumulative impacts that have already been analyzed: (1) impacts from SRS activities; (2) impacts of other actions near the MFFF and SRS; (3) transportation impacts; and (4) impacts at mission reactors. In contravention of the section 2.714(b)(2)(ii) criterion, EI has not provided any expert opinion or other documentation to support its assertion that such cumulative effects are significant and need to be considered in the DCS ER.

Finally, EI’s contention L alleges that the “NRC staff has pointed out a number of examples of the Applicant’s failure to comply with NEPA,” such as the failure to consider alternatives, and the failure to include adequate information evaluating “cumulative effects” at SRS. *Id.* at 3. Similar to the other contentions in this group, contention L also lacks an adequate basis as required by section 2.714(b)(2)(iii). The contention fails to point to any specific portions of NEPA or the Commission’s environmental regulations with which DCS has failed to comply. Moreover, as section 5.7 of the ER indicates, *see* ER at 5-43 to 5-44, an

array of alternatives are considered in the SPD EIS. Furthermore, EI's assertion, without more, that Staff RAIs demonstrate noncompliance with NEPA is an insufficient basis to support a contention. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147, 150 (1993). Hence, contention L is inadmissible.

IV. CONCLUSION

For the reasons set forth in Part II of this Memorandum and Order, we find that Petitioners GANE, EI, and Joint Petitioners BREDL and Donald J. Moniak have established standing to intervene in this materials licensing proceeding. Further, we find that Ms. Foster has failed to establish her standing and, therefore, her hearing petition is *denied*. For the reasons detailed in Part III.A, GANE's proffered contentions 1, 2, 3, 5 (as consolidated), 6, 9, 11 (in part), and 12 as well as BREDL contentions 1E (in part) and 9A are admitted. Therefore, the intervention petitions of Petitioner GANE and Joint Petitioners BREDL and Donald J. Moniak are *granted*, and they are admitted as parties to the proceeding. Because EI has not proffered any admissible contentions, its intervention petition is *denied*.

Pursuant to 10 C.F.R. § 2.1205(o), Ms. Foster and EI may appeal this decision to the Commission within ten (10) days of service of this Memorandum and Order on the questions whether their requests for a hearing or petitions to intervene should have been granted in whole or in part. Because DCS has challenged the granting of all the intervention petitions, it may appeal this ruling within ten (10) days of service of this Memorandum and Order on the question of whether the intervention petitions of GANE and that of BREDL and Donald J. Moniak should have been denied in their entirety. Similarly, the Staff may appeal this ruling with ten (10) days of service of this Memorandum and Order on the question of whether the intervention petition of BREDL and Donald J. Moniak should have been denied in its entirety. Because the Staff has conceded the granting of GANE's intervention petition, however, it may only file a statement in support of any DCS appeal of the grant of GANE's intervention petition. Such statement must be filed within fifteen (15) days of service of the DCS appeal brief. BREDL and GANE may also file counterstatements opposing any appeals taken by DCS or the Staff within fifteen (15) days of service of any appeal brief filed by DCS or the Staff.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD²¹

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 6, 2001

²¹ Copies of this Memorandum and Order were sent this date by either Internet e-mail transmission or overnight mail to (1) GANE, (2) BREDL, (3) EI, (4) Ms. Foster, (5) DCS, and (6) the NRC Staff.

Although Judge Lam participated in final deliberations regarding this issuance and agrees with the reasoning and result, he was unavailable to sign it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

**Ann Marshall Young, Chair
Dr. Peter S. Lam
Thomas D. Murphy**

In the Matter of

**Docket No. 50-213-OLA
(ASLBP No. 01-787-02-OLA)**

**CONNECTICUT YANKEE ATOMIC
POWER COMPANY
(Haddam Neck Plant)**

December 10, 2001

ORDER

**(Approving Stipulation and Settlement Agreement, and
Granting Motion To Participate as Interested State)**

By Stipulation filed November 13, 2001,¹ Connecticut Yankee Atomic Power Company (CYAPCO) and the State of Connecticut, Department of Public Utility Control (CDPUC), stipulate that they have resolved all issues raised by CDPUC's contentions in the above-captioned proceeding on the basis of a Settlement Agreement filed as an attachment to the Stipulation; and CDPUC moves, with CYAPCO's express assent, for leave to participate in the remaining aspects of the proceeding as an interested state pursuant to 10 C.F.R. § 2.715(c).²

No objection being expressed to the Stipulation, the Settlement Agreement, or the State's motion by any party to this proceeding, the Settlement Agreement of

¹ Stipulation (CY and DPUC: Withdrawal of Contention and Petition To Intervene; Motion for Leave To Participate as Interested State and Assent to the Allowance Thereof), Nov. 13, 2001.

² The Citizens Awareness Network is also an intervenor in the proceeding, but is not a party to the Stipulation at issue herein.

CYAPCO and CDPUC is hereby APPROVED, the Board finding the settlement to be consistent with 10 C.F.R. § 2.759 and in the public interest; and CDPUC's motion to continue to participate in the proceeding as an interested state is hereby GRANTED.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD³

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 10, 2001

³ Copies of this Order were sent this date by Internet e-mail or facsimile transmission, if available, to all participants or counsel for participants.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD:

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

December 13, 2001

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), the Licensing Board denies a request by Intervenor State of Utah (State) to admit late-filed contention Utah RR, Suicide Mission Terrorism and Sabotage, in which the State seeks to litigate safety and environmental challenges relating to the September 11, 2001 attacks by foreign terrorists upon the World Trade Center buildings in New York, New York, and the Pentagon building in the Washington, D.C. metropolitan area, concluding that (1) although a balancing of the five 10 C.F.R. § 2.714(a)(1) late-filing factors supports admission of the State issue statement, it nonetheless is inadmissible as an impermissible challenge to existing agency regulatory requirements regarding ISFSI physical security standards; and (2) the Board's ruling in this regard should be referred to the Commission for its further consideration.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (GOOD CAUSE FOR DELAY)

To justify a presiding officer's consideration of the "merits" of a late-filed contention, i.e., whether the contention fulfills the admissibility standards specified in 10 C.F.R. § 2.714, a party must demonstrate that a balancing of the five factors set forth in section 2.714(a)(1)(i)-(v) supports acceptance of the petition. The first and foremost factor in this appraisal is whether good cause exists that will excuse the late-filing of the contention. *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). And relevant to the evaluation of that factor, the good cause element has two components that impact a presiding officer's assessment of the timeliness of a contention's filing: (1) when was sufficient information reasonably available to support the submission of the late-filed contention; and (2) once the information was available, how long did it take for the contention admission request to be prepared and filed. *See LBP-99-3*, 49 NRC 40, 46-48 (assessing late-filing factors relative to petition to intervene), *aff'd*, CLI-99-10, 49 NRC 318 (1999).

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (BALANCING OF 10 C.F.R. § 2.714(a)(1) CRITERIA)

Relative to the other four late-filing factors, in the absence of good cause there must be a compelling showing on the four remaining elements, of which factors two and four — availability of other means to protect the petitioner's interest and extent of representation of petitioner's interest by other parties — are to be given less weight than factors three and five — assistance in developing a strong record and broadening the issues/delaying the proceeding. *See Braidwood*, CLI-86-8, 23 NRC at 244-45.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (OTHER MEANS AND OTHER PARTIES TO PROTECT INTERVENORS' INTEREST)

With respect to factor two — availability of other means to protect the State's interests — although a pending Commission petition has the potential to afford the party seeking late-filed contention admission some relief, given the general reluctance of the Commission to intervene in ongoing adjudicatory proceedings, *see Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374-75 (2001), that matter provides little, if any, support for denying admissibility.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (ASSISTANCE IN DEVELOPMENT OF SOUND RECORD)

Factor three — contribution to development of a sound record — also provides little, if any, support for denying admissibility when the affiant presentation in support of the contention provides an analysis of the asserted vulnerability to, and purported radiological consequences of, a September 11-type terrorist attack upon a proposed ISFSI facility that could, if the events of September 11, 2001, are considered sufficient to establish the reasonable foreseeability of such an incident at the facility, make a record development contribution.

RULES OF PRACTICE: NONTIMELY SUBMISSION OF CONTENTIONS (SIGNIFICANCE VERSUS DELAY)

Regarding factor five — broadening the issues and delaying the proceeding — even if admission of a contention would have a substantial impact upon the existing scope of, and schedule for, a proceeding, proffering an issue of sufficiently serious moment can temper this factor as a significant ingredient against late admission of the contention.

RULES OF PRACTICE: ADMISSIBILITY OF CONTENTION(S) (CHALLENGE TO COMMISSION REGULATIONS)

A contention is inadmissible if it constitutes an impermissible challenge to existing agency regulatory requirements. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 364 (2001) (contention that amounts to general attack on regulations is impermissible).

RULES OF PRACTICE: REFERRAL OF RULING TO COMMISSION

In the wake of catastrophic terrorist events, and in light of current Commission consideration of whether, and to what degree, the agency's regulatory regime, including facility physical security requirements, should be changed to reflect what transpired, a presiding officer's ruling on admissibility of a related late-filed contention should be referred to Commission for its consideration. *See Haddam Neck*, CLI-01-25, 54 NRC at 374-75.

MEMORANDUM AND ORDER
(Denying Motion for Admission of Late-Filed Contention Utah RR
and Referring Ruling to the Commission)

In this proceeding regarding the pending application of Private Fuel Storage, L.L.C. (PFS), for permission to construct and operate a 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI) in Skull Valley, Utah, before the Licensing Board is a request by Intervenor State of Utah (State) to admit late-filed contention Utah RR, Suicide Mission Terrorism and Sabotage. With this contention, the State seeks to litigate safety and environmental challenges relating to the September 11, 2001 attacks by foreign terrorists upon the World Trade Center buildings in New York, New York, and the Pentagon building in the Washington, D.C. metropolitan area. In response to this State request, Intervenor Ohngo Gaudadeh Devia (OGD) supports admission of the contention, while both PFS and the NRC Staff oppose its acceptance based upon either a balancing of the five late-filing factors in 10 C.F.R. § 2.714(a)(1) or the purported State failure to submit a properly framed and supported issue statement.

For the reasons set forth below, we deny admission of this contention but, in accordance with 10 C.F.R. § 2.730(f), refer this ruling to the Commission for its further consideration.

I. BACKGROUND

We will not recount in any detail the horrific yet well-known events of September 11, 2001, that clearly are the genesis of the State's October 10, 2001 motion to admit late-filed contention Utah RR. Nor will we recount in detail the various prior Board rulings on contentions relating to terrorism or sabotage filed by the State and other intervening parties, except to note that heretofore we have found those contentions, as framed, generally inadmissible. *See* LBP-99-43, 50 NRC 306, 316 n.3 (1999); LBP-98-13, 47 NRC 360, 372 (1998); LBP-98-10, 47 NRC 288, 296 (1998); LBP-98-7, 47 NRC 142, 186, 199, 216, 226, 233-34, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998). With its late contention Utah RR, Suicide Mission Terrorism or Sabotage, the State now seeks the admission of the following issue statement:

The Applicant, in its Safety Analysis Report [(SAR)], and the Staff, in its Safety Evaluation Report [(SER)], have failed to identify and adequately evaluate design basis external man-induced events such as suicide mission terrorism and sabotage, "based on the current state of knowledge about such events" as required by 10 CFR § 72.94 (emphasis added). In addition, the scope of the Applicant's Environmental Report and the Staff's Draft Environmental Impact Statement is too limited to comply with the National Environmental Policy Act [(NEPA)] and 10 CFR §§ 72.34, 51.45, 51.61 and 51.71 because they do not adequately identify and evaluate

any adverse environmental effects which cannot be avoided from attacks by suicide mission terrorism or sabotage.

[State] Request for Admission of Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage) (Oct. 10, 2001) at 3 [hereinafter State Motion].

Relative to the five section 2.714(a)(1) late-filing factors, the State asserts that the events of September 11, 2001, establish that a new level of terrorism and sabotage are now reasonably foreseeable so as to provide an appropriate trigger for its contention and that its submission of the contention within 30 days of that date meets the “good cause” standard, thereby making this first factor one that weighs in its favor. With respect to factor two, although recognizing that it has also submitted to the Commission a separate, pending petition to suspend this proceeding based on the same terrorism/sabotage concerns, the State contends that Commission denial of the petition would leave it with only this contention as a means for gaining consideration of its concerns in this proceeding, thus putting this factor on the admissibility side of the late-filing balance as well. The same is true with respect to factor three, according to the State, because its contention is supported by Radioactive Waste Management Associates Senior Associate Dr. Marvin Resnikoff who has extensive experience in radiological risk assessment and in analyzing the PFS storage and transportation systems, which would provide the basis for his testimony addressing how PFS current designs would fail if subjected to a September 11, 2001-type attack. The State places late-filing factor four on its side of the balance too, declaring that no other party will represent its interests since no other party has a terrorism contention. Finally, as to factor five, the State acknowledges that admission of contention Utah RR would broaden and delay this proceeding, but declares that this factor should not be weighed against admission because the issues raised are critical to ensuring protection of the public health and safety and compliance with NEPA. *See id.* at 14-15.

In support of the contention itself, the State asserts that the events of September 11, 2001, establish that “a suicide mission to crash a hijacked commercial airliner loaded with jet fuel into a nuclear facility is a reasonably foreseeable event.” *Id.* at 3. Noting various nuclear facility-related federal government and international organization reactions to those events, including the NRC’s commitment to review and make appropriate changes to its security regulations and procedures, the State asserts the need for “a new evaluation of the design basis external man-induced events [(DBEMIE)] from suicidal terrorism and sabotage, as required by 10 CFR §§ 72.34, 72.94, 51.45(b)(1) & (2).” *Id.* at 4. In this regard, although asserting that it is not challenging existing agency regulations, the State nonetheless maintains that, given the events of September 11, 2001, the Commission’s Atomic Energy Act and NEPA mandates to protect the public health and safety and consider adverse environmental effects would be abrogated by continued agency review

of the PFS application without new DBEMIE-related siting criteria and NEPA analyses that focus on suicide terrorist activities. This is particularly so, according to the State, because (1) the PFS facility, which could eventually be the storage place for the current United States inventory of commercial spent nuclear fuel, is to be in the middle of Skull Valley, surrounded by vital national security facilities such as the Utah Test and Training Range, Dugway Proving Ground, Deseret Chemical Depot, and the Tooele Army Depot, and is near commercial jetways, thus presenting an opportune suicide mission target; *see id.* at 9-10; (2) the transportation routes to the facility, whether by rail or highway, would present an ideal terrorist target, *see id.* at 10; and (3) the casks in which the spent nuclear fuel (SNF) is to be shipped and stored, and the canister transfer building and the intermodal transfer point in which these casks would be housed during portions of the shipping and storage process, are not designed to withstand a direct commercial airliner impact or any resulting fuel fire, which would result in a release of radioactive material that would exceed the 5-rem standard established in 10 C.F.R. § 72.106, *see id.* at 11-13. Finally, according to the State, in light of the agency's determination to review security measures across the board, impacts of terrorist threats to the PFS facility and transportation routes from such items as truck bombs, anti-tank and armor-piercing weapons, and multimember, intercoordinated attacks should be identified and adequately evaluated in the context of the agency's safety and environmental reviews. *See id.* at 13-14.

Subsequently, in a short response Intervenor OGD supports the State's request and seeks to join in the State's contention. *See* OGD Response to [State] Request for Admission of Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage) (Oct. 24, 2001) at 1.

Applicant PFS, on the other hand, opposes admission. Albeit not addressing the late-filing factors, PFS nonetheless declares that the proposed contention is inadmissible for a number of reasons, including (1) being an impermissible challenge to the agency's security regulations, including 10 C.F.R. § 73.51, *see* Applicant's Response to [State] Request for Admission of Late-Filed Contention Utah RR (Oct. 24, 2001) at 4-8; (2) being based on a misreading of section 72.94, which concerns evaluation of potential accidents associated with normal human activity near a proposed facility site, not deliberate attacks upon the facility, *see id.* at 8-9; (3) being an impermissible challenge to the agency's NEPA regulations and outside the scope of NEPA in that NEPA does not require the assessment of remote and speculative impacts such as would arise relative to terrorism and sabotage; *see id.* at 9-10; (4) being an impermissible challenge to the Staff's license application evaluation process as embodied in its SER, *see id.* at 11; (5) being an improper attempt to raise transportation issues that are outside the scope of the proceeding, *see id.*; (6) lacking the requisite factual basis in that it (a) fails to establish any likelihood that the PFS facility is more apt to be subject to attack as compared to other nuclear facilities, (b) fails to account for the remote location

of the facility or the angle at which a crashing airliner is likely to strike, (c) is based on erroneous information about the ability of storage casks to withstand fires, (d) improperly assumes that an aircraft impact would have the same effects as a 2000-pound bomb, and (e) provides no factual support for its assertion that other types of terrorist activities, e.g., truck bombs, are reasonably foreseeable in light of the activities of September 11, 2001, *see id.* at 11-13; and (7) seeking to litigate a matter currently under Commission review that may be the subject of a general rulemaking, *see id.* at 13-14.

The Staff likewise asserts that the State's request should be rejected for failing both to meet the section 2.714(a)(1) late-filing standards and to proffer an admissible issue statement. *See* NRC Staff's Response to [State] Request for Admission of Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage) (Oct. 26, 2001) at 15. In connection with the late-filing standards, the Staff asserts that while the first and fourth factors — good cause and representation by other interests — favor permitting late-filing, the other three factors do not and, in fact, tilt the overall balance in favor of not admitting contention Utah RR. Further, regarding the contention itself, the Staff contends it is inadmissible as a challenge to the agency's physical security regulations, which the Staff declares do not require PFS to address terrorist attacks like the events of September 11, and contravenes 10 C.F.R. § 2.758(a) as it governs the consideration of Commission rules in adjudicatory proceedings. *See id.* at 7-9. Also mistaken, the Staff asserts, is the State's reliance on 10 C.F.R. § 72.94 as a basis for its contention, which the Staff maintains requires consideration of past or present man-made facilities and activities in the context of a facility siting determination and thus has no applicability here given that no terrorist events have occurred in the region of the PFS facility. *See id.* at 9-10. So too, the Staff asserts, it is not apparent that the events of September 11, 2001, must be considered for the Commission to make the requisite public health and safety reasonable assurance finding under 10 C.F.R. § 72.40(a)(13) if PFS can demonstrate it has satisfied existing regulations and applicable law. *See id.* at 10. And as for the State's concerns about the shipping casks, the Staff declares that these matters are covered by 10 C.F.R. Part 71 and United States Department of Transportation regulations so as to be outside the scope of this proceeding. *See id.* at 11.

Additionally, according to the Staff, the State's claims regarding the NEPA aspects of its contention are misplaced given its failure to make any showing, other than unsupported speculation, that an actual, September 11-type terrorist attack directed against the PFS facility is a "reasonably foreseeable event." Indeed, the Staff asserts, "there is no rational means by which a decision-maker can reasonably predict or foresee that such an attack will be targeted against any particular (nuclear or other) facility" and, as such, the potential for terrorist attack need not be addressed under NEPA. *Id.* at 12. Moreover, the Staff contends that the State has provided no support for its view that additional types of terrorist

attacks, such as truck bombs, are required to be included in the facility design basis or as reasonably foreseeable events subject to NEPA analysis. *See id.* at 13. Finally, the Staff maintains that the issues framed by contention Utah RR are best considered in the context of a rulemaking or some other generic Commission review, any resulting requirements from which would be applicable to PFS and other applicants or licensees as appropriate. *See id.* at 13-14.

II. ANALYSIS

A. Section 2.714(a)(1) Late-Filing Factors

Previously, in considering the admissibility of a late-filed issue statement such as this one, we described the applicable late-filing standards as follows:

To justify a presiding officer's consideration of the "merits" of a late-filed contention, i.e., whether the contention fulfills the admissibility standards specified in 10 C.F.R. § 2.714, a party must demonstrate that a balancing of the five factors set forth in section 2.714(a)(1)(i)-(v) supports acceptance of the petition. The first and foremost factor in this appraisal is whether good cause exists that will excuse the late-filing of the contention. *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). And relevant to our evaluation of that factor here, as we have noted previously (albeit in a somewhat different context), the good cause element has two components that impact on our assessment of the timeliness of a contention's filing: (1) when was sufficient information reasonably available to support the submission of the late-filed contention; and (2) once the information was available, how long did it take for the contention admission request to be prepared and filed. *See LBP-99-3*, 49 NRC 40, 46-48 (assessing late-filing factors relative to petition to intervene), *aff'd*, CLI-99-10, 49 NRC 318 (1999). Moreover, relative to the other four factors, in the absence of good cause there must be a compelling showing on the four remaining elements, of which factors two and four — availability of other means to protect the petitioner's interest and extent of representation of petitioner's interest by other parties — are to be given less weight than factors three and five — assistance in developing a strong record and broadening the issues/delaying the proceeding. *See Braidwood*, CLI-86-8, 23 NRC at 244-45.

LBP-00-27, 52 NRC 216, 220-21 (2000).

In this instance, concerning the first and most significant section 2.714(a)(1) factor — good cause for late-filing — the State has established that this element rests on the admissibility side of the balance, at least with respect to the State's concerns regarding a September 11-type terrorist airliner attack. Good cause exists for such a filing, both as to the "trigger" and "timing" portions of this factor.

As to the four remaining factors, we agree with the Staff that factor four — extent of representation of petitioner's interests by other parties — weighs in the State's favor. We disagree with the Staff, however, in connection with the other three factors. With respect to factor two — availability of other means

to protect the State's interests — although its pending Commission petition has the potential to afford the State some relief, given the general reluctance of the Commission to intervene in ongoing adjudicatory proceedings, *see Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374-75 (2001), we see this as providing little, if any, support for denying admissibility at this juncture. The same is true with regard to factor three — contribution to development of a sound record. In his presentation in support of contention Utah RR, Dr. Resnikoff provides an analysis of the asserted vulnerability of the PFS storage casks and cask handling facilities to a September 11-type attack and the radiological consequences that purportedly would result. *See* State Motion, Exh. 2 (Declaration of Dr. Marvin Resnikoff in Support of Utah RR). If the events of September 11, 2001, are considered sufficient to establish the reasonable foreseeability of such an incident at the PFS facility, then the information he apparently would intend to provide regarding the physical consequences for the PFS facility and the ensuing radiological impacts could make a record development contribution. Finally, regarding factor five — broadening the issues and delaying the proceeding — as the Staff notes, admission of this contention would have a substantial impact upon the existing scope of, and schedule for, this proceeding. It also is apparent, however, that the issue proffered, if admissible, is a matter of sufficiently serious moment so as to temper this factor as a significant ingredient against late admission of this contention.

Accordingly, we conclude that a balancing of the five late-filing factors in section 2.714(a)(1) supports admission of contention Utah RR as it relates to a September 11-type terrorist attack.¹

B. Contention Admissibility Standards

Of course, establishing that a balancing of the section 2.714(a)(1) late-filing factors supports admission is only part of the burden faced by an intervenor seeking to gain entry of a late-filed contention. There is also the matter of the admissibility of the contention itself under the standards established in section 2.714(b)(2), (d)(2) and the Commission's caselaw interpreting those requirements. Although PFS and the Staff provide a variety of arguments in this instance as to why both the safety and environmental aspects of contention Utah RR are not admissible, for the reasons set forth below we find one to be dispositive, i.e., that the contention constitutes an impermissible challenge to existing agency regulatory requirements. *See Dominion Nuclear Connecticut, Inc.* (Millstone

¹On the other hand, relative to the State's additional concerns about other purported terrorist activities such as truck bombs, good cause is lacking for the admission of these items. With this most prominent factor weighing against admission, an assessment and balancing of the other late-filing factors would not result in the type of compelling showing that is necessary to gain entry into this proceeding.

Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 364 (2001) (contention that amounts to general attack on regulations is impermissible).

As we noted previously, we have sustained this particular objection relative to a number of other contentions submitted by the State and other Intervenors seeking to litigate safety and environmental issues relating to sabotage and terrorism. The question squarely posed by the contention Utah RR, however, is whether the events of September 11, 2001, provide a basis for now permitting litigation on sabotage/terrorism-related safety and/or environmental matters. Given existing Commission regulations, we conclude they do not.

Parts 72 and 73 of Title 10 of the *Code of Federal Regulations* set forth the physical security protection requirements for SNF storage at facilities like that proposed by PFS. Specifically, 10 C.F.R. §§ 72.180, 72.184 provide that an applicant such as PFS must “establish, maintain, and follow a detailed plan for physical protection as described in § 73.51” and a “safeguards contingency plan for responding to threats and radiological sabotage” as described in Appendix C to Part 73. With regard to the physical protection plan, section 73.51(b)(1) states that an applicant for an away-from-reactor ISFSI (such as that proposed by PFS) must “establish and maintain a physical protection system with the objective of providing high assurance that activities involving spent nuclear fuel and high-level radioactive waste do not constitute an unreasonable risk to public health and safety.” Moreover, under section 73.51(b)(2)(i)-(iv), to satisfy this general objective an applicant must meet certain specified performance capabilities, including SNF storage within a protected area (PA); PA restricted access; detection and assessment of an unauthorized penetration of, or activities within, the PA; as necessary, timely communication with a designated response force; and effective physical protection organization management. Further, under section 73.51(b)(3), the facility physical protection system “must be designed to protect against loss of control of the facility that could be sufficient to cause a radiation exposure exceeding the dose as described in § 72.106.” Finally, section 73.51(d) sets forth specific methods for meeting the section 73.51(b)(2) performance capabilities, with the caveat that other alternative measures may be authorized by the Commission. For the safeguard contingency plan, Appendix C to Part 73 outlines specific requirements, including describing a set of predetermined decisions and actions for responding to threats, thefts, and sabotage.

These standards in large measure come from a May 1998 final rule, 63 Fed. Reg. 26,955 (1998), that was intended to clarify requirements for protecting spent fuel at the various types of SNF and high-level radioactive waste storage sites licensed by the agency, including stand-alone ISFSIs like that proposed by PFS. Among other things, that rule added section 73.51 and its specific physical protection requirements. In doing so, however, in the statement of considerations regarding the rule, responding to a comment asking that the protection goal for

these types of waste storage facilities should include countering the malevolent use of an airborne vehicle, the Commission declared:

Inclusion of an airborne vehicle was assessed for possible inclusion into the protection goal for this rule. However, protection against this type of threat has not yet been determined appropriate at sites with greater potential consequences than spent fuel storage installations. Therefore, this type of requirement is not included within the protection goal for this final rule.

63 Fed. Reg. at 26,956. Thus, the Commission seems clearly to have excluded the malevolent use of an airborne vehicle as part of any sabotage/terrorist threat that must be evaluated for these facilities, making admission of contention Utah RR as a safety issue problematic.

That this is an appropriate result under the agency's current regulatory regime is underscored by a comparison with the overall Commission approach regarding sabotage/terrorism events relating to power reactors, i.e., "sites with greater potential consequences than spent fuel storage installations." In this regard, 10 C.F.R. § 50.13 declares:

An applicant for a license to construct and operate a production or utilization facility, or for an amendment to such license, is not required to provide for design features or other measures for the specific purpose of protection against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person, or (b) use or deployment of weapons incident to U.S. defense activities.

This provision, in turn, reflects the Commission's determination in the late 1960s to exclude from licensing consideration the need for an applicant to provide special design features or other measures to protect against enemy attacks and destructive acts. The basis for this exclusion, according to the Commission, was that

the protection of the United States against hostile enemy acts is a responsibility of the nation's defense establishment and of the various agencies of our Government having internal security functions. . . . One factor underlying our practice in this connection has been a recognition that reactor design features to protect against the full range of the modern arsenal of weapons are simply not practicable and that the defense and internal security capabilities of this country constitute, of necessity, the basic "safeguards" as respects possible hostile acts by an enemy of the United States.

Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), 4 AEC 9, 13 (1967), *aff'd sub nom. Siegel v. AEC*, 400 F.2d 778 (D.C. Cir. 1968). There seems little doubt that the terrorist attacks of September 11, 2001, constituted acts by an enemy or enemies of the United States, *see* Pub. L. No. 107-40, 115 Stat. 224 (Sept. 20, 2001), as would any similar acts directed against American nuclear facilities. As such, the existing Commission policy of excluding

such acts from licensing determinations, except to the extent they fall within the already defined threat protection goals for the facility, *see Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-27, 22 NRC 126, 137-38 (1985), appears applicable and controlling relative to any safety-related considerations.²

As we noted earlier, contention Utah RR also seeks to gain consideration of a September 11, 2001-type event in the context of the agency's NEPA responsibilities. Although this question is a close one and another Licensing Board has recently reached a somewhat different conclusion, *see Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 444-47 (2001), at this juncture we are persuaded, as the Appeal Board observed a number of years ago, that "the rationale for 10 CFR § 50.13 [is] as applicable to the Commission's NEPA responsibilities as it is to its health and safety responsibilities." *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973); *see also Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 743-44 (3d Cir. 1989) (sabotage risk need not be considered in environmental impact statement because uncertainty in current risk assessment techniques would not allow meaningful risk assessment). As such, we find contention Utah RR inadmissible in this respect as well.³

C. Referral to the Commission

Although we thus conclude that late-filed contention Utah RR should not be admitted, as we have recognized, this ruling is based on existing agency regulations that were adopted prior to September 11, 2001. As is often observed since September 11, things are not — and may never be — the same in the wake of the catastrophic events of that day. Moreover, as all the parties have noted, the Commission currently is considering whether, and to what degree, the agency's regulatory regime, including facility physical security requirements, should be changed to reflect what transpired on that fateful day. *See also* Statement of Dr. Richard A. Meserve, Chairman, Submitted by the United States Nuclear Regulatory Comm'n to the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce Concerning Nuclear Power Plant

²In this regard, we note that the State has not made any attempt to gain the admission of late-filed contention Utah RR under 10 C.F.R. § 2.758 or to otherwise address the applicability of that provision to its contention admission request.

³Although our determination that the contention constitutes an impermissible attack on the agency's regulations is dispositive of this issue statement, we also note that the State's attempt to expand the consideration of sabotage/terrorism beyond September 11-type events to (1) other sabotage/terrorism scenarios, such as truck bombs, and (2) transportation issues, would be inadmissible as lacking a factual basis and outside the scope of this proceeding, respectively. So too, we note that the State's reliance on the siting provisions of section 72.94 regarding regional DBEMIEs as a basis for this contention is misplaced. Moreover, to the degree OGD seeks to adopt contention Utah RR in its October 24, 2001 pleading, we deny that request as seeking to add a late-filed contention without addressing the section 2.714(a)(1) late-filing factors. *See* LBP-98-7, 47 NRC at 182-83.

Security at 2-5 (Dec. 5, 2001) (ADAMS Access. No. ML013390509) (as part of top-to-bottom physical security review in wake of September 11, 2001 events, Commission is reexamining design basis threat and will modify it, as appropriate). In this light, this ruling seems to be one particularly suited for early review by the Commission and, accordingly, we take the step of referring this decision regarding the admissibility of late-filed contention Utah RR for its consideration. *See Haddam Neck*, CLI-01-25, 54 NRC 374-75.

III. CONCLUSION

Although we conclude that a balancing of the five 10 C.F.R. § 2.714(a)(1) late-filing factors supports admission of contention Utah RR, Suicide Mission Terrorism and Sabotage, relative to September 11, 2001-type events, we deny admission of this contention as an impermissible challenge to existing agency regulatory requirements regarding ISFSI physical security requirements. Nonetheless, given the nature of the happenings of September 11, 2001, that are the genesis of this contention, as well as the Commission's stated intent to review the agency's regulatory regimen in light of those events, we refer our rulings to the Commission for its further consideration.

For the foregoing reasons, it is, this thirteenth day of December 2001, ORDERED that:

1. The October 10, 2001 State motion for admission of late-filed contention Utah RR is *denied*.

2. In accordance with 10 C.F.R. § 2.730(f), the Licensing Board's rulings in section II.A-B above are *referred* to the Commission for its further consideration and action, as appropriate.

THE ATOMIC SAFETY AND
LICENSING BOARD⁴

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 13, 2001

⁴ Judge Lam was not available to review this decision, although he was aware of and had no objection to the Board majority's action in issuing this ruling in his absence. The Board majority notes that Judge Lam is a member of the Licensing Board in the ongoing proceeding concerning the licensing of a proposed mixed oxide fuel fabrication facility that recently issued a unanimous decision admitting a contention relating to the events of September 11, 2001. *See Savannah River*, LBP-01-35, 54 NRC at 444-47.

Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) Intervenors Skull Valley Band of Goshute Indians, OGD, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

December 19, 2001

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), the Licensing Board denies a PFS motion seeking reconsideration of the Board's November 30, 2001 decision, LBP-01-34, 54 NRC 293 (2001), denying a PFS request for summary disposition regarding contention SUWA B, Railroad Alignment Alternatives.

RULES OF PRACTICE: MOTION FOR RECONSIDERATION

A properly supported reconsideration motion is one that does not rely upon (1) entirely new theses or arguments, except to the extent it attempts to address a presiding officer's ruling that could not reasonably have been anticipated, *see Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 & n.1 (1997) (citing cases); or (2) previously presented arguments that have been rejected, *see Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). Instead, the movant must identify errors or deficiencies in the presiding officer's determination

indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information. *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 140 (1994); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 687, *rev'd and remanded on other grounds*, ALAB-726, 17 NRC 755 (1983). Reconsideration also may be appropriately sought to have the presiding officer correct what appear to be inharmonious rulings in the same decision. *See* LBP-98-10, 47 NRC 288, 296 (1998); LBP-98-17, 48 NRC 69, 73-74 (1998); *see also* LBP-00-31, 52 NRC 340, 342 (2000).

MEMORANDUM AND ORDER
(Denying Motion for Reconsideration Regarding LBP-01-34)

Pending with the Licensing Board is the December 6, 2001 motion of Applicant Private Fuel Storage, L.L.C. (PFS), seeking reconsideration of the Board's November 30, 2001 decision, LBP-01-34, 54 NRC 293 (2001), denying a PFS request for summary disposition regarding contention SUWA B, Railroad Alignment Alternatives. In responses filed December 13, 2001, the NRC Staff and Intervenor Southern Utah Wilderness Alliance (SUWA) offer opposing views regarding the validity of the PFS request, the Staff asserting the motion has merit and should be granted, while SUWA contends that the Board should deny reconsideration.

For the reasons set forth below, we deny the PFS reconsideration request.

I. BACKGROUND

In LBP-01-34, 54 NRC at 295-96, we set forth the background regarding our admission of contention SUWA B, in which Intervenor SUWA challenges the adequacy of the National Environmental Policy Act (NEPA) range of alternatives analysis afforded for the proposed Low Corridor rail spur on which spent nuclear fuel would be transported by train into the proposed PFS Skull Valley, Utah 10 C.F.R. Part 72 independent spent fuel storage installation (ISFSI). Further, in that issuance we held that, notwithstanding Intervenor SUWA's failure to follow the dictates of 10 C.F.R. § 2.749(a) and provide a statement of material facts in dispute controverting the statement of material facts not at issue submitted by PFS in support of its dispositive motion, we were declining to grant summary disposition in favor of Applicant PFS. As we explained in that opinion, we did so based on the Staff's acknowledgment that it had not fully analyzed, and thus could not express an opinion on, the validity of the purported PFS undisputed material

factual statements regarding an alternative rail corridor alignment. Although not addressed in the Staff's June 2000 draft environmental impact statement (DEIS), this alignment nonetheless was one of four alternatives relied upon by PFS as supporting a summary merits determination in its favor. *See id.* at 302-03 (citing 10 C.F.R. § 51.70(b) (Staff must independently evaluate and be responsible for all information used in DEIS)).

In its December 6, 2001 motion seeking reconsideration of this ruling, PFS proffers several arguments it asserts compel a different result. First, PFS declares that in the face of the SUWA failure to contest any of its statement of material facts not in dispute, notwithstanding the Staff's "no opinion" position regarding a number of the material facts purported to support one of the four alternatives, i.e., the so-called West Skull Valley Alternative, there clearly is no material factual dispute relative to the other three alternatives discussed in its dispositive motion and, as such, summary disposition should be granted as to those. *See* [PFS] Motion for Reconsideration of Ruling on the [PFS] Motion for Summary Disposition of [SUWA] Contention B (Dec. 6, 2001) at 2-5 [hereinafter PFS Reconsideration Motion]. In this regard, PFS notes that in a previous summary disposition ruling regarding contention Utah K/Confederated Tribes B, the Board entered summary disposition in favor of PFS on certain matters despite the fact that the Staff had not yet reached a conclusion regarding those items. *See id.* at 3 & n.3 (citing LBP-01-19, 53 NRC 416 (2001)). Additionally, PFS asserts that the Staff's "no opinion" position relative to the PFS material facts regarding the fourth alternative was not a bar to the entry of summary disposition because the Staff indicated it anticipated this alternative would result in impacts similar to or greater than those of the Applicant's preferred Low Corridor rail spur proposal. *See id.* at 5-6. Finally, PFS asserts even though the Staff may not have fully completed its analysis of one of the proffered PFS routes, the Board is authorized to evaluate the additional alternative proffered by PFS and, if it finds it adequate, amend the agency's environmental record of decision to incorporate its determination. *See id.* at 6-9.

The Staff agrees with PFS in all material respects. Initially, the Staff declares that the Board has misconstrued its statements regarding the status of its review of the PFS West Skull Valley Alternative. Acknowledging that it did not review this matter in its June 2000 DEIS and could not address the specifics of the PFS material facts relating to that alternative because it had not received the "specific design details or a detailed alignment for this alternative," the Staff nonetheless asserts it did consider the alternative in responding to the PFS dispositive motion and was able to reach the ultimate judgment that the impacts involved were comparable to or greater than what would be involved in the Low Corridor alternative so as to support the PFS motion. NRC Staff's Response to [PFS] Motion for Reconsideration of Ruling on the [PFS] Motion for Summary Disposition of [SUWA] Contention B (Dec. 13, 2001) at 6-8 (quoting

NRC Staff's Response to [PFS] Motion for Summary Disposition of Contention SUWA B — Railroad Alignment Alternatives (July 19, 2001) unnumbered attach. at 5 (Affidavit of Gregory P. Zimmerman Concerning Contention SUWA B)) [hereinafter State Response]. Further, while declaring it is within the Board's authority not to parse a contention on summary disposition, the Staff maintains that doing so in this instance would reduce the multiplicity of factual issues for hearing, thereby expediting the proceeding. *See id.* at 8. Finally, the Staff maintains that, regardless of what requirements may be imposed upon the Staff relative to the independent analysis of alternatives in a DEIS, the Board is free to modify the environmental record of decision by way of a summary disposition ruling such as the one sought by PFS. *See id.* at 8-10.

Not unexpectedly, SUWA does not agree with the PFS and Staff positions regarding reconsideration. SUWA declares that whatever problems are asserted to arise in connection with the SUWA dispositive motion response, the Board's ruling made clear that these were irrelevant to its ultimate ruling rejecting the PFS request based on a perceived deficiency in the agency's NEPA process. *See* [SUWA] Response (and Objection) to [PFS] Motion for Reconsideration of Ruling on SUWA's Contention B (Dec. 13, 2001) at 1-3. Further, SUWA asserts that contrary to the suggestions of PFS and the Staff, the Board cannot grant summary disposition regarding the West Skull Valley Alternative because that would involve the type of factual determinations that the Board cannot make at this stage of the proceeding. *See id.* at 3-4.

II. ANALYSIS

As we have indicated earlier in this proceeding relative to reconsideration requests:

A properly supported reconsideration motion is one that does not rely upon (1) entirely new theses or arguments, except to the extent it attempts to address a presiding officer's ruling that could not reasonably have been anticipated, *see Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 & n.1 (1997) (citing cases); or (2) previously presented arguments that have been rejected, *see Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5 (1980). Instead, the movant must identify errors or deficiencies in the presiding officer's determination indicating the questioned ruling overlooked or misapprehended (1) some legal principle or decision that should have controlling effect; or (2) some critical factual information. *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 140 (1994); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-25, 17 NRC 681, 687, *rev'd and remanded on other grounds*, ALAB-726, 17 NRC 755 (1983). Reconsideration also may be appropriately sought to have the presiding officer correct what appear to be inharmonious rulings in the same decision. *See* LBP-98-10, 47 NRC 288, 296 (1998).

LBP-98-17, 48 NRC 69, 73-74 (1998); *see also* LBP-00-31, 52 NRC 340, 342 (2000). In this instance, at least as presented by PFS and the Staff, the bases supporting the requested reconsideration arguably fall into the category of arguments relating to an unanticipated presiding officer ruling and misapprehended factual information.

Addressing then the parties' assertions regarding the Board's authority/ability to rule on the PFS request for summary disposition of contention SUWA B,¹ as we observed in LBP-01-34, 54 NRC at 302-03 & n.5, 10 C.F.R. § 51.70(b) specifically charges "the NRC Staff" with the responsibility for evaluating all information used in a DEIS. We consider this regulatory directive a clear indication of the Commission's intent that the Staff's assessment of relevant information is an important component in the appraisal of any NEPA issues prior to the issuance of a Final Environmental Impact Statement (FEIS). Accordingly, whatever may be the case relative to the Staff's assessment of information concerning Atomic Energy Act-related public health/safety/common defense and security matters, *see* LBP-01-19, 53 NRC at 456 (granting summary disposition regarding safety matter in the absence of Staff position on PFS undisputed material facts), some form of Staff evaluation of any information purportedly germane to reaching a Board merits disposition of pre-FEIS environmental matters is a prerequisite to such determination.² We thus reject this claim as a basis for revising LBP-01-34, albeit noting that whether (and to what degree) such information, once assessed by the Staff, would support summary disposition is a separate matter.

We likewise reject the notion supported by PFS and the Staff that we are not constrained by the Staff's admitted inability to express an opinion about the validity of the specific PFS undisputed material factual statements regarding the Western Skull Valley Alternative because of the unavailability of design and alignment details. As this argument goes, the Staff nonetheless afforded any requisite assessment of the new PFS information by reason of its stated agreement with the PFS conclusion that this alternative would have environmental impacts the same as or greater than those of the Low Corridor rail spur. This seems to suggest that, in this instance, a conclusion about the sum of the whole can be reached without an assessment of its individual parts. Yet, elsewhere in this proceeding, in the apparent exercise of its independent assessment role relative to NEPA, the Staff has taken pains to identify any corrections it perceives are

¹Of course, SUWA's failure to provide a statement of material facts at issue did not relieve the Board of the responsibility of reviewing the PFS showing regarding purported undisputed facts to ensure that summary disposition was appropriate. *See* LBP-01-30, 54 NRC 231, 235 n.5 (2001).

²Although the Applicant suggests that this determination does not square with the fact that the agency's rules of practice do not preclude the entry of summary disposition absent a Staff response to such a motion, *see* PFS Reconsideration Motion at 9, we note that in the context of a pre-FEIS summary disposition motion by an applicant, confirmation of such a Staff assessment could be provided by reference to any Staff DEIS findings or, in instances in which information not assessed in the DEIS is relied upon to support a dispositive motion, a functional equivalent.

necessary to PFS undisputed material factual statements, thereby attempting to ensure the integrity of the NEPA decisional record. *See* NRC Staff's Response to [PFS] Motion for Summary Disposition of Utah Contention O — Hydrology (July 19, 2001) unnumbered attach. at 2-5 (Affidavit of Richard H. Ketelle Concerning Utah Contention O — Hydrology). In this instance, the same approach seems warranted before summary disposition would be appropriate.³

Finally, in response to the PFS request that we grant summary disposition relative to the other three rail line alternatives discussed, as the Staff notes, the Board has considerable latitude in determining the extent to which it will grant what is essentially partial summary disposition. In this instance, based on the potential interrelationship of the various alternatives in any overall analysis of NEPA compliance and our assessment of the limiting time likely to be required to hear the entire matter, we have declined to take that approach.

III. CONCLUSION

Although PFS has put forth appropriate grounds for requesting reexamination by the Licensing Board of its ruling in LBP-01-34 declining to enter summary disposition in its favor on contention SUWA B, we are unable to agree with PFS (and the Staff) that those grounds warrant revision of our ruling. We thus deny the PFS reconsideration motion.

³ As the Staff point out, the FEIS in this proceeding is scheduled to be issued sometime in the near future, an event it asserts could provide the basis for a new or renewed summary disposition motion regarding contention SUWA B. *See* Staff Response at 10 n.9; *see also* PFS Reconsideration Motion at 10 n.15. Putting aside the fact that the existing general schedule for this proceeding does not contemplate such a motion, with an evidentiary hearing regarding this and other outstanding contentions scheduled to begin in April 2002, such a filing is likely to engender dismissal in accordance with 10 C.F.R. § 2.749(a) or result in a deferred schedule for addressing this issue.

For the foregoing reasons, it is, this nineteenth day of December 2001, ORDERED that the December 6, 2001 motion of Applicant PFS for reconsideration of the Licensing Board's decision in LBP-01-34, 54 NRC 293 (2001), is *denied*.

THE ATOMIC SAFETY AND
LICENSING BOARD⁴

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 19, 2001

⁴Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) Intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, SUWA, and the State; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael C. Farrar, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

December 26, 2001

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), the Licensing Board, acting pursuant to 10 C.F.R. § 2.749, denies a PFS request for summary disposition in its favor regarding contention Utah L, Geotechnical, and late-filed contention QQ, Seismic Stability. The Licensing Board finds that material factual disputes exist concerning the seismic design basis of the ISFSI.

RULES OF PRACTICE: DISCOVERY

Just as in the entire course of the proceeding an applicant is permitted to adjust its filings in response to Staff inquiries and additional information it obtains, discovery provides an intervenor the opportunity to adjust the strategic approach it is taking to the prosecution of its contention. Once the stated bases demonstrate that a contention is to be taken seriously, any number of later developments will also guide and control just how that contention does or does not move into the actual hearing process. On the other hand, an applicant can use the discovery

process to pin down an intervenor's experts, gaining from them, for example, concessions that their theories do not take them as far as first thought, or that deficiencies perceived in an applicant's original analyses have been remedied by further studies or investigations.

**RULES OF PRACTICE: SUMMARY DISPOSITION
(EXPERT OPINION)**

Summary disposition is not a tool for untangling expert affidavits and deciding "which experts are more correct." *Norfolk Southern Corp. v. Oberly*, 632 F. Supp. 1225, 1243 (D. Del. 1986), *aff'd on other grounds*, 822 F.2d 388 (3d Cir. 1987).

**RULES OF PRACTICE: SUMMARY DISPOSITION (ROLE OF
LICENSING BOARD)**

Although trial courts facing conflicting opinion must focus on each opinion to ensure that it is sufficiently grounded in a factual basis, the weighing of expert conclusions should be left to a trial where the trier of fact will have the benefit of cross-examination to assist in its evaluations. These holdings also apply to licensing boards, even though they have the role of both ruling on summary disposition motions and being the ultimate trier of fact because the trial process itself — which allows for vigorous inquiry of witnesses and probing for a basis for drawing inferences and finding ultimate facts — can go a long way toward illuminating the disputes and the strengths and weaknesses of the competing experts' opinions.

RULES OF PRACTICE: SUMMARY DISPOSITION

The Commission's *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 20-21 (1998), reflects that the Commission disfavors the commitment of time, energy, and resources by witnesses, counsel, and board members to the consideration of summary disposition motions that have no chance of success because they involve complex factual/opinion disputes that patently can be resolved only in a hearing.

RULES OF PRACTICE: MOTIONS TO STRIKE

Motions to strike and similar requests are appropriate where it is clear that matter is extraneous to the thrust of the contention and should be stricken (or rejected at the outset). It must be recognized, however, that when there is

an interdependence of facts and opinions, caution must be exercised against artificially trying to separate them, for it may turn out that considering that stricken matter would have been most helpful in reaching a decision on the merits.

MEMORANDUM AND ORDER
(Ruling on Applicant’s Motion for Summary Disposition of Part A of
“Contention Utah L, Geotechnical” and on Related Matters)

Introduction and Summary

The State of Utah has been opposing the plans of a consortium of electric utility companies, called Private Fuel Storage, L.L.C. (PFS, or the Applicant), to construct within the State’s borders, on the reservation of the Skull Valley Band of the Goshute Indians, an aboveground facility for the temporary storage of spent fuel from nuclear power plants.¹ The State’s many challenges to PFS’s application for a Nuclear Regulatory Commission license have, in this forum, taken the form of the “contentions” — allegations of safety and environmental inadequacies in the planned PFS facility — called for by the NRC’s rules.

Although several of the State’s contentions have already been the subject of a full evidentiary hearing,² or are destined for such a hearing (*see* notes 10 and 35, below), a large number have previously been rejected by this Licensing Board³ on a variety of grounds. Some were dismissed at the outset for such reasons as not providing necessary supporting documentation, not raising issues litigable in this forum, and/or not furnishing sufficient justification for being filed outside established time periods.⁴

Other contentions, although initially admitted as appropriate to litigate, were later dismissed by this Board on “summary disposition,” a procedure invoked

¹ As those familiar with the area know, the facility would be located some 50 miles southwest of Salt Lake City, between Tooele and the Dugway Proving Grounds.

² A hearing was conducted in mid-2000 on the merits of several contentions involving financial assurance and emergency planning. A partial initial decision was issued on the latter. LBP-00-35, 52 NRC 364 (2000), *petition for review denied*, CLI-01-9, 53 NRC 232 (2001). Later developments have left the financial assurance issues yet to be decided.

³ To this point, the Licensing Board assigned to this proceeding has been chaired by Chief Administrative Judge G. Paul Bollwerk, III. Pursuant to, and as detailed in, a December 19, 2001, Notice of Reconstitution, responsibilities for the completion of the case are being split between that original board, chaired by Chief Judge Bollwerk, and this second board, chaired by Judge Michael C. Farrar (with both boards having the same technical members, Judges Jerry R. Kline and Peter S. Lam). Unless the context demands otherwise or we so indicate, references herein to “this Board” or “the Licensing Board” are *not* intended to distinguish between rulings made by the original board and by this second Board, for there is no lack of continuity in our respective roles.

⁴ We do not pause in this opinion to recite this Board’s many prior decisions involving rulings on the initial admissibility of contentions (as referred to in the text above) or on summary disposition of contentions previously admitted (*see* next paragraph of text). We note simply that there have been some 40 such decisions, involving some 120 contentions.

when there are no significant factual disputes about a matter and controlling legal principles warrant resolving it without the formal presentation of evidence at a trial. As to those issues, the Applicant was able to convince us that no evidentiary hearing was necessary to determine that the State's claims lacked merit.⁵

The Applicant now urges us to take similar action by ruling summarily in its favor on another State claim, the one embodied in so-called Part A of "Contention Utah L, Geotechnical." By this claim,⁶ the State has been asserting that, contrary to the standard mandate long imposed by the Commission on the facilities it licenses,⁷ the facility is not properly designed to withstand the potential risk of earthquakes. In that connection, proper design usually involves predicting what type or level of seismic event should be anticipated and guarded against. *See, for example, Consolidated Edison Co. of New York* (Indian Point Station Units 1, 2, and 3), ALAB-561, 10 NRC 410, 411 (1979) (dissenting opinion).

Although the Applicant has put forward a number of undisputed facts that the State does not contest, we nonetheless *decline to grant summary disposition to PFS on Part A of Contention Utah L*. For the State's countervailing presentation — including information provided by the State's array of experts on seismology and related topics — raises a genuine dispute about a number of other key factual matters, including the ultimate factual conclusions we should draw from underlying technical facts.

In ruling in the State's favor at this preliminary juncture, we express no opinion, of course, about what the evidence will later establish or what the eventual result will be. We simply rule that there is sufficient dispute between the parties that the controversy must go to a trial for resolution.

In this opinion,⁸ we also rule on related matters involving the *scope* of the State's geotechnical contention. We resolve those matters essentially in the State's favor, finding that the underlying issues are so inextricably intertwined that we will (1) *reject PFS's suggestion that we carve out some aspects as inappropriate for*

⁵In other instances, after discovery of additional facts bearing on particular claims, the State withdrew contentions on the grounds that its concerns had been satisfied.

⁶This Memorandum and Order directly involves only "Part A" of the State's geotechnical contention. "Part B," challenging the Applicant's request for an exemption from certain regulatory requirements, proceeded initially in a somewhat different direction, but has more recently become part of the matters before us. *See* LBP-01-3, 53 NRC 84 (2001), *aff'd and remanded for further proceedings*, CLI-01-12, 53 NRC 459 (2001).

A motion for summary disposition of Part B was filed by PFS on November 9, 2001, and responses were filed on December 7, 2001. In the wake of our recent ruling on a Part B discovery dispute (unpublished order, November 21, 2001), we gave the State until 7 days after that discovery is completed — but no later than December 21 — to amend its Part B responses based on the additional discovery allowed. Thus, we should soon be able to rule on the Part B summary disposition motion, likely applying the same principles set out in this opinion to the particular circumstances presented there.

⁷*See* 10 C.F.R. Part 50, Appendix A, General Design Criterion 2; 10 C.F.R. Part 100, Appendix A; 10 C.F.R. § 72.102; *Virginia Electric and Power Co.* (North Anna Power Station, Units 1, 2, 3, and 4), ALAB-256, 1 NRC 10, 12-13 (1975).

⁸The body of this opinion consists of four main parts — A. The Pending Matters and the Conflicting Positions (pp. 501-04); B. The Governing Legal Standards (pp. 504-12); C. The Resulting Rulings (pp. 512-22); and D. The Upcoming Hearing (pp. 522-24). Those are followed by our Order (p. 524-25).

hearing and (2) allow the State to add a new, late-arising challenge (“Contention Utah QQ”). In light of these rulings, the hearing⁹ will encompass the full range of the State’s currently expressed geotechnical concerns.¹⁰

A. The Pending Matters and the Conflicting Positions

In this licensing proceeding under 10 C.F.R. Part 72 for an independent spent fuel storage installation (ISFSI), the matters now before us all revolve around Contention Utah L, Geotechnical, framed by the State (in a supplemental petition timely filed in November 1997) as follows (footnote omitted):

The Applicant has not demonstrated the suitability of the proposed ISFSI site because the License Application and [Safety Analysis Report] do not adequately address site and subsurface investigations necessary to determine geologic conditions, potential seismicity, ground motion, soil stability and foundation loading.

As will be discussed (*see pp. 504-07, below*), a party has to submit a “basis” for each contention. Here, the State in fact submitted four bases to support Contention L.¹¹ These bases embrace the following issues: (1) surface faulting; (2) ground motion; (3) characterization of subsurface soils, including (a) subsurface investigations, (b) sampling and analysis, and (c) physical property testing for engineering analysis; and (4) soil stability and foundation loading.

Upon review of the contention and its supporting bases, we admitted it into the proceeding. LBP-98-7, 47 NRC 142, 253, *reconsideration granted in part and denied in part on other grounds*, LPB-98-10, 47 NRC 288, *aff’d on other grounds*, CLI-98-13, 48 NRC 26 (1998). The parties then conducted extensive discovery of the facts and expert opinions underlying each other’s positions.

We did not allow into the proceeding the bulk of two additional contentions (Utah EE and GG) belatedly submitted by the State in December 1997 in an attempt to raise further concerns about the facility’s seismic design parameters. Contention

⁹The evidentiary hearing on this issue, and on other matters not summarily resolved (*see notes 35 and 36, below*), is currently scheduled to begin in Salt Lake City on Monday, April 8, 2002, and was anticipated to last 3 weeks.

¹⁰Among the other matters to be considered at that trial is the State’s “Contention Utah K,” claiming that the facility has not been properly designed to withstand potential “credible accidents,” including those caused by aircraft. The Commission has recently handed down an important ruling guiding our consideration of one of the standards applicable to that subject. CLI-01-22, 54 NRC 255 (2001), *aff’g* LBP-01-19, 53 NRC 416 (2001).

For our part, we issued earlier this month an opinion indicating that the State’s recently proffered “terrorism” contention (Contention Utah RR), based on the events of September 11, may not under existing rules be made the subject of our hearing. LBP-01-37, 54 NRC 476 (2001). *See also* CLI-01-22, 54 NRC at 257 n.3 (which refers also to the State’s petition to the Commission to suspend any further proceedings herein). Recognizing that the Commission has been heavily involved in reviewing its policies in the aftermath of the terrorist events, we referred our “Utah RR” ruling to the Commission for immediate review. LBP-01-37, 54 NRC at 487-88. Having done so, we are in position to obtain the benefit of any early guidance the Commission is able to provide on this score, as it analyzes the overarching question of how best to protect the public in the post-9/11 world.

¹¹*See* “State of Utah’s Contentions on the Construction and Operating License Application . . .” at 80-95 (Nov. 23, 1997).

Utah EE — “Failure to Demonstrate Cask-Pad Stability During Seismic Event” — questioned, among other things, the adequacy of PFS’s analysis regarding the site-specific seismic stability of one of the two PFS-designated cask systems to be used at the facility, namely the Holtec HI-STORM 100 system. The similarly titled Contention Utah GG asserted that PFS has failed to demonstrate that the other cask system, the so-called TranStor system, will remain stable during a seismic event. We largely denied admission of these contentions in April 1998, based on a combination of reasons including late filing, but did admit one portion (paragraph 5) of Contention Utah GG as revised. LBP-98-7, 47 NRC at 206-09, 210-11, 257.¹²

For similar reasons, we later rejected Contention Utah JJ, dealing with the assertedly inadequate PFS analysis of the implications of “possible co-seismic rupture” involving the Stansbury Fault and other faults. We found that the State should have acted faster than it did after receiving the information that triggered this contention. LBP-00-16, 51 NRC 320 (2000).

1. Motion for Summary Disposition

The principal matter now pending before us is the Applicant’s motion for summary disposition of Utah’s original geotechnical contention. As noted above, that contention challenges the adequacy of PFS’s site and subsurface investigations necessary to determine geologic conditions, potential seismicity, ground motion, soil stability, and foundation loading.

PFS filed its summary disposition motion on December 30, 2000, after discovery was completed. In arguing that no genuine issue of material fact exists, PFS pointed, among other things, to its having performed since the contention was filed extensive geotechnical studies and investigations that it claims address all of the State’s concerns. In support of that position, PFS submitted a “Statement of Material Facts on Which No Genuine Dispute Exists” (Dec. 30, 2000) [hereinafter PFS Undisputed Facts], along with the supporting affidavits of several of its experts: Kevin J. Coppersmith, Robert R. Youngs, John C. Clark, and Paul J.

¹² Later, the State withdrew the limited aspect of Contention Utah GG that we had admitted, because PFS had, in its seventeenth amendment to its license application, removed reference to the TranStor cask system. “. . . Request to Withdraw Contention . . .,” September 14, 2000, granted October 6, 2000. In withdrawing, however, the State indicated that the “cask sliding analysis” shortcomings allegedly applicable to the TranStor casks also bore on the Holtec casks, and urged the NRC Staff to “require PFS to perform a more complete analysis” to address its concerns. As we discuss below (p. 519), the circumstances surrounding Contention GG’s late filing, partial admission, and eventual withdrawal have some continued significance.

Trudeau.¹³ PFS also relied upon certain admissions contained in the deposition testimony of several State witnesses.¹⁴

In its January 30, 2001, response, the State urged us not to grant summary disposition. To that end, the State included a statement of the material facts that it contends are in dispute, and provided several supporting affidavits from its experts: M. Lee Allison, Walter J. Arabasz, Steven F. Bartlett, and Farhang Ostadan.¹⁵ The State also relied on portions of the deposition testimony of several PFS experts.

For its part, the NRC Staff supports the PFS motion, perceiving no remaining genuine issues of material fact. Its January 30 filing urged that the undisputed facts demonstrate that the issues previously raised by the State have been resolved. In support of its position, the Staff submitted the affidavits of John Stamatakos and Goodluck I. Ofoegbu, both of the Southwest Research Institute (SwRI).¹⁶

2. *Motion To Strike*

Although the matter then appeared ripe for decision, new pleadings have been filed intermittently throughout the remainder of this year. The first came within 10 days when, on February 9, PFS filed a motion to strike portions of the State's response to the PFS motion for summary disposition. PFS argues that the State was improperly attempting in its response to raise issues beyond the scope of admitted Contention Utah L; PFS finds specific fault with portions of the State's Disputed and Relevant Material Facts, portions of the Arabasz Declaration and Bartlett Declaration, and nearly all of the Ostadan Declaration.

The State responded to PFS's motion to strike on February 20, arguing that the motion not only lacked merit but also was, in reality, an impermissible reply to the State's response to the summary disposition motion. For its part, the NRC Staff's response agreed with PFS that the portions of the State's materials cited by the Applicant should be stricken as beyond the scope of Contention Utah L.

¹³ See PFS Dispositive Motion Exh. A, Declaration of Dr. Kevin J. Coppersmith [hereinafter Coppersmith Decl.]; *id.* Exh. B, Declaration of John Clark [hereinafter Clark Decl.]; *id.* Exh. C, Declaration of Dr. Robert Y. [sic] Youngs [hereinafter Youngs Decl.]; *id.* Exh. D, Declaration of Paul Trudeau [hereinafter Trudeau Decl.].

¹⁴ See PFS Dispositive Motion Exh. E, Excerpts from Deposition of Dr. Walter J. Arabasz [hereinafter Arabasz Dep.]; *id.* Exh. F, Deposition of Barry J. Solomon; *id.* Exh. G, Excerpts from the Deposition of Dr. M. Lee Allison; *id.* Exh. H, Excerpts from Deposition of Dr. Steven F. Bartlett and Dr. Farhang Ostadan.

¹⁵ See State Response Exh. 1, Declaration of Dr. M. Lee Allison [hereinafter Allison Decl.]; *id.* Exh. 2, Declaration of Dr. Walter J. Arabasz [hereinafter Arabasz Decl.]; *id.* Exh. 3 Declaration of Dr. Steven F. Bartlett [hereinafter Bartlett Decl.]; *id.* Exh. 4, Declaration of Dr. Farhang Ostadan [hereinafter Ostadan Decl.].

¹⁶ See "NRC Staff Response . . ." unnumbered attach. 1, Affidavit of John Stamatakos; *id.*, unnumbered attach. 2, Affidavit of Goodluck I. Ofoegbu.

3. *Motions To Admit and To Modify Late-Filed Contention*

While the Board was involved in deciding numerous other matters in this case (*see* LBP-01-13, 53 NRC 319 (2001), and LBP-01-19, 53 NRC 416 (2001)), the controversy over seismic matters soon became more complex with the filing, on May 16, of the State's motion to add Contention Utah QQ, dealing with assertedly late-breaking seismic matters involving revised calculations submitted by the Applicant. *See* State of Utah's Request for Admission of Late-Filed Contention Utah QQ (Seismic Stability). The Staff and the Applicant both responded on May 30, arguing that the contention should not be admitted into the proceeding. The Applicant believed the contention faulty on both substantive and timeliness grounds. For its part, the Staff thought that the contention's substance was sufficiently well presented but, like the Applicant, argued that good cause for its belatedness did not exist because similar matters could have been raised earlier. In fact, so goes the argument, the State had been rebuffed previously for raising the same matters in untimely fashion.

Less than 3 weeks later, while that motion was pending, the State requested on June 19 that it be allowed to modify the basis of pending Contention Utah QQ to reflect recent filings that the Applicant had made. On July 3, the Applicant opposed this modification request, but the NRC Staff thought that the proposed modification reflected, at least in part, a legitimate approach.

A similar development occurred less than 2 months later when, on August 23, the State filed a second request to modify the basis of pending Contention Utah QQ, again noting that the Applicant had filed a new calculation, which the State wished to challenge. The responses filed on September 7 followed the previous pattern, *i.e.*, the Applicant opposed the request while the NRC Staff believed that it was in part valid.

The Applicant's September 11 response triggered yet another set of papers when Utah moved, on September 12, to strike Exhibit 1 of that response on the grounds that it (1) incorporated an illegitimate attempt to avoid the rules limiting the length of briefs and (2) contained untrue material. The Staff and the Applicant, in September 24 filings, indicated their belief that the State's motion to strike was not well taken.

B. The Governing Legal Standards

All the above Contention Utah L "Part A" matters concerning the seismology of the proposed site are now ready for decision. Review of the legal standards governing our decision begins with the NRC's specific rules regarding the filing of contentions and of supporting bases for those contentions. It is necessary to begin there because — even though the principal matter before us is whether

summary disposition is appropriate here — we also have pending a motion to add a contention, and two motions to amend its stated bases.

1. Filing Contentions

In the course of this proceeding, we have had numerous occasions to set out the rules that govern the filing of contentions and the supporting documentation they must have to be admitted into the proceeding. In a nutshell, the Commission's rules in this regard are strict; their very specific language leaves little doubt about their requirements (10 C.F.R. § 2.714(b)(2)):

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

- (i) A brief explanation of the bases of the contention.
- (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
- (iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the Applicant's environmental report.

Lest there be any mistake, the rules go on to prescribe that a board shall “refuse to admit a contention if . . . [t]he contention and supporting material fail to satisfy the requirements” quoted above. 10 C.F.R. § 2.714(d)(2)(i).

Thus, where federal courts permit considerably less-detailed “notice pleading,” the Commission requires far more to plead a contention. This was not always the case (*see, for example, Houston Lighting and Power Co.* (Allen's Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542 (1980)), but it has been the rule since 1989 — and, as will be seen below, that revised rule serves a number of valid purposes.

In view of the significance the contentions pleading rule plays in putting our current issues in context, we think it worthwhile to set out in full the thorough history and explanation the Commission provided about the purposes of that rule in *Duke Energy Corp.* (Oconee Nuclear Station Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334-35 (1999) (emphasis added):

Our strict contention rule serves multiple interests. First, it focuses the hearing process on real disputes susceptible of resolution in an adjudication. For example, a petitioner may not demand an adjudicatory hearing to attack generic NRC requirements or regulations, or to express generalized grievances about NRC policies. See *North Atlantic Energy Services Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 217 n.8 (1999); *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). Second, *the rule's requirement of detailed pleadings puts other parties in the proceeding on notice of the Petitioners' specific grievances and thus gives them a good idea of the claims they will be either supporting or opposing.* Finally, *the rule helps to ensure that full adjudicatory hearings are triggered only by those able to proffer at least some minimal factual and legal foundation in support of their contentions.*

In 1989 the Commission toughened its contention rule in a conscious effort to raise the threshold bar for an admissible contention and ensure that only intervenors with genuine and particularized concerns participate in NRC hearings. See Final Rule, Contentions, 54 Fed. Reg. at 33,168. By raising the admission standards for contentions, the Commission intended to obviate serious hearing delays caused in the past by poorly defined or supported contentions. At the time, hearings often were “delayed by months and even years of prehearing conferences, negotiations, and rulings on motions for summary disposition.” *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248 n.7 (1996) (citing *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), LBP-85-5, 21 NRC 410 (1985), where 500 contentions were submitted, 60 were admitted, and only 10 were actually litigated after a period of 2½ years of negotiations).

Prior to the contention rule revisions, licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation. Indeed, in practice, intervenors could meet the rule's requirements merely “by copying contentions from another proceeding involving another reactor.” Proposed Rule, Contentions, 51 Fed. Reg. 24,365, 24,366 (July 3, 1986). Admitted intervenors often had negligible knowledge of nuclear power issues and, in fact, no direct case to present, but instead attempted to unearth a case through cross-examination. See Cotter, *Nuclear Licensing: Innovation Through Evolution in Administrative Hearings*, 34 Admin. L. Rev. 497, 505, 508 (1982). *Congress therefore called upon the Commission to make “fundamental changes” in its public hearing process to ensure that “hearings serve the purpose for which they are intended: to adjudicate genuine, substantive safety and environmental issues placed in contention by qualified intervenors.”* H.R. Rep. No. 97-177, at 151 (1981).

The 1989 revisions to the contention rule thus insist upon “some factual basis” for an admitted contention. 54 Fed. Reg. at 33,171. The intervenor must “be able to identify some facts at the time it proposes a contention to indicate that a dispute exists between it and the Applicant on a material issue.” *Id.* These requirements are intended to “preclude a contention from being admitted where an intervenor has no facts to support its position and [instead] contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts.” *Id.* Although in quasi-formal adjudications like license renewal an intervenor may still use the discovery process to develop his case and help prove an admitted contention, *contentions shall not be admitted if at the outset they are not described with reasonable specificity or are not supported by “some alleged fact or facts” demonstrating a genuine material dispute.* *Id.* at 33,170.

The Commission concluded by stating that it wanted entertained only “contentions that are material and supported by reasonably specific factual and legal allegations.” 49 NRC at 335.

As may be seen, then, the Commission has made it clear that those who want to participate in its proceedings, and thereby to force an applicant for a license to bear the heavy burden of such a proceeding, must themselves carry a heavy initial burden. It is not sufficient to show up on the Commission's doorstep, as it were, with generalized complaints about a proposed facility or action. Instead, complaints must be stated with great specificity, a basis for them must be put forward, and indeed at a very early stage one who wishes to participate in the proceeding must go so far as to describe in general terms the nature of the evidence that will be put forward.

If a contention is not filed on time, its proponent faces an even greater burden. In those instances, the rules prescribe a balancing test that considers five key factors (10 C.F.R. § 2.714(a)(1)):

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

As the parties well know, we have had numerous occasions to apply these rules during prior phases of this proceeding. In doing so earlier this year we observed (LBP-01-13 (p. 504, above), 53 NRC at 324-25) (emphasis added):

In evaluating the admissibility of a late-filed contention, *the first and foremost factor in this appraisal is whether good cause exists that will excuse the late-filing of the contention. See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). And relative to our evaluation of that factor here, as we have noted previously . . . , the good cause element has two components that impact on our assessment of the timeliness of a contention's filing: (1) when was sufficient information reasonably available to support the submission of the late-filed contention; and (2) once the information was available, how long did it take for the contention admission request to be prepared and filed. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-3, 49 NRC 40, 46-48 (assessing late-filing factors relative to petition to intervene), *aff'd*, CLI-99-10, 49 NRC 318 (1999). Moreover, relative to the four other factors, *in the absence of good cause there must be a compelling showing on the four remaining elements*, of which factors two and four — availability of other means to protect the petitioner's interest and extent of representation of petitioner's interests by other parties — are to be given less weight than factors three and five — assistance in developing a strong record and broadening the issues/delaying the proceeding. *See Braidwood*, CLI-86-8, 23 NRC at 244-45.

Additionally, as we have noted recently, even if these factors support admission, the contention itself must be admissible under the standards established in 10 C.F.R. § 2.714(b)(2), (d)(2) and the Commission's case law. *See* LBP-01-37 (note 10, above), 54 NRC at 484.

To recap the standards set out above: the Commission has adopted strict rules about pleading contentions, and those rules serve an important purpose. Those rules are intended to make sure that those who are admitted into the Commission's proceedings are serious, and are prepared to make a valuable contribution.

2. *Conducting Discovery*

Given the role it plays in our decision today, we need address only briefly the standards applicable to the next phase of the proceedings, the discovery process. From an intervenor's point of view, discovery provides the opportunity to put more flesh on the bones of its contentions and the bases that it was able to state at the outset.¹⁷ Just as during the entire course of the proceeding an applicant is permitted to adjust its filings in response to Staff inquiries and to additional information it obtains (as has often been done here, *see* notes 30 and 34, below), an intervenor will be utilizing the discovery process to adjust the strategic approach it is taking to the prosecution of its contention.

That is to say, providing "a brief explanation" (10 C.F.R. § 2.714(b)(2)(i)) of the bases for contentions plays an important function in determining whether that contention is a substantial one that can be admitted into the proceeding. But once the stated bases demonstrate that a contention is to be taken seriously, any number of later developments will also guide and control just how that contention does or does not move into the actual hearing process. For example, much might be learned by an intervenor that would lend further support to its view about the issues after contentions are filed. This mirrors what happens when, in response to NRC Staff scrutiny or other developments, much is often added by the applicant to support the application's documentation and reasoning after a matter is first noticed for hearing.

Of course, discovery also plays a limiting role. An applicant can use that process to pin down an intervenor's experts, gaining from them, for example, concessions that their theories do not take them as far as first thought, or that deficiencies perceived in the applicant's original analyses have been remedied by further studies or investigations. Indeed, PFS's attempt to win summarily here is in no small part quite properly based on the discovery it has conducted.

¹⁷ As the Commission indicated (p. 506, above), even though an *unsupported* contention cannot be admitted on the contemplation that discovery will lend it some support, where sufficient support has already been provided, an intervenor may of course "use the discovery process to develop his case and help prove an admitted contention." 49 NRC at 335.

3. *Moving for Summary Disposition*

Once discovery is completed, it may be appropriate for an applicant to file motions for summary disposition as to certain contentions. We say “may” be appropriate because it should be clear to our practitioners that not every matter or contention lends itself to summary disposition. Summary disposition is a useful tool for resolving in short order those contentions that, after discovery is completed, are shown by undisputed facts to have nothing to commend them. *But it is not a tool for trying to convince a Licensing Board to decide, on written submissions, genuine issues of material fact that warrant resolution at a hearing.*

In that regard, the basic standards for summary disposition, which we have drawn upon many times in this proceeding and recently reiterated, bear repeating here:

In an NRC proceeding, a party is entitled to summary disposition if the presiding officer determines that there exists “no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law.” 10 C.F.R. § 2.749(d). When reviewing a motion for summary disposition, the Commission has used standards similar to those used by the federal courts when ruling on motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

Consistent with Rule 56, the moving party bears the initial burden of showing that no genuine issue as to any material fact exists, which the party must do by a required statement of material facts and any supporting documentation submitted with the requisite motion. *See Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), LBP-99-32, 50 NRC 155, 158 (1999). The opposing party must counter each adequately supported material fact with its own statement of material facts in dispute and supporting documentation, or the facts will be deemed admitted. *See* CLI-93-22, 38 NRC at 102-03. When responding, the opposing party may not rely upon mere allegations or denials but must submit “specific facts showing that there is a genuine issue of fact.” [footnote omitted] 10 C.F.R. § 2.749(b).

LBP-01-30, 54 NRC 231, 235 (2001).

In addition to those basic principles about summary disposition, there are corollary tenets that become crucial here — the nature of the guidelines that control rulings on summary judgment in federal court (and, by accepted analogy and routine practice, similar rulings on summary disposition here) when opinions of competing experts differ.

As commentators and practitioners know, differences among experts may occur at different factual levels: either about disputed baseline observations, or about the ultimate facts or inferences to be drawn even where baseline facts may be uncontested. Or, as the Supreme Court has put the distinction, there are at

one level “predicate” facts (also called “evidentiary” or “basic” facts) and at another level “ultimate” facts, both subject to dispute.¹⁸

With this distinction in mind, even a cursory review of the analogous federal case law governing summary judgment under the Federal Rules of Civil Procedure demonstrates that, when presented with conflicting expert opinion, trial courts are reticent to grant summary judgment. *See, e.g., Hudson Riverkeeper Fund v. Atlantic Richfield Co.*, 138 F. Supp. 2d 482, 488-89 (S.D.N.Y. 2001), and cases cited therein. When ruling on summary judgment, trial courts have indicated it is not their function to untangle the expert affidavits and decide “which experts are more correct.” *Norfolk Southern Corp. v. Oberly*, 632 F. Supp. 1225, 1243 (D. Del. 1986), *aff’d on other grounds*, 822 F.2d 388 (3d Cir. 1987). Of course, trial courts facing conflicting expert opinion must focus on each opinion’s “principles and methodology” to ensure that it is sufficiently grounded in a factual basis. *Kannankeril v. Terminix International*, 128 F.3d 802, 807 (3d Cir. 1997).¹⁹ *But the weighing of the expert conclusions should be left to a trial, where the trier of fact will have the benefit of cross-examination to assist its evaluation. Ibid.*

The force of the above holdings applies to NRC licensing boards even though — unlike federal district court judges in cases where a jury is to be the ultimate fact-finder — we have a dual role, ruling on summary disposition motions and then ourselves becoming the trier of fact. But this does not mean we should — or readily could — combine both functions in one step whenever one party or another seeks to have us rule summarily. For, as has been seen, underlying the courts’ reluctance to act summarily in the face of competing expert testimony is the notion that the trial process itself — which allows for vigorous inquiry of witnesses and probing for a basis for drawing inferences and finding ultimate facts — can go a long way toward illuminating the disputes and the strengths and weaknesses of the competing experts’ opinions. Thus, in *Daubert* (note 19, above), the Supreme Court stressed the value of “vigorous cross-examination” by the parties in exposing shaky opinions (509 U.S. at 596); in our hearings, questioning not only by the parties but also by the Board can likewise prove to be decisive in enabling us to render a sound decision (*see* p. 523, below).

Our views on these matters are not only in keeping with federal court practice but, we think, also fully consistent with Commission policy. Although the Commission supports the efficiencies that can be gained by granting summary

¹⁸ *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 158 n.30 (1987) (quoting from *County Court of Ulster County v. Allen*, 442 U.S. 140, 156 (1979)).

¹⁹ In this regard, the Supreme Court, in a case that came up on summary judgment, has established “gatekeeping” standards to ensure that only opinions presented by recognized experts in the field and properly grounded in scientifically sound methodology are accepted by the trial courts. *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993). *See also Kumho Tire Co. v. Carmichael*, 526 U.S. 136, 151-52 (1999), indicating that the *Daubert* factors are flexible ones and the gatekeeping inquiry must be tied to the facts of a particular case.

disposition in appropriate cases,²⁰ it has also expressed concerns about overuse of summary practice. *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 20-21 (1998); *cf.* 10 C.F.R. § 2.749(a) (cited by this Board the other day in LBP-01-38, 54 NRC 490, 495 n.3 (2001)). In context, we think that what the Commission disfavors is the commitment of time, and energy, and resources — by witnesses, counsel, and Board members — to the consideration of summary disposition motions that have no chance of success because they involve complex factual/opinion disputes that patently can be resolved only in a hearing.

This view is in keeping with the commentary recently published in connection with the pending proposal to change the NRC's Rules of Practice. There, in response to public comments on its 1998 Policy Statement, the Commission pointed out that, while there are times at which filing summary disposition motions is appropriate, a judicious approach is required:

There may be times in the proceeding when these motions should not be entertained because consideration of the motions would unduly delay or complicate proceedings by distracting responding parties from addressing other pending issues. Moreover, there may be situations in which the time required to consider summary disposition motions and responses and to issue a ruling on these motions will substantially exceed the time needed to complete the hearing and record on the issues. The licensing board is in a good position to determine when the use of summary disposition would be appropriate and would not delay the ultimate resolution of issues and the Commission will provide the boards the flexibility to make that determination in most proceedings.

66 Fed. Reg. 19,610, 19,615 (Apr. 16, 2001).

In light of all the foregoing, we think the Commission would agree there are issues so complex that we should not embark on an extended quest to resolve them by summary disposition. Rather, particularly as the time for the hearing grows near, it would be much better to conserve and redirect energy and resources — the parties' and ours — from summary disposition practice²¹ to careful management

²⁰ As do we. *See, for example, Allen's Creek* (p. 505, above), 11 NRC at 552-53 (concurring opinion), and a number of earlier decisions in this proceeding (*see pp.* 499-500, above).

²¹ We recognize that our analysis begs the question of how to determine *in advance* which issues are so complex that an effort to obtain summary disposition will almost certainly fail. We can, of course, conserve *Board* resources simply by ruling peremptorily after all the moving and opposing documents are in. But we cannot so readily accomplish the Commission's purpose of avoiding also the *parties'* misallocation of their efforts. If this concern arises again here (*see* issues discussed under "Future Discovery," p. 522, below) or elsewhere, an appropriate case-management tool might be the convening of a post-discovery conference at which informal discussion of the issues could make clear which ones seem ill-suited for summary handling. This tentative conclusion would not preclude the filing of a summary disposition motion, but it would provide fair warning to the movant that its efforts were likely to be in vain.

of and preparation for the hearing process itself, so that the goals of efficiency, effectiveness, and fairness can most readily be met.²²

To that end, we spell out, in a companion unpublished opinion also issued today, certain steps to be taken to help achieve those goals as the parties and we prepare for our upcoming hearing. For now, we turn in Section C to the task of applying the governing legal standards just discussed to the matters before us.

C. The Resulting Rulings

The above principles help guide our course here. In this portion of our opinion, we set forth our decision on each of the pending matters.

Applicant's Motion for Summary Disposition

Although the State concedes that some of the facts put forward by the Applicant as undisputed do indeed fit into that category, the State is contesting a great many others. In doing so, it has brought forward a number of experts who appear at this stage to be qualified and competent and who have provided in lengthy affidavits their views challenging the Applicant's case in a number of important respects.

In our view, *denials* of summary disposition for complex issues need not be burdened or delayed with extended discussion of each subissue presented by the moving party. Rather, at most all that is needed is the exposition of sufficient genuine dispute about the facts in material areas to illustrate why, overall, summary action is unavailable.²³ To show that there remains controversy requiring a hearing to resolve, we discuss each of the first three bases the State offered in support of its contention.²⁴

1. The first basis supplied for the State's contention challenges the adequacy of the PFS investigation in identifying capable faults that could produce "greater vibratory ground motion than that for which the facility is designed" or "faults beneath the storage area" that may pose a threat of surface rupture, factors that must be accommodated in facility siting and design. *See* PFS Undisputed Fact 1.

²² *See Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981), and *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998), both urging licensing boards to use all available tools for producing an informed adjudicatory record in a reasonable, disciplined time frame while providing a fair hearing process.

²³ To be sure, there might be instances in which the grant of *partial* summary disposition would be appropriate to consider, and when doing so a more complete review of all the facts would be in order. But as we noted the other day herein, "the Board has considerable latitude in determining the extent to which it will grant what is essentially partial summary disposition." LBP-01-38 (p. 511, above), 54 NRC at 495. In light of our views about the interrelated nature of the geotechnical issues (*see* p. 517, below), this is not an instance in which partial resolution now would further our ability to reach a sound, thorough final decision.

²⁴ The fourth basis appears to have been left essentially undefended by the State. We will discuss its status at the prehearing teleconference we intend to convene in mid-January to plan further the course that will take us to the hearing.

PFS asserts, however, that the various technical reports that it has prepared alleviate any concerns alleged by the State in Basis 1 of the contention. In reaching its conclusions, PFS has had several reports (including versions in 1996, 1998, and February 1999) prepared by its contractor Geomatrix, all of which allegedly comprehensively analyze both the ground motion hazard and the surface displacement hazard based on previously identified and newly discovered faults. *See* PFS Dispositive Motion at 5. PFS also asserts that the reports correspond to the requirements of Regulatory Guide 1.165 and the Standard Review Plan for evaluating vibratory ground motion and surface fault displacement. *See* PFS Undisputed Fact 5. Overall, PFS stresses that its evaluations utilize a “multidisciplinary, multiple indicator approach to triangulate and corroborate results.” *Ibid.*

In support of its position, PFS has submitted the expert testimony of Kevin J. Coppersmith and John C. Clark. Dr. Coppersmith is a former employee of Geomatrix Consultants, the contractor responsible for production of the studies evaluating surface faulting at the ISFSI site. Dr. Coppersmith’s particular experience relates to the “evaluation of faults to determine their potential for being seismogenic and for evaluating surface faulting hazards.” Coppersmith Decl. at 1; *see also id.* Exh. 1, Curriculum Vitae for Kevin J. Coppersmith. For his part, Mr. Clark is Vice President of another PFS consultant, Bay Geophysical, which supplemented the Geomatrix reports by its evaluation of faults at the site. Mr. Clark has expertise in the area of collection and interpretation of seismic reflection data, and performed the interpretation of the seismic reflection data in conjunction with Geomatrix for the PFS site. *See* Clark Decl. at 1-4; *see also id.* Exh. 1, John C. Clark Curriculum Vitae.

The State, however, challenges the PFS data by way of its expert witness, M. Lee Allison. Dr. Allison holds a doctorate in geology, and possesses over 25 years’ experience in geological policy management, research, exploration, and consulting. He has been designated as the State’s expert for interpreting PFS seismic reflection data, an area of expertise that he gained from his employment as an exploration geologist for the oil industry and as a senior geologist at the University of Utah Research Institute. He is currently the State Geologist for the State of Kansas, and held that same position for the State of Utah from 1989 to 1999. *See* Allison Decl. at 1.

The State claims that the PFS seismic analysis is inadequate in that, in ways identified by Dr. Allison, it ignores or overlooks other faults in the collected data and fails to use an integrated or comprehensive approach to evaluate the vibratory ground motion and surface fault displacement. These failures in the PFS investigations, the State asserts, cause the site to be mischaracterized. *See* State Response at 5-7; Allison Decl. at 2.

2. In Basis #2, the State raised specific questions as to the sufficiency of the PFS determination of ground motion for the site, namely the failure to take

into account “spatial variations in ground motion amplitude and duration because of near surface traces of potentially capable faults” (as contemplated in the methodology promulgated by Sommerville et al.). PFS says that the issue has been mooted by the incorporation of its subsequent study evaluating the near surface effects of potentially capable faults, utilizing the Sommerville approach, in both the probabilistic and deterministic seismic hazard analysis. *See* PFS Dispositive Motion at 9-10.

In support of its motion, PFS has submitted the affidavit of Robert R. Youngs, a principal engineer with Geomatrix Consultants, the PFS contractor that performed the Sommerville analysis. Dr. Youngs has 25 years of professional consulting experience in the analysis of seismic hazards, particularly in the area of characterization of earthquake ground motions as well as in performing probabilistic and deterministic analyses to develop seismic design criteria for ground shaking and fault displacement. *See* Youngs Decl. at 1; *id.* Exh. 1, Youngs Curriculum Vitae.

The State challenges the PFS mootness assertion by arguing that, contrary to PFS’s apparent thinking, the contention’s criticism of the faulting analysis is not limited to the Sommerville methodology. In this vein, the State points out that PFS has not analyzed conflicting shear wave velocity data for the uppermost soil layer. *See* State Response at 12. In support of its assertion that the PFS seismic wave velocity data and analysis are inadequate, the State has proffered the expertise of Walter J. Arabasz, whose career has focused primarily on earthquake hazard analysis covering Utah and the Intermountain West.

Dr. Arabasz is currently a research professor of geology and geophysics at the University of Utah, as well as Director of the University’s Seismograph Stations. In addition, he has since 1977 provided professional consulting services for earthquake hazard evaluations for “dams, nuclear facilities, and other critical structures.” He also has had major involvement in the assessment of vibratory ground motion hazards for the proposed spent fuel repository at Yucca Mountain. *See* Arabasz Decl. at 1.

According to Dr. Arabasz, PFS has not conducted a fully deterministic seismic analysis as required by 10 C.F.R. § 72.102(f)(1) and 10 C.F.R. Part 100, Appendix A. He argues that the PFS deterministic analysis is invalid because, although PFS has submitted two analyses labeled as deterministic, it has utilized a hybrid methodology which incorporates probabilistic elements and leaves uncertainties in the calculations. *See* State Disputed Facts at 3; Arabasz Dep. at 45-48. A valid deterministic analysis is essential, he says, because it is a “benchmark” to which results of a probabilistic seismic hazard analysis can be compared. If the deterministic analysis was invalid or inadequate to begin with, according to Dr. Arabasz, it cannot be used to compare the conservatism of the PFS probabilistic hazard assessment results. *See* Arabasz Decl. at 2.

3. Included in the third basis for Contention Utah L is a subpart a, “subsurface investigations,” which now embraces the issue of the soil-cement mixture that PFS proposes to use in Layer 1 of the soil under the storage pad area. PFS claims that this mixture will provide an adequate safety factor protecting against sliding of the casks. *See* PFS Undisputed Facts at 10; SAR at 2.6-61 to 2.6-62. In support, PFS has proffered the affidavit of Paul Trudeau, a Senior Lead Engineer at Stone & Webster, with 28 years of experience in geotechnical engineering. Mr. Trudeau has been designated by Stone & Webster as the Division Computer Coordinator and as the division specialist in cross-hole seismic velocity surveys. He has performed work at fossil fuel and nuclear power plants around the country, where his responsibility was to perform geotechnical investigations, prepare geotechnical analyses, and develop geotechnical design criteria. Mr. Trudeau’s areas of concentration on this project are the investigation and analysis of soils — relating to settlement, load bearing capacity, and stability of foundations — as well as the performance of computer-aided analyses of soil behavior. *See* Trudeau Decl. at 1-2; *id.* Exh. 1, Trudeau Curriculum Vitae.

On the other hand, the State argues that the PFS soil-cement analysis is inadequate because PFS has not provided any calculations or field testing to demonstrate the safety of the “untried” soil-cement mixture. Its concern is highlighted by the fact that the entire soil-cement concept was given cursory treatment, appearing then on only one page of the Safety Analysis Report (which it did not believe “adequate to describe the anticipated properties of the material,” on which further studies were to be performed at a later time). *See* State Response at 15. In addition, the State notes its concern that PFS has not considered other design deficiency possibilities inherent in the soil cement, such as its performance under torsional forces, its permeability, and the impact of shrinkage in the event the mixture is subject to extreme environmental conditions. *See id.* at 16.

As support for its position that PFS’s soil-cement concept has not been established to offer the requisite resistance to seismic loads, the State has proffered the affidavit of Steven F. Bartlett. Dr. Bartlett is currently an Assistant Professor in the Civil and Environmental Engineering Department at the University of Utah, where he teaches courses in geotechnical engineering and conducts research. He had earlier been employed by the Utah Department of Transportation, as well as several consulting firms, applying his expertise and knowledge in geotechnical engineering, earthquake engineering, geoenvironmental engineering, applied statistics, and project management. *See* Bartlett Decl. at 1. Dr. Bartlett provides considerable detail in support of the assertion that the PFS evaluation cannot withstand scrutiny because inadequate evaluation has been done regarding a

number of factors affecting the performance of soil cement, which could affect stability of casks at the ISFSI. *Id.* at 3-7.²⁵

As can be seen from each of the above examples, the State's experts have presented a serious, documented, response to the Applicant's claims, sufficiently plausible to create doubt about the outcome. The State's presentation may or may not prevail at the hearing — but that is not the test now. Notwithstanding the Applicant's best efforts to present its evidence in a favorable light, the State has — under the applicable summary disposition principles regarding competing experts and opinions (*see* pp. 509-10, above) as well as the requirement that all reasonable inferences must be drawn in the State's favor (*see* LBP-99-35, 50 NRC 180, 194 (1999)) — surely succeeded in establishing that there is a sufficient genuine dispute as to material facts (and opinions) such that a hearing must be held. Accordingly, the Applicant's motion for summary disposition must be denied.²⁶

Applicant's Motion To Strike

As we reviewed the material that led us to that decision, it became clear that we should reject the Applicant's invitation, by way of its motion to strike, to go line-by-line through the State's arguments and supporting affidavits to see what portions of its presentation fit neatly within the corners of the originally stated bases. As would be expected of an issue as complex as geotechnical, matters not clearly articulated in an original basis statement might nonetheless emerge as the

²⁵ Similar expert disputes exist with respect to the other subparts of Basis #3. As both the examples below make clear, the experts on the two sides are in disagreement:

With regard to subpart b, "sampling and analysis," the State asserts that the soil sampling remains insufficient. Based on the declaration of Dr. Bartlett, the State argues that PFS has not performed adequate testing to ascertain soil conditions as described in Regulatory Guide 1.132. For example, the State claims that PFS has not sampled the soil with the correct density of spacing, nor did it use continuous soil sampling. *See* State Response at 18-19. For its part, PFS asserts, by way of the affidavit of Paul Trudeau, that since the initial filing of the SAR, the number of tests it has performed has dramatically increased (e.g., the number of undisturbed samples increased from 9 to 33, and the number of triaxial shear strength tests has gone from 2 to 17). *See* PFS Dispositive Motion at 15-16.

With regard to subpart c, "physical property testing," the State asserts that PFS has not explained how its data were used in the design basis, nor has it "adequately or accurately" assessed ground motion from potential earthquakes. *See* State Response at 23. In support, the State proffers the affidavit of Dr. Farhang Ostadan, a civil engineer and consultant in soil dynamics and geotechnical earthquake engineering. *See* Ostadan Decl. at 1. As the State sees it, the major concern with regard to the PFS analysis is that PFS has segmented its investigations and failed to integrate its analysis adequately. *See id.* at 2. PFS provides its own detailed technical analysis, largely intended to establish that work performed later overcame the perceived deficiencies. PFS Dispositive Motion at 26-29.

²⁶ In reaching this conclusion, we note that, although the Applicant believes its experts are better qualified than the State's, and that their opinions are better grounded, the Applicant does not appear to be arguing that the background of the State's affiants is inadequate to qualify them as experts, or that their opinions rely on methodology so unscientific that they would fail the *Daubert* gatekeeping test (*see* note 19, above). The relative weight to be accorded the opinions of the competing experts will, then, be determined at the hearing, as we appraise their qualifications more fully and examine the merits of the views presented there and the force of their underpinnings.

proceeding moves along — and all parties, with full notice to each other, refine their approaches (*see* p. 508, above, and note 30, below) — and become quite relevant to a full comprehension of that basis, and of the underlying contention.

Looked at another way, the State’s presentation, like that of the Applicant, attempts to present the whole of a coherent argument, and striking words and lines would eliminate not just those parts, but much of the comprehension of the whole. Along this line, our review of the hundreds of pages of expert affidavits and related documents in front of us demonstrates how inextricably intertwined are the issues, and subissues, involving geological conditions and facility design — what is learned and developed about one subject influences how another is viewed. To attempt to separate them artificially at this stage, in a matter this complex, would create too great a risk that the upcoming hearing would not look completely at the issues.

This is not to say that motions to strike, or similar requests, have no place in our proceedings. There will be times when it will be clear that matter is extraneous to the thrust of the contention and should be stricken (or rejected at the outset).²⁷ What must be recognized here, however, is that the interdependence of so many of the facts and opinions cautions against artificially trying to separate them, then finding at the hearing that stricken matter would have been most helpful to reaching a decision on the merits. Accordingly, we deny the PFS motion to strike.

State’s Motion To Admit Late-Filed Contention

As noted earlier (p. 504, above), the State put forward a new contention, labeled Utah QQ and entitled “Seismic Stability,” based on revised calculations submitted by PFS. The contention itself provides:

PFS’s site specific investigations, laboratory analyses, characterization of seismic loading, and design calculations, including redesign of soil cement, [fn.] fail to demonstrate that a) the newly revised probabilistic seismic hazard design basis ground motions have been correctly and consistently applied to the Canister Transfer Building (“CTB”), storage pads, and their foundations; b) PFS’s general design approach, including the redesign of soil cement, for the CTB, storage pads, or storage casks can safely withstand the effects of earthquakes; and c) the foundation design of the CTB, storage pads, and the underlying soils, or the stability of the storage casks, are adequate to safely withstand the newly revised probabilistic seismic hazard design basis ground motions. 10 CFR §§ 72.102(c), (d); 72.122(b).

[fn.] PFS uses the term “soil cement” but the more correct term is “cement-treated soil.” *See* Mitchell Dec. ¶ 12. The use of the term “soil cement” in this filing does not imply the State accepts that PFS will, in fact, use soil cement.

²⁷ *See, for example*, the situation described in *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93 (1988).

That contention is, of course, “late” in the sense that it was not filed within 30 days of the 1997 notice that triggered the initial opportunity to participate. The State urges, however, that “good cause” for its belated presentation arises from the Applicant’s having revised its calculations about the level of ground motion that needed to be designed against, which led to its amending, for the twenty-second time, its license application. The amended application, we are told, now includes a “new proposal to use soil cement around” the Canister Transfer Building (CTB) and revising “the use of soil cement under and around the storage pads.” State Request at 15.

The State proffered what appeared to be an impressive package when it sought admission of Contention Utah QQ. The 20-page request includes the contention set out above, followed by a “Basis” presentation that appears to run a dozen pages.²⁸

The basis begins with a review of the Applicant’s actions and position, then turns to a description of four State concerns alleging that “the revised design is unsupported and creates significant safety concerns.” State Request at 8. Those four concerns cover the following areas: (1) application of the new design basis ground motion to the CTB and its foundation system; (2) application of the new design basis ground motion to the storage casks and the storage pads; (3) survivability and durability of cement-treated soil for the redesigned CTB and storage pad foundation systems;²⁹ and (4) overestimation of the sliding resistance provided by the clayey-silt and silty-clay underlying the CTB and storage pads.

In each of these areas, the State presents its concern, provides references to the Applicant’s position, and cites one of three multipage “declarations” submitted by its experts, whose credentials appear impressive. In addition to attaching copies of those declarations, the State provides and relies upon copies of the twelve-page “summary” of the changes reflected in the Applicant’s license amendment #22, as well as the NRC Staff’s two-page letter response informing the Applicant of the missing information which would be needed to permit the Staff to complete its review of the amendment.

We would have thought that, upon reading the Contention Utah QQ package, both lay and professional observers would have quickly formed the conclusion that it presents essentially what the Commission had in mind in creating its current strict contentions pleading rule. The Staff agreed, accepting the contention as well pled (but challenging it on untimeliness grounds).

²⁸ It appears that the statement of basis runs from the middle of page 3 through the middle of page 15, but regardless of how the documentation is labeled, its content is comprehensive.

²⁹ The third concern goes on to include five subtopics: (a) overstressing and cracking due to dynamic bending, torsional, and beam shear stress; (b) delamination or debonding along a cement-treated soil lift interface; (c) shrinkage cracking due to drying and curing; (d) cracking due to vehicle loads; and (e) long-term performance of cement-treated soil over a 40-year period.

This conclusion was not shared by the Applicant, which argues that portions of the contention are insufficient to show that a genuine dispute exists on a material issue of law or fact, or fail to meet the Commission's requirements for specificity and materiality, or are too speculative in nature. But we are not at all persuaded, at this pleading stage, by the Applicant's arguments in this regard. Indeed, to the extent those arguments rely upon the Applicant's experts' opinions, they are essentially another effort (*compare* pp. 508, 516, above) to induce us to rule prematurely on the merits of the issues. On that score, our colleagues put it well the other day in *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 432 (2001): "The determination of whether a contention is admissible, however, is not concerned with the ultimate outcome of the merits dispute Rather, the determination at the contention admissibility stage is concerned only with whether a real, meaningful controversy is presented and adequately supported."

In the final analysis, we do not think this even a close case. To the contrary, Contention Utah QQ could serve as a model for how an intervenor might go about complying with all the requirements of the contentions pleading rule. It meets the terms of the rule itself (*see* p. 505, above) and serves the purposes the Commission had for adopting that rule (*see* pp. 505-06, above). Rather than finding the contention deficient, then, we find it to be exemplary. In this instance, a well-pled contention was forthcoming; as we see it, the Commission's rigorous contention pleading rule (as enforced from the beginning by this Board) thus served its purpose — and no purpose is served by refusing to recognize it.

This leaves the timeliness issue, which boils down to a claim by the Staff and Applicant that — whatever might be learned from the Applicant's newer investigations and changing analyses — the points the State is now presenting could have been uncovered and presented, albeit in a different context, long ago in connection with prior investigations and initial analyses. Indeed, it is pointed out, the State's efforts to raise these claims were rejected by this Board as untimely at a much earlier stage of this proceeding (*see* note 12, above).

This untimeliness argument, unlike the challenge to the way the contention was pleaded, does have something to commend it. But not enough. As we see it, the Applicant's two new investigations, conducted by two new contractors and providing two new and different analyses of ground motion and at least two new approaches to anti-seismic design and construction, have yielded something in addition — an entirely new face on the earlier documentation which the State had

before it, and an entirely new light by which we view this contention, compared to those presented earlier.³⁰

In that new light,³¹ we need not further delay the inclusion of this contention into the proceeding by analyzing in painstaking detail each aspect of what was available before, and comparing it to what is available now. It is now abundantly clear that we cannot do justice to what underlies Contention Utah L — or to what underlies the contemplated facility — if we reject the newly proffered Contention Utah QQ. Specifically, there is enormous interaction and interdependence — in both the physical and the litigation worlds — among the various concerns each embraces.

Accordingly, applying the standard test for late-filed contentions (*see* p. 507, above) in the new circumstances presented, the paramount “good cause” criterion has been met by the State’s timely response to the Applicant’s license amendment which triggered the “new look” at the seismic-related design parameters. As to the other four factors, taken together they also weigh in the State’s favor.

Specifically, as to the less significant factors two and four (*see* p. 507, above) there is no other means for the State to protect its interests (other than the usual Staff review, which in this context is not considered as an alternative to the hearing process) and no other party presenting similar arguments. In contrast, there is every indication, from the specific thoroughness with which the State presented Contention Utah QQ and its underlying basis, that it “may reasonably be expected to assist in developing a sound record” on this contention within the meaning of the more important factor three, which weighs heavily here in that the record to be created is needed for our overall decision-making process (*see* p. 520, above).

Finally, as to factor five, while the inclusion of this contention will to a degree “broaden the issues,” we do not see it as having a significant impact relative to delay of this proceeding. In reaching this conclusion, we are of course heavily influenced by the fact that we have now determined that there will be a hearing on

³⁰We of course do not intend, by citing the Applicant’s conduct of additional investigations and its filing of numerous license application amendments, any criticism of those actions. Indeed, PFS should be given credit for seemingly doing its utmost to analyze and support all aspects of its project on a continuing basis. At the same time, those opposing the project must in fairness be afforded some modicum of similar leeway to adjust their approaches as their knowledge basis, too, increases over time.

In this respect, our proceedings are very unlike typical litigation, which ordinarily focuses on assessing responsibility for an event or series of events that occurred in the past. In contrast to that type of fixed focus, our proceedings involve challenges to a moving target — an application that is frequently upgraded to reflect new developments or to respond to new questions. The flexibility to be accorded the parties here must often, then, be greater than that which might be afforded in other types of litigation.

³¹In these changed circumstances, our decision neither (1) undercuts the validity under the then-existing circumstances of the action Chief Judge Bollwerk’s Board earlier took on a similar contention nor (2) violates the “law of the case” doctrine.

other geotechnical issues.³² Were this the first we had heard of any geotechnical issue, allowing Contention Utah QQ to be heard would dramatically broaden the issues and have the potential for delay so as to make this factor weigh heavily against the State. But in our situation, we anticipate that discovery on this matter will not delay the start of the April 2002 hearings (*see* p. 522, below) and we would expect the extra hearing time needed to be relatively small. In any event, a weighing of the requisite late-filing factors swings the balance well in favor of admitting Contention Utah QQ.

Other Matters

Our rulings above leave us several other matters to speak to:

1. *Amendment of Bases.* Having admitted Contention Utah QQ, we need devote little attention to the State's motions to amend the bases that accompanied that contention when it was first presented. For reasons of completeness similar to those we spelled out earlier, we grant the motions.

2. *Restatement of Geotechnical Issue.* In light of (1) our rulings today, (2) the time that has elapsed and the events that have taken place since Contention Utah L was first filed, and (3) the complexity of the issues, we think it timely now that a unified geotechnical contention be prepared. By that we mean a statement that combines, in a single document, the thrust of Contentions Utah L (Part A) and Utah QQ in a manner that will help all to prepare in more orderly fashion for the upcoming hearing. Given the stage of the proceedings, that statement need not track the contention pleading rule precisely but should draw upon key elements of that rule as appropriate for current purposes. To that end, and recognizing the parties' proven ability to collaborate on similar matters, we direct the Applicant and the State to prepare jointly by January 17, 2002, a statement, of the nature described above, that will serve to frame the upcoming hearing. To the extent that their best efforts are not completely successful and reach an impasse, we stand ready to resolve any remaining issues about the statement's content.

3. *Motion To Strike.* In keeping with the limited role of motions to strike (*see* pp. 516-17, above), we deny the State's motion to strike Exhibit 1 of the Applicant's September 11 brief. As we viewed that exhibit, we think it did serve

³² We note that on a different question — whether early Commission review of an issue was appropriate — the Commission earlier this month reminded litigants that “increased litigation burden” from adding a contention does not constitute “immediate and serious irreparable impact” within the meaning of 10 C.F.R. § 2.786(g), the interlocutory review rule, particularly when there are “already admitted several other contentions on which a hearing is anticipated.” *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 373-74 (2001). To be sure, the procedural issue the Commission faced in *Haddam Neck* was quite different from the one we face here. But our reliance here on the pendency of related substantive issues (when considering whether a *hearing will be unduly broadened*) finds a measure of additional support in the Commission's recognition that such pendency can be an important factor in analyzing an analogous issue (whether a *party will be unduly burdened*).

a purpose different from the brief itself (to which the page limitations apply) and we chose to evaluate it for what it is worth rather than disregard it.

4. *Future Discovery.* With Contention Utah QQ now admitted, the parties are entitled to begin discovery, which may be less extensive a process than usual because that contention emerged during the course of discovery on related matters. As the parties know, it has long been planned that the discovery process would about now be launched on other issues, triggered by the Staff's scheduled issuance at this time of two documents: (1) a Supplemental Safety Evaluation Report on Contention Utah L, and (2) the Final Environmental Impact Statement.³³ Although some adjustments may be necessary, the discovery schedule for those issues can also serve generally to guide discovery on Contention Utah QQ. In that regard, we ask the parties to confer in an effort to reach agreement on a specific discovery schedule for Contention Utah QQ in time to present it to us in the contemplated mid-January teleconference (*see* note 24, above) for ratification (following resolution of any disagreements that may then exist).

With respect to the substance of the discovery process, we urge the parties to conserve their resources — which will be subject to many demands in the time before the hearing — by working in concert to resolve any disputes that might arise without calling for Board intervention. Given the fact-driven nature of many discovery disputes and the nearness of the hearing date, any disputes that do require our attention will likely be settled not by written opinion but by conference call that seeks commonsense solutions along the lines of the Board's November 21 decision on the Contention Utah L, Part B discovery dispute (*see* note 6, above). Again, the parties are welcome to fashion such solutions themselves, without our assistance.

D. The Upcoming Hearing

As noted at the outset, the hearing is scheduled to begin in April of next year in Salt Lake City.³⁴ Given the complexity of the geotechnical issues (as well as

³³ Under the general schedule guiding this proceeding, those documents were anticipated to be issued on December 21, 2001. We and the parties have recently been advised by the NRC Staff that, owing to the need to "redact certain information in light of recent security concerns," that schedule must be altered slightly (Letter from Robert M. Weisman, December 18, 2001). Thus, while an unredacted version of the supplemental SER was still made available to the concerned parties on December 21, the unredacted version of the FEIS will not be ready until December 31 (the redacted versions of each, we are told, will be published around January 11, 2002).

³⁴ Some might wonder why this portion of the hearing is being held over 4 years after the notice of opportunity for hearing was issued. But that notice was issued early in the process during which the NRC Staff was to review the first-of-a-kind, and controversial, license application proffered by PFS, which has been amended at least 23 times, all or nearly all since the notice of hearing was issued and most recently on November 21, 2001. As a result, the extensive prehearing winnowing and discovery processes before this Board have taken place essentially concurrently with PFS's revisions of the application and the NRC Staff's analysis of those revisions. For example,

(Continued)

of the “credible accidents” issue, with or without a “terrorism” component as explained in note 10, above), it is imperative that we and the parties make the best possible use of the intervening time to prepare for that hearing. In particular, if we are to hear and resolve the issues in an expeditious and fair manner, we will need more than the usual assistance of the parties. To that end, and as already noted (p. 512, above), we are today issuing a companion (unpublished) order establishing a set of measures and deadlines that will begin that process.

In concluding this opinion, we note that utilization of the strict contentions pleading rules embodied in NRC regulations, coupled with application of the summary disposition rules utilized in litigation generally, has generated an estimable result here. That is, we are headed to a hearing that will, fittingly, deal primarily with two threats of possible damage to the proposed facility that are of especial concern to the citizens of Utah and to the public at large: (1) the risk from airborne impacts that could arise in connection with existing U.S. military activities in the vicinity; and (2) the risk from seismic events. Chief Judge Bollwerk’s extended, laborious efforts to get us to this advantageous point deserve mention and recognition.

This brings us back to where we started (*see* Section B.1, pp. 505-08 above). The Commission’s contentions pleading rules ensure that only serious litigants, presenting serious concerns and able to marshal serious litigation support for them, will be able to proceed. Contentions that fairly overcome those preliminary hurdles, and which turn on facts and opinions about which there is ample dispute, deserve our full examination. With our denial of summary disposition and our other rulings herein, that type of examination will be given to the State’s geotechnical contentions in the upcoming hearing.

Those of us charged with making crucial decisions in areas such as the scientifically complex geotechnical realm look forward to that hearing as an occasion not only to allow the parties to test each other’s claims — in a manner that, as we have seen, cannot be done on summary disposition — but also, building on the parties’ questioning of each other, for the Board members to challenge the parties to justify their positions. In doing so, it provides us vital opportunities — beyond what can be gleaned from parsing dense documents — to plumb the depths of an expert’s thinking, to test the reasons underlying an expert’s own views and that expert’s rejection of competing theories, to compare and contrast the views of different experts, and to gain greater familiarity with, and understanding of, the intricate theses that we are called upon to evaluate in the course of rendering a decision that can have profound ramifications.

on November 13 the Staff issued its Supplemental Safety Evaluation Report on aircraft crash hazards (*see* note 10, above), just released a similar document on geotechnical issues on December 21, and now anticipates producing its Final Environmental Impact Statement at the end of December (*see* note 33, above). All those documents are prerequisites to any final hearing taking place. As may be seen, then, the hearing processes themselves have not been the cause of any untoward delay.

The parties may now begin to prepare for that hearing.³⁵ For our part, we will be working to resolve the related matter to which we have referred, namely, the summary disposition motion regarding Part B of the seismic contention, which has just become ripe for decision (*see* note 6, above).³⁶

For the foregoing reasons, it is, this 26th day of December 2001, ORDERED that:

1. The Applicant's February 9 motion to strike is DENIED;
2. The Applicant's motion for summary disposition of Part A of Contention Utah L is DENIED;
3. The State's motion to admit late-filed Contention Utah QQ is GRANTED;
4. The State's motions to modify the bases of Contention Utah QQ are GRANTED;
5. The State's September 12 motion to strike is DENIED;
6. The discovery design set out on page 522 is ADOPTED; and

³⁵ As noted above (note 10), another matter needing extensive development at the hearing is Utah's Contention K on *potential accidents*. Issues that should take less time to develop at that hearing involve (1) the possible impact of the facility on the *peregrine falcon*, all that remains from Contention Utah W (*see* LBP-01-30, 54 NRC 231 (2001)); and (2) the thoroughness of the consideration given to *rail-line alternatives*, as raised by the Southern Utah Wilderness Association in Contention SUWA B (*see* LBP-01-34, 54 NRC 293 (2001), *reconsideration denied*, LBP-01-38, 54 NRC 490 (2001)).

The hearing will not be considering one issue of possibly major import — the adequacy of PFS's security plan, raised by State Contention Security-J — because a relevant State law is undergoing constitutional challenge brought by the Skull Valley Band and the Applicant in Utah's federal district court (*Skull Valley Band of Goshute Indians v. Leavitt*, Case No. 2:01CV00270C (D. Utah, filed April 19, 2001)). Last summer, we naturally deferred our consideration of the issue pending the outcome of that proceeding, LBP-01-20, 53 NRC 565 (2001). (We have since been receiving regular status reports from the parties on the course of that litigation, in which the State is seeking summary judgment and the Court is awaiting an early January decision by the United States on filing an amicus curiae brief on behalf of the NRC. The next status report is due to us on December 28.)

³⁶ Summary disposition motions on three other matters remain to be decided. Two of the matters involve State contentions: Utah O, "*hydrology*," and Utah W, "*other impacts*." The third matter involves a contention filed by Ohngo Gaudedah Devia (a group comprised in part of members of the Skull Valley Band of Goshute Indians), namely Contention OGD O, which raises *environmental justice* considerations.

7. The parties are DIRECTED to undertake preparation of the ‘‘geotechnical contentions unification’’ document.

THE ATOMIC SAFETY AND
LICENSING BOARD

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

Jerry R. Kline
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 26, 2001

Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) Intervenors Skull Valley Band of Goshute Indians, OGD, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State of Utah; and (3) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael C. Farrar, Chairman
Dr. Jerry R. Kline
Dr. Peter S. Lam

In the Matter of

Docket No. 72-22-ISFSI
(ASLBP No. 97-732-02-ISFSI)

PRIVATE FUEL STORAGE, L.L.C.
(Independent Spent Fuel Storage
Installation)

December 28, 2001

In this proceeding concerning the application of Private Fuel Storage, L.L.C. (PFS), under 10 C.F.R. Part 72 to construct and operate an independent spent fuel storage installation (ISFSI), the Licensing Board, acting pursuant to 10 C.F.R. § 2.749, grants in part and denies in part a PFS request for summary disposition regarding Contention Utah O Hydrology. The Board finds that there does not exist a dispute of material fact regarding radiological contamination at the facility and the potential impact of the facility's water usage on other well users and the aquifer and grants summary disposition with regard to these matters. With regard to facility nonradiological contamination, the Board finds that there does exist a material factual dispute and denies summary disposition regarding this matter.

**RULES OF PRACTICE: SUMMARY DISPOSITION (GENUINE
DISPUTED MATERIAL ISSUE OF FACT)**

In the face of a moving party's well-pled undisputed material facts, the respondent may not rely upon suspicious or bald assertions, even if such assertions

are in the form of expert opinion, to establish the existence of a material factual dispute.

RULES OF PRACTICE: SUMMARY DISPOSITION (GENUINE DISPUTED MATERIAL ISSUE OF FACT)

When moving for summary disposition, a party may not rely upon generalized responses to demonstrate there no longer exists a dispute of material fact when confronted with specific concerns raised by the other side.

**MEMORANDUM AND ORDER
(Granting in Part and Denying in Part Summary Disposition
Regarding Contention Utah O, Hydrology)**

Pursuant to 10 C.F.R. § 2.749, Applicant Private Fuel Storage, L.L.C. (PFS), has requested that summary disposition be entered in its favor regarding Intervenor State of Utah's Contention Utah O, Hydrology. By that contention, the State asserts that PFS, in its application under 10 C.F.R. Part 72 for an NRC license for its proposed Skull Valley, Utah independent spent fuel storage installation (ISFSI), has failed adequately to assess the effects on the hydrological resources of the surrounding area from the construction, operation, and decommissioning of the ISFSI.

The NRC Staff supports the PFS summary disposition request, while the State opposes it. For the reasons and to the extent set forth below, the Board *grants in part and denies in part* the PFS request for summary disposition on Contention Utah O.

I. BACKGROUND

In June 1997, PFS filed a license application for its proposed ISFSI, which included a safety analysis report (SAR) and an environmental report (ER) addressing, respectively, the safety aspects of the proposed facility and its projected environmental impacts. In response, the State and a number of other petitioners, including farming/ranching/land investment companies Castle Rock Land and Livestock, L.C., Skull Valley Co., Ltd., and Ensign Ranches of Utah, L.C. (collectively Castle Rock), filed a number of contentions opposing the PFS application. In particular, three contentions — Utah O, Castle Rock 8, and Castle Rock 10 — dealing with the potential effects of the ISFSI on surrounding hydrological resources were admitted and combined by the Board in LBP-98-7,

47 NRC 142, 192-93, 216, 217, *reconsideration granted in part and denied in part on other grounds*, LBP-98-10, 47 NRC 288, *aff'd on other grounds*, CLI-98-13, 48 NRC 26 (1998). As admitted and subsequently revised, Contention Utah O now reads as follows:

The Applicant has failed to adequately assess the health, safety, and environmental effects from the construction, operation, and decommissioning of the ISFSI as required by 10 C.F.R. §§ 72.24(d), 72.100(b), and 72.108, with respect to the following contaminant sources, pathways, and impacts:

1. Contaminant pathways from the [A]pplicant's sewer/wastewater system; routine facility operations; and construction activities.
2. Contaminant pathways from the [A]pplicant's retention pond in that:
 - a. The ER fails to discuss potential for overflow and therefore fails to comply with 10 C.F.R. Part 51.
 - b. ER is deficient because it contains no information concerning effluent characteristics and environmental impacts associated with seepage from the pond in violation of 10 C.F.R. § 51.45(b) and § 72.126(c) & (d).
3. Potential for groundwater and surface water contamination.
4. The effects of [A]pplicant's water usage on other well users and on the aquifer.
5. Impact of potential groundwater contamination on downgradient hydrological resources.

LBP-99-39, 50 NRC 232, 236, 240 (1999) (dismissing portion of contention related to the Rowley Junction intermodal transfer point) (revising LBP-99-6, 49 NRC 114, 121 (1999) (upon withdrawal of Castle Rock, dismissing portion of contention related to firefighting) (revising LBP-98-7, 47 NRC at 254)).

In June 2000, the Staff published its draft environmental impact statement (DEIS) regarding the proposed PFS ISFSI. *See* Draft Environmental Impact Statement for the Construction and Operation of an [ISFSI] on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, NUREG-1714 (June 2000) [hereinafter DEIS]. As relevant to this motion, the DEIS contains discussions assessing the hydrological resources in and around the proposed site. *See* DEIS at 3-6 to -14, 4-4 to -13, 6-4 to -6, 6-33, 6-39.

Relying principally on the evaluation in the DEIS, PFS filed the instant motion, supported by a statement of material facts not in dispute, claiming that there no longer exists a genuine issue of material fact regarding Contention Utah O. *See* [PFS] Motion for Summary Disposition of Utah Contention O — Hydrology (June 29, 2001) [hereinafter PFS Motion]; *id.*, Statement of Material Facts on Which No Genuine Dispute Exists [hereinafter PFS Undisputed Material Facts]. In addressing the first three parts and the fifth part of the State's contention,

PFS asserts that the State's concerns over radiological and nonradiological contamination of hydrological resources are based upon subjective belief and unsupported speculation; in support, it provides the affidavits of Stone & Webster, Inc. (S&W), Senior Principal Environmental Engineer Dr. H.C. "George" Liang and S&W Lead PFS Project Mechanical Engineer Donald Lewis to demonstrate that proposed operational procedures at the PFS facility will eliminate the potential for groundwater and surface water contamination. *See* PFS Motion at 5-14; *id.* Exh. A at 13-26 (Declaration of H.C. "George" Liang and Donald Wayne Lewis) [hereinafter Liang/Lewis Declaration].

In addition, relying on its experts' opinion and the DEIS, PFS contends that the potential impact of any contaminants on the surrounding groundwater and surface water will be insignificant given the arid climate, the lack of surface water, the depth of groundwater, and the soil characteristics between the surface and the groundwater, all of which it is said effectively prohibit water at the PFS site from reaching groundwater or surface water. *See* PFS Motion at 7-8, 15; Liang/Lewis Declaration at 8-10, 25, 28-29. Further, with respect to paragraph four of the contention, PFS asserts — based on its groundwater use estimates and a prior State study of Skull Valley aquifer use — that its groundwater withdrawal for facility construction and operation would not adversely impact other users or the aquifer. *See* PFS Motion at 14, Liang/Lewis Declaration at 26-28.

On July 19, 2001, the Staff filed a response supporting the PFS motion and, with asserted "minor modifications," the PFS statement of undisputed material facts. *See* NRC Staff's Response to [PFS]'s Motion for Summary Disposition of Utah Contention O — Hydrology (July 19, 2001) at 12 [hereinafter Staff Response]. In its response, which was supported by the affidavit of Bechtel-Jacobs Corp. Subsurface Contaminant Specialist Richard H. Ketelle, the Staff contends that because the State's "broad allegations" have been adequately addressed in the DEIS, there no longer exists a genuine issue of material fact with respect to Contention Utah O. *Id.* at 7-8; *see also id.* unnumbered exhibit at 2-5 (Affidavit of Richard H. Ketelle Concerning Utah Contention O — Hydrology) [hereinafter Ketelle Affidavit].

Also on July 19, 2001, the State filed its response opposing the PFS request for summary disposition, along with a statement of disputed material facts and the supporting affidavit of State Department of Environmental Quality Division of Water Quality Director Donald A. Ostler. *See* [State] Response and Opposition to PFS's Motion for Summary Disposition of Contention Utah O — Hydrology (July 19, 2001) [hereinafter State Response]; *id.* [State] Statement of Disputed and Relevant Material Facts (July 19, 2001) [hereinafter State Disputed Material Facts]; *id.* Exh. 1 (Declaration of Don A. Ostler, P.E., in Support of Utah's Response to Summary Disposition of Contention Utah O) [hereinafter Ostler Declaration]. In its response, the State asserts that the PFS experts, albeit qualified civil engineers, are not sufficiently qualified in hydrology to assess the facility's

environmental impacts on surface and groundwater. *See* State Response at 5-6. In addition, the State contends there remain in dispute numerous material facts about the data used and assumptions made by PFS and Staff experts in evaluating the possible impacts of the proposed facility upon hydrological resources in the surrounding area. *See id.* at 10-14.

The State later filed a reply to the Staff's July 19, 2001 response to the PFS dispositive motion. *See* [State] Reply to NRC Staff's Response to [PFS] Motion for Summary Disposition of Utah Contention O — Hydrology (July 30, 2001) [hereinafter State Reply]. In this reply, the State asserts that the Staff failed to describe and apply the appropriate legal tests for such a proceeding. In addition, the State contends that the Staff failed to address the key factual issues surrounding Contention Utah O, relying instead on "a description of the history of Utah O followed by a boiler plate description of the law surrounding summary disposition." *Id.* at 2 n.2. In particular, the State challenges the Staff's asserted failure to address the absence of site soil permeability and aquifer data, declares that the Staff's modifications to the PFS undisputed material factual statement have raised material factual disputes, and urges that the expertise of the Staff's supporting witness does not extend to all the areas in which he expressed opinions. *See id.* at 3-10.

II. ANALYSIS

A. Standard for Summary Disposition Review

The standard governing motions for summary disposition is well established and has been used repeatedly by the Licensing Board in ruling on previous PFS dispositive motions:

Under 10 C.F.R. § 2.749(a), (d), summary disposition may be entered with respect to any matter (or all of the matters) in a proceeding if the motion, along with any appropriate supporting material, shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law." The movant bears the initial burden of making the requisite showing that there is no genuine issue as to any material fact, which it attempts to do by means of a required statement of material facts not at issue and any supporting materials (including affidavits, discovery responses, and documents) that accompany its dispositive motion. An opposing party must counter each adequately supported fact with its own statement of material facts in dispute and supporting materials, or the movant's facts will be deemed admitted. *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102-03 (1993).

LBP-99-23, 49 NRC 485, 491 (1999).

The Board recently discussed the corollary tenets that, among other things, instruct us at the summary disposition stage not to try to decide “which experts are more correct.” *Id.*, LBP-01-39, 54 NRC 497, 509-10 (2001). With all these principles in mind, the Board addresses the PFS summary disposition motion regarding Contention Utah O.

B. Parties’ Positions on Contention Utah O

1. PFS Position

In support of its motion for summary disposition, PFS submits sixty-six purported undisputed material facts to demonstrate there exists no genuine issue of material fact concerning Contention Utah O, thereby entitling it to a decision as a matter of law. *See* PFS Undisputed Material Facts at 1-13. As outlined in that statement, the thrust of the PFS position is that its proposed operating procedures will ensure no radiological or nonradiological contamination of surface or groundwater will occur and that the State’s views to the contrary are based upon unsupported opinion and speculation. In that regard, PFS contends, the State has failed to support its “broad claims” regarding the impact of radiological contamination upon the surface water and groundwater relating to the proposed facility, including contamination associated with routine operations, the sewer/wastewater system, and the detention pond as asserted in the first three paragraphs of the contention and the surface- and groundwater claims of the fifth paragraph. PFS Motion at 5; *see also* PFS Undisputed Material Facts at 4-5, 7-8, 9-12.

According to PFS, the State’s supporting expert’s opinion about the occurrence of *radiological* contaminants is based upon “subjective belief and unsupported speculation” that is insufficient to forestall favorable action on the PFS dispositive motion. PFS Motion at 5. PFS also states that — because the proposed site is “an arid location, with no perennial or intermittent surface waters” and is located where the groundwater is relatively deep and the intervening soil has low permeability — contaminants would not reach surface or groundwater even if site contamination occurred. *Id.* at 7; *see also* PFS Undisputed Material Facts at 2, 3.

As PFS sees it, its proposed “Start Clean — Stay Clean” operating procedures and designs — which include pre-shipping/post-facility arrival/pre-storage area transfer contamination surveys of the seal-welded, never-to-be-opened spent nuclear fuel (SNF) canisters and total isolation of the canister transfer building from the facility sewer/wastewater system — will strictly limit actions that create the possibility of a radiological contaminant leak and will provide for a rapid response in the unlikely event such a leak occurs. *Id.* at 5-6; *see also* PFS Undisputed Material Facts at 4-5. In this regard, PFS challenges the State’s claim that a mistake by someone at the reactor site where the SNF originates,

followed by a similar mistake at the PFS facility, has the potential to cause a radiological contamination problem. PFS contends that speculation regarding such an improbable chain of events is not sufficient to defeat a motion for summary disposition. *See* PFS Motion at 8. Instead, PFS declares, the State is attempting to require PFS unnecessarily to justify the absence of certain State-desired facility design features. *See id.* at 9.

With respect to *nonradiological* contamination, in connection with the first of the five specific paragraphs of Contention Utah O, PFS asserts that summary disposition in its favor is appropriate because it has established that the potential for groundwater contamination from ISFSI construction activities, routine operations, and the sewer/wastewater system is so small that any environmental impact to the surrounding hydrology is not credible. *See* PFS Motion at 9-10. According to PFS, its proposed “best management practices” for storing and disposing of potential nonradiological contaminants will ensure that those substances do not have an impact on the surrounding hydrology. PFS Motion at 10-11; *see also* PFS Undisputed Material Facts at 2-4, 5-6, 8. In addition, PFS claims its wastewater system will not contaminate the underlying groundwater because there is no hydrological link between the surface water and the groundwater.¹ *See* PFS Motion at 11-12; *see also* PFS Undisputed Material Facts at 2, 11.

PFS maintains it is entitled to summary disposition as well in connection with State assertions about nonradiological contamination relating to part two of the contention, which proffers the need to analyze the impacts of detention pond contamination. Although noting that the pond is designed to hold the waters from a single, 100-year storm event, PFS declares that summary disposition is appropriate because no contamination is expected to enter the detention basin, so that there will be no resulting impact upon the groundwater quality. *See* PFS Motion at 12-13; *see also* PFS Undisputed Material Facts at 10. PFS also asserts that by demonstrating that its procedure will preclude nonradiological contamination, it has adequately addressed the State’s concerns for part three of contention Utah O, which alleges the possibility of surface and groundwater contamination. PFS Motion at 13-14; *see also* PFS Undisputed Material Facts at 11-12. Moreover, PFS contends, even in the unlikely event contamination would occur, for the reasons previously set forth regarding surface water location, soil permeability, and groundwater depth, such contamination would not reach the surrounding surface or groundwater, so that summary disposition in its favor should be entered for this part of the contention as well. *See* PFS Motion at 13-14; *see also* PFS Undisputed Material Facts at 11-12.

¹PFS also cites the DEIS as support for its position that its sewer/wastewater system will not contaminate underlying groundwater, noting the DEIS finding that the soil at the site has a “‘relatively low infiltration capacity.’” PFS Motion at 11 (quoting DEIS at 4-12).

In response to the concerns raised in the fourth portion of contention Utah O, regarding facility water usage impacts, PFS asserts that both the DEIS and a State study support its position that facility water usage of 2.3 acre-feet per year over the life of the facility is unlikely to impact adversely the Skull Valley aquifer or other water users, thus entitling it to summary disposition on this point as well. *See* PFS Motion at 14; *see also* PFS Undisputed Material Facts at 12-13. With regard to the latter point, PFS cites a 1987 State proposal for development of the Superconducting Super Collider that indicated up to 4,000 acre-feet of water could be removed annually from the Skull Valley aquifer without adversely impacting other users in the area. Finally, in addressing the fifth part of contention Utah O, which alleges PFS needs to study the impact of potential groundwater contamination on downgradient hydrological resources, PFS declares that because the State has not raised any information in addition to that put forward in its unsuccessful attempts to support the other parts of this contention, PFS is entitled to summary disposition on this portion of the contention as well. *See* PFS Motion at 15; *see also* PFS Undisputed Material Facts at 13.

2. Staff Position

In responding to this PFS dispositive motion, the Staff states that it has reviewed the PFS statement of undisputed material facts and has determined the statement to be correct, subject to a few minor changes, none of which undermines the Staff's support for the PFS motion. *See* Staff Response at 7. The Staff also asserts that while completing the DEIS, it evaluated the potential impacts from site construction, operation, and decommissioning and determined that any such impact upon the surrounding hydrology would be "small." *Id.* The Staff thus contends that there no longer exists a genuine issue of material fact with regard to Contention Utah O and that PFS is entitled to a merits decision, in its favor, as a matter of law.

3. State Position

According to the State, the PFS dispositive motion should be denied as lacking adequate support, failing to comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4322 *et seq.*, and 10 C.F.R. Part 72, and as leaving numerous material facts unresolved. In this regard, the State raises a number of specific objections to the motion.

First, the State questions the supporting expert testimony presented by Donald W. Lewis and Dr. H.C. “George” Liang,² asserting these PFS affiants do not exhibit sufficient relevant knowledge, skills, experience, training, or education to meet the standards necessary to be qualified as expert witnesses on the matters at hand. The State contends that these PFS witnesses have demonstrated unfamiliarity with terms and procedures relevant to the issues raised by contention Utah O and, therefore, their testimony should be limited to matters relating to their area of expertise, civil engineering. *See* State Response at 5-6.

The State also argues that NEPA and Part 72 require an ISFSI applicant to assume and discuss facility accidents, which are not uncommon, and the potential impacts those accidents may have upon the surrounding environment, which, according to the State, PFS has failed to do. *See* State Response at 7; *see also* Ostler Declaration at 4, 7. The State contends that NEPA requires an analysis of all reasonably foreseeable impacts that may occur as a result of the proposed project, which the State believes should include both radiological and nonradiological spills, releases, and accidents at an ISFSI. *See* State Response at 7-8. Thus, the State contends the burden falls upon Applicant PFS to inform the public of possible accident scenarios and the potential environmental impacts these scenarios may produce. In any event, the State contends, the PFS claim that such accidents need not be considered — based on the “unsupported speculation” premise that future employees will not have any accidents and will follow procedures — is not in keeping with generally accepted principles of behavior or with the dictates of NEPA and Part 72. *See id.* at 9-10; *see also* State Disputed Material Facts at 8.

Also contested by the State are the conclusions drawn by the affiants supporting the PFS motion concerning the hydrological connection between the surface and the underlying aquifer and the permeability of the surface soils. *See* State Response at 10; *see also* State Disputed Material Facts at 1-9. According to the State, to determine whether a connection exists between the surface and an underlying aquifer requires defining the size and water quality of the underlying aquifer and determining the permeability of the surface soil at the PFS site, which the State claims PFS has failed to do. *See* State Response at 10-14; *see also* Ostler Declaration at 2-4, 8-10; State Reply at 3-5. The State asserts that because soil permeability varies among soil types and there are various types of soil present at the PFS site, the conclusions the Staff and PFS draw about soil permeability in the DEIS and the ER based on regionwide data are inapposite. *See* State Response at 13; *see also* State Reply at 3-4. Moreover, the State maintains that contrary to the PFS position, there will exist at the PFS facility pathways — such as

²The State contends that Dr. Liang’s area of expertise lies specifically in “assembling data and information collected by various experts in other fields of hydrology and using that information as input to mathematical equations and programs to model the physical flow of surface and groundwaters.” State Response at 6. According to the State, with this background Dr. Liang should not be allowed to opine about matters outside the data collection and “groundwater dispersion” areas of hydrology. *Id.*

spills and release to soil, migration of septic/wastewater discharges, improperly filled boreholes, and the retention pond — that will allow migration from the surface to the groundwater. *See id.* at 13-14; *see also* Ostler Declaration at 5-8, State Reply at 5-6. The State thus believes that PFS and the Staff have not gathered sufficient site-specific data to support the conclusions drawn about this hydrological connection. *See* State Response at 14-15.

The State further contends that the Staff “minor” modifications to the PFS statement of undisputed material facts simply emphasize the existence of material factual disputes. For instance, the Staff provides an unsupported declaration estimating PFS annual average water requirements at 4.4 acre-feet. *See* State Reply at 6-7. So too, the State asserts, Staff changes to PFS statements regarding the existence of radiological and nonradiological contamination from “no credible sources or pathways” to “unlikely to occur” shows a reliance on the PFS Start Clean — Stay Clean program rather than a lack of possible migration pathways. *See id.* at 8-9. Finally, the State challenges the expertise of the Staff’s supporting witness Ketelle by asserting that while he is qualified to opine about groundwater contamination, remediation, and contaminant pathways, he is not qualified to provide opinions about engineering design, construction, or industrial risk management relative to the adequacy of the PFS structures and procedures to preclude contaminant releases. *See id.* at 9-10.

C. Licensing Board Determination

1. Impacts Relating to Radiological and Nonradiological Contamination

We begin our analysis with the Applicant’s assessment of the potential impact the ISFSI’s construction, operation, and sewer/wastewater system will have upon the surrounding surface water and groundwater, the subject of the first paragraph of Contention Utah O. With its Start Clean — Stay Clean program, PFS commits to operating in a manner designed to eliminate any scenario whereby *radiological* contaminants might reach surface water and groundwater.

For its part, the State does not specifically question the adequacy of these radiological contamination prevention procedures or postulate a specific scenario under which such contamination could be released into surface- or groundwater pathways.³ Instead, it supports this aspect of its challenge to the PFS motion with the declaration of Don Ostler in which he states:

In my 27 years’ experience in reviewing practices at industrial facilities, I am aware of numerous incidents where employees have accidentally or intentionally released pollutants or

³The Board notes that none of the State’s submitted disputed material facts address the adequacy of the proposed PFS procedures for safeguarding against the possible release and spread of *radiological* contaminants. *Compare* PFS Undisputed Material Facts at 4-5 *with* State Disputed Material Facts at 1-9.

contaminants, or placed same into a septic system. Even companies with best management practices cannot control accidents that occur onsite. Without adequate monitoring systems, PFS will be unaware if such accidents occur. Also PFS does not even have contingency plans or containment systems to address possible accidents. It is credible that a facility operator would assume that spills and releases as a result of human error and misconduct can and do occur at industrial and commercial facilities, such as the PFS facility.

Ostler Declaration at 7.

In this statement, Mr. Ostler paints with a broad brush, essentially asserting the industrial truism that when it comes to “contaminants,” accidents happen. From our review of Mr. Ostler’s credentials, however, it is apparent that while he has considerable expertise in hydrology, that expertise essentially relates to nonradiological, as opposed to radiological, contaminants. *See id.* at 1; *see also* PFS Motion Exh. B, at 24-28 (Deposition of Don A. Ostler (Apr. 19, 2001)) [hereinafter Ostler Deposition]. As PFS correctly notes, he does not identify a specific deficiency in connection with the PFS Start Clean — Stay Clean program that could result in *radiological* contamination being introduced from the PFS facility into the local surface water or groundwater system. *See* PFS Motion at 8 (citing Ostler Deposition at 50-51, 56-64).

As we have observed before herein, while a summary disposition opponent is entitled to all reasonable inferences that may be drawn from any evidence submitted, this does not relieve it of the responsibility, in the face of well-pled undisputed material facts, of providing something more than suspicions or bald assertions as the basis for a material factual dispute. *See* LBP-99-35, 50 NRC 180, 194 (1999). In this instance, in addressing the likelihood of radiological contamination, the State has failed to provide any showing that meets this standard so as to establish a material factual dispute about the reasonable foreseeability of such releases that would engender the need for any additional NEPA analysis.⁴ We thus grant the PFS motion in this regard.

On the other hand, given Mr. Ostler’s experience, we have no difficulty in finding that, with respect to *nonradiological* contaminants, his representations regarding problems that have occurred at industrial facilities despite the use of “best management practices” in connection with such contaminants are sufficient to create such a material factual dispute relative to that type of contaminant. In this regard, PFS’s own description indicates that, as far as nonradiological contaminants are concerned, its facility will be essentially no different from typical industrial facilities of its size (*see* PFS Motion at 3). But PFS has not

⁴In this regard, we find the State’s attempt to interpose a material factual dispute relative to the adequacy of the PFS program by challenging the qualifications of the Staff’s supporting witness is unavailing. Putting aside the fact that the State’s characterization of the witness’s expertise in this regard may not be entirely accurate, *see* Ketelle Affidavit, unnumbered attach. (resume of Richard H. Ketelle), it is apparent that the witness’s conclusions are fully consistent with the Staff analysis as presented in its DEIS. *See* DEIS at 4-10 (proposed PFS facility is designed and intended to be operated as a zero release facility, thus, no effluents are expected).

indicated it has in mind for nonradiological contaminants any specially designed cradle-to-grave program, like the Start Clean — Stay Clean program provides for radiological ones, to obviate human error.

As to the fate of such contaminants, we believe that the State has raised, via Mr. Ostler's expertise, legitimate concerns about the PFS analysis of the permeability of the surface soils and the hydrological connection between the surface and the groundwater. PFS and the State have presented experts with opposing assessments of soil permeability and the ability of a nonradiological contaminant released into the soil to reach groundwater. The parties have also asserted differing expert opinions concerning the adequacy of PFS's proposed septic system. In particular, opinions differ about the ability of the septic system to treat the type of nonradiological waste that will be encountered and the degree to which septic wastes will ultimately reach and contaminate the groundwater. *Compare* Utah Disputed Material Facts at 4-5 with PFS Undisputed Material Facts at 6, 8. And the same is true for the nonradiological aspects of paragraphs two and three of this contention. Given these disputes, and the standards that we must apply (*see* p. 530, above), summary disposition is inappropriate in these instances.⁵ *See also Private Fuel Storage*, LBP-01-39, 54 NRC at 509-10, 516.

2. Potential Impact on Other Well Users and Aquifers

With respect to part four of the contention, dealing with water supply, PFS contends that even under the facility's most conservative water-use assumptions (i.e., its estimates showing the highest water use), the other well users or the Skull Valley aquifer will not be adversely affected. In support of its claim, PFS declares that its projected water usage will remain well within limits established by the State in a 1987 development proposal created for the Superconducting Super Collider.⁶ *See* PFS Motion at 14.

Although, as noted earlier, the State makes reference to a Staff estimate of annual average water usage higher than the PFS estimate, *see* State Reply at 6-7, and also alludes to the Staff's DEIS discussion indicating that a lack of available data made it difficult fully to refine a groundwater availability analysis, *see* Utah Disputed Material Facts at 6, any dispute here does not involve a material fact. Put another way, because the State does not contest the earlier State-generated water availability data (relied upon by PFS), then regardless of how the dispute over the facility's annual average use estimates were to be resolved, the Skull

⁵In light of this finding regarding the nonradiological contaminant aspects of the contention, at this juncture we need not resolve the State challenge to the hydrology expertise of the PFS supporting witnesses.

⁶According to PFS, the State determined that up to 4000 acre-feet of water could be removed from the Skull Valley aquifer without impacting other users in the area, while PFS asserts its proposed ISFSI will require only an average 2.3 acre-feet per year. *See* PFS Motion at 14.

Valley aquifer would provide significant margin — in the range of a thousandfold — for that usage.

Because the State has not contested this PFS showing based on State data,⁷ the Board concludes that there no longer remains a dispute of material fact concerning the impact water usage at the proposed facility will have upon the Skull Valley aquifer and surrounding well users, thereby entitling PFS to judgment in its favor regarding part four of this contention.

3. *Impact on Downgradient Water Users*

In concert with our determination in Section II.C.1 above, with its showing regarding the means by which nonradiological contaminants could be released to reach the ground- and surface water surrounding the proposed site, the State has created material factual disputes about the impact the ISFSI may have upon downgradient water users. Thus, the Board concludes that the State has demonstrated a genuine dispute with regard to this issue, thereby precluding the Board from entering summary disposition in favor of PFS with regard to part five of the contention.

III. CONCLUSION

PFS having demonstrated there does not exist a dispute of material fact regarding (1) *radiological* contamination at the facility relative to parts one, two, three, and five of Contention Utah O, Hydrology; and (2) the potential impact of the facility's water usage on other well users and the aquifer as presented by part four of Contention Utah O, we grant these aspects of its summary disposition request regarding this contention. With respect to facility *nonradiological* contamination as it is implicated in parts one, two, three, and five of this contention, we find that the State has demonstrated the existence of material factual disputes, including those involving competing expert opinions. Thus, PFS having failed to meet its burden in this regard, we deny its request for summary disposition on these aspects of Contention Utah O.

⁷ We also are not persuaded that there is a material factual dispute by reason of the State's passing suggestion that only the State Engineer has the authority to determine the legal adequacy of groundwater withdrawal, *see* State Reply at 7, which appears to hark back to a matter addressed in the context of a different, and already resolved, issue. *See* LBP-01-24, 54 NRC 174, 175-76 (2001) (dismissing with prejudice Contention Utah T, Inadequate Assessment of Required Permits and Other Entitlement).

For the foregoing reasons, it is, this 28th day of December 2001, ORDERED that the June 29, 2001 PFS motion for summary disposition is *granted in part* and *denied in part* as is described in Section II.C of this Decision.

THE ATOMIC SAFETY AND
LICENSING BOARD⁸

Michael C. Farrar, Chairman
ADMINISTRATIVE JUDGE

Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 28, 2001

⁸ Although Judge Kline participated in deliberations regarding this issuance and agrees with the result, he was unavailable to sign it.

Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant PFS; (2) Intervenors Skull Valley Band of Goshute Indians, Ohngo Gaudadeh Devia, Confederated Tribes of the Goshute Reservation, Southern Utah Wilderness Alliance, and the State; and (3) the Staff.

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