

**NUCLEAR REGULATORY COMMISSION
ISSUANCES**

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

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PREFACE

This is the sixtieth volume of issuances (1–756) 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, 2004, to December 31, 2004.

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.

Between 1969 and 1990, the AEC 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 from the AEC to the Nuclear Regulatory Commission by the Energy Reorganization Act of 1974. Appeal Boards represented the final level in the administrative adjudicatory process to which parties could appeal. Parties, however, were permitted to seek discretionary Commission review of certain board rulings. The Commission also could 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. Since then, the Commission itself reviews 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:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

**Docket Nos. 50-275-LT
50-323-LT**

**PACIFIC GAS AND ELECTRIC
COMPANY
(Diablo Canyon Nuclear Power
Plant, Units 1 and 2)**

July 7, 2004

This proceeding concerns the application by Pacific Gas & Electric Company to transfer the operating licenses for its two Diablo Canyon nuclear power reactors. Pacific Gas & Electric requested termination of the proceeding, and the City of Santa Clara requested that the Commission vacate the orders previously issued in the proceeding. The Commission grants the motion to terminate the proceeding and denies the request for vacatur.

LICENSE TRANSFER: TERMINATION OF PROCEEDING

TERMINATION OF PROCEEDING: MOOTNESS

The Commission terminated a proceeding involving transfer of the operating licenses for two nuclear power reactors because the proceeding became moot when the applicant emerged from bankruptcy under conditions that obviated the need to transfer the licenses.

TERMINATION OF PROCEEDING: VACATUR

The Commission denied a request to vacate orders entered in a license transfer proceeding that became moot. The earlier orders were Commission orders, not

unreviewed licensing board orders. The Commission devoted substantial analysis to the significant question of antitrust law and policy decided in one of the orders, and intended it to be the final order in this proceeding. The precedential value of a final determination “on a generic legal issue litigated in a particular proceeding should not hinge upon the presence or absence of wholly extraneous subsequent developments in that proceeding.” *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-723, 17 NRC 555, 557-58 (1983). *Cf. Puget Sound Power and Light Co.* (Skagit Nuclear Power Project, Units 1 and 2), CLI-80-34, 12 NRC 407 (1980).

MEMORANDUM AND ORDER

This proceeding involves Pacific Gas and Electric Company’s application for authorization to transfer its licenses for the Diablo Canyon power plants in connection with PG&E’s Chapter 11 bankruptcy Plan of Reorganization. We terminated this adjudication on February 14, 2003,¹ and the NRC Staff subsequently issued an order approving the license transfer.² Thereafter, we granted the unusual request of PG&E and the chief bankruptcy contestant, the California Public Utilities Commission, that we take no further action (in the already closed NRC proceeding) during the pendency of a tentative settlement they had reached.³ We held in abeyance a later request by San Luis Obispo County to stay the NRC Staff’s transfer order.⁴

In a recent motion to terminate this proceeding, PG&E notified the Commission that it had emerged from bankruptcy on April 12, 2004, obviating the need to transfer the licenses for the two Diablo Canyon nuclear plants and rendering this proceeding moot. PG&E represented that counsel for the CPUC and San Luis Obispo County did not object to termination of the proceeding.

The City of Santa Clara filed the only response to PG&E’s motion.⁵ Santa Clara, although it did not oppose PG&E’s request to terminate the proceeding, urged us to take the additional action of vacating orders previously issued in

¹ See CLI-03-2, 57 NRC 19 (2003).

² See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2); Order Approving Transfer of Licenses and Conforming Amendments, 68 Fed. Reg. 33,208 (June 3, 2003), announcing Staff order dated May 27, 2003.

³ Pending settlement, two courts of appeals that were considering challenges to earlier Commission decisions in this proceeding issued orders holding the judicial proceedings in abeyance.

⁴ See CLI-03-10, 58 NRC 127 (2003). The NRC Staff is not a party to this adjudicatory proceeding.

⁵ The City of Santa Clara was one member of a group of seven intervenors we collectively called TANC (for the Transmission Agency of Northern California, the entity named first in the group’s intervention petition). See CLI-02-16, 55 NRC 317, 332 (2002).

this proceeding. Specifically, Santa Clara said that it was “aggrieved by certain aspects of [] CLI-03-02” through that order’s treatment of antitrust conditions.⁶ Santa Clara also requested that the Commission issue an order canceling approval of the transfer of the PG&E licenses.

PG&E opposed both of Santa Clara’s requests. As to vacatur, PG&E says that the Commission’s legal and policy decision regarding the status of the antitrust conditions in the Diablo Canyon licenses provides important guidance for PG&E and other licensees in the future. According to PG&E, Santa Clara can suffer no harm from the order, as the decision in question applied to a specific license transfer that will not be consummated and Santa Clara can challenge any future application to transfer the Diablo Canyon licenses. As to cancellation of the license transfer order, PG&E notes no need to do so, as the order was due to become null and void by its own terms on May 31, 2004.

The Commission denies Santa Clara’s request for cancellation of the Staff’s license transfer order, for that order has become void without Commission action by passage of time. The Commission agrees to terminate this proceeding, but denies Santa Clara’s request to vacate CLI-03-2 or any other orders in this proceeding. The earlier orders were Commission orders, not unreviewed Licensing Board orders.⁷ Indeed, we devoted substantial analysis to the significant question of antitrust law and policy we decided in CLI-03-2, and we intended it to be the final order in this adjudicatory proceeding. The precedential value of a final determination “on a generic legal issue litigated in a particular proceeding should not hinge upon the presence or absence of wholly extraneous subsequent developments in that proceeding.”⁸

As final agency action, CLI-03-2 was appealable only to the federal courts. The Northern California Power Agency, an intervenor in the NRC proceeding, did, in fact, appeal the decision to the U.S. Court of Appeals for the District of Columbia Circuit, and the City of Santa Clara intervened in the appeal.⁹ In that

⁶ “City of Santa Clara, California’s Response to Pacific Gas and Electric Company’s Motion To Terminate Proceeding,” at 2 (Apr. 23, 2004).

⁷ See *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113 (1998). In *Claiborne*, the applicant moved to withdraw its license and terminate the proceeding, rendering moot all remaining issues in the case. The Commission dismissed pending petitions for review and vacated the disputed unreviewed orders, but refused to vacate other orders entered in the proceeding. *Id.* at 114. See also *Rochester Gas and Electric Corp.* (Sterling Power Project, Nuclear Unit No. 1), ALAB-596, 11 NRC 867 (1980).

⁸ *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-723, 17 NRC 555, 557-58 (1983). Cf. *Puget Sound Power and Light Co.* (Skagit Nuclear Power Project, Units 1 and 2), CLI-80-34, 12 NRC 407 (1980). In *Skagit*, unlike here and in *Black Fox*, termination of a construction permit proceeding occurred while the Commission had before it a lower board decision on a nonfinal matter. That decision might have been overturned or modified on Commission review.

⁹ See *Northern California Power Agency v. NRC*, Case No. 03-1038.

action, the Northern California Power Agency, after dismissal of the appeal due to mootness, requested the court to vacate CLI-03-2 on the ground that it was deprived of its right to judicial review of an agency order because of mootness brought about by the actions of another.¹⁰ The court of appeals has not acted on the Northern California Power Agency's motion. But, given that no further review is available at the Commission, we see no basis for vacating our earlier orders ourselves.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of July 2004.

¹⁰ See generally *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950); *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994); *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324 (1961).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

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In the Matter of

**Docket Nos. 50-413-OLA
50-414-OLA**

**DUKE ENERGY CORPORATION
(Catawba Nuclear Station, Units 1
and 2)**

July 7, 2004

In this license amendment proceeding to authorize the use of four lead test assemblies of mixed oxide fuel at one of Duke Energy Corporation's Catawba nuclear reactors, the Commission addresses the Board's certified questions about an Intervenor's security contention.

STANDARDS: REVIEW OF LICENSE APPLICATIONS

ENFORCEMENT ORDERS: SCOPE

The NRC Staff measures license applications against regulatory standards, not against enforcement orders. A licensee must comply with regulations for its category of facility and with individual enforcement orders directed to its facility.

ENFORCEMENT ORDERS: SCOPE

Enforcement orders imposing security upgrades at the two existing Category I facilities did not change the prospective applicability of NRC regulations or create a universal design basis threat applicable to any other facility (such as Catawba) that might possess Category I material in the future.

ENFORCEMENT ORDERS: SCOPE

STANDARDS: REVIEW OF LICENSE APPLICATIONS

Under established principles of administrative law, Commission orders determine requirements only for those licensees and facilities to whom the orders are issued. Such orders do not amend NRC regulations, nor do they set — either by law or in practice — a new review standard for other licensees or applicants.

ENFORCEMENT ORDERS: SCOPE

STANDARDS: REVIEW OF LICENSE APPLICATIONS

The Commission has not, by means of its post-9/11 orders, elevated the general security standard for Category I facilities. Issuance of enforcement orders to licensees — indeed, even to all licensees currently in the category — does not amend NRC regulations or change licensing standards for new facilities.

STANDARDS: REVIEW OF LICENSE APPLICATIONS

ENFORCEMENT ORDERS: SCOPE

We hold that the possibility of a future security order being directed to Catawba does not require consideration, in this licensing adjudication, of the orders issued to the two existing Category I facilities. Those orders are facility-specific, not generic. And, even on their own terms, they “do not impose immutable requirements, but are subject to change depending on updated assessments of the terrorist threat.” See *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 73 (2004). Such facility-specific orders are not appropriate measuring rods for evaluating whether to license future activity at a different facility.

MEMORANDUM AND ORDER

In this license amendment proceeding to authorize the use of four lead test assemblies of mixed oxide (MOX) fuel in one of Duke Energy Corporation’s Catawba nuclear reactors, the Commission addresses the Board’s certified questions regarding an Intervenor’s security contention. The Commission holds that Security Contention 1 is inadmissible and declines to revisit CLI-04-6.

I. BACKGROUND¹

A. This Proceeding

Duke Energy Corporation has requested a license amendment to allow insertion of four MOX lead test assemblies in one of its Catawba commercial nuclear reactors.² Duke later submitted a request for an exemption from certain “Category I” security requirements, which, without such exemptions, would apply to Catawba because of the presence of “formula quantities” of plutonium, a strategic special nuclear material.³

The Blue Ridge Environmental Defense League (BREDL) filed a petition to intervene in this proceeding. On March 5, 2004, the Board granted BREDL’s request for a hearing on three reframed nonsecurity contentions,⁴ and Duke appealed. We dismissed the appeal (as interlocutory) without prejudice.⁵

Because of disputes among the parties regarding BREDL’s “need to know” certain nonpublic safeguards information in order to frame its security contentions, BREDL did not submit those contentions until the Commission issued CLI-04-6, resolving the disputes.⁶ On April 12, 2004, the Board admitted BREDL’s Security Contention 5, rejected Security Contentions 2 through 4, and certified Security Contention 1 to the Commission to determine its admissibility.⁷ Security Contention 1, which we discuss in detail below, calls on Duke to meet the same enhanced security standards that the NRC imposed on other Category I facilities in the wake of the 9/11 terrorist attacks. The Board certified not only the questions “specifically raised in Security Contention 1,” but also “those that arise out of and relate to it, and also to issues addressed in CLI-04-06, as discussed [in

¹ We refer the reader to our earlier more detailed discussions of Duke’s license amendment request. *See* CLI-04-11, 59 NRC 203, 205-07 (2004); CLI-04-6, 59 NRC 62, 67-70 (2004).

² MOX is a mixture of uranium and plutonium oxides. The test precedes anticipated “batch use” of the fuel as part of a cooperative program with the Russian Federation to dispose of weapons-grade plutonium by using it in commercial nuclear reactors.

³ A formula quantity “means strategic special nuclear material in any combination in a quantity of 5,000 grams or more computed by the formula, grams = (grams contained U-235) + 2.5 (grams U-233 + grams plutonium).” 10 C.F.R. § 73.2. Category I facilities are licensed to possess formula quantities of strategic special nuclear material.

⁴ *See* LBP-04-4, 59 NRC 129 (2004). In the same order, the Board denied the hearing request of the Nuclear Information and Resource Service.

⁵ *See* CLI-04-11, 59 NRC 203.

⁶ *See* CLI-04-6, 59 NRC 62.

⁷ *See* unpublished “Memorandum and Order (Ruling on Security-Related Contentions)” (Apr. 12, 2004). This order has not been made public because it contains safeguards information; however, on May 28, 2004, the Board issued LBP-04-10, 59 NRC 296 (2004), a redacted public version of the sealed April 12 order. Later references to the Board’s ruling on security-related contentions are to the public version.

the Board's order of April 12, 2004.]”⁸ Essentially, the Board has asked, in the context of BREDL's Security Contention I, whether CLI-04-6 retains validity and whether the enforcement orders the NRC issued to two Category I fuel facilities in the aftermath of 9/11⁹ relate to the present licensing proceeding. We accepted the Board's certification and sought initial and reply briefs from the parties.¹⁰

B. Security Contention 1

In its security submittal, Duke details the incremental measures it will take to protect the unirradiated MOX fuel, i.e., the fuel from the time it is delivered by the Department of Energy to Catawba until it is inserted into the reactor core for irradiation. Pursuant to 10 C.F.R. § 73.5, Duke has requested certain exemptions from the requirements of 10 C.F.R. §§ 73.45 and 73.46, which apply to Category I facilities.¹¹ Duke maintains that the Catawba facility, though technically a Category I facility during the time in question, is fundamentally a commercial reactor. Since Catawba already meets the safeguards requirements for reactors, Duke's security plan focuses on the additional measures — above those required for a commercial reactor facility — it believes are required to protect the MOX fuel and requests exemptions from those Duke considers unnecessary or inapplicable to Catawba.¹² In doing so, Duke recognizes that it does need to do something more, compared to measures taken for standard uranium fuel assemblies, to handle the fresh MOX assemblies. But Duke also asserts that, even when the MOX assemblies are present, Catawba is *functionally* something less than a typical Category I facility. Duke states that Category I fuel processing facilities differ so greatly from Catawba in the nature, type, and amount of Category I

⁸ CLI-04-11, 59 NRC at 209, quoting the Board's unpublished order.

⁹ See *In the Matter of BWX Technologies, Lynchburg, VA; Order Modifying License (Effective Immediately)*, 68 Fed. Reg. 26,675 (May 16, 2003), and *In the Matter of Nuclear Fuel Services Inc., Erwin, TN; Order Modifying License (Effective Immediately)*, 68 Fed. Reg. 26,676 (May 16, 2003). Neither Duke nor BREDL is privy to these orders.

¹⁰ CLI-04-11, 59 NRC at 209.

¹¹ There are two Category I facilities, Nuclear Fuel Services, Inc., and BWX Technologies, in the United States. Both existing Category I facilities engage in fuel processing. Although they possess formula quantities of strategic special nuclear material, commercial nuclear reactors are not considered Category I facilities and are exempt from the requirements of 10 C.F.R. §§ 73.45 and 73.46 because the plutonium they possess is located in spent fuel, which is highly radioactive. Spent fuel is exempted because its special nuclear material “is not readily separable from other radioactive material and [. . .] has a total external radiation dose rate in excess of 100 rems per hour at a distance of 3 feet from any accessible surface without intervening shielding.” 10 C.F.R. § 73.6(b). By possessing the four lead test assemblies, Catawba will be a Category I facility until the assemblies are inserted into the reactor core.

¹² NRC regulations are performance based. See, e.g., 10 C.F.R. §§ 73.20, 73.45.

material present that the threat of theft at the other Category I facilities is not at all comparable to that at Catawba.

In Security Contention 1, BREDL alleged that “Duke’s revisions to its security plan and its exemption application are deficient because they fail to address the post-9/11 revised design basis threat¹³ for Category I nuclear facilities.”¹⁴ BREDL maintains that, through orders issued to NFS and BWXT after September 11, 2001, there has been a *de facto* change in the design basis threat for Category I fuel cycle facilities, rendering compliance with section 73.1 insufficient, and that there is no basis in the regulations for distinguishing between the fuel cycle facilities and Catawba once the latter stores Category I quantities of strategic special nuclear material. Therefore, says BREDL, Duke’s license amendment application is deficient because it does not even consider this revised design basis threat.

In a related vein, BREDL states that the license amendment must pose “no undue risk to the public health and safety or the common defense and security,” pursuant to the Atomic Energy Act, 42 U.S.C. § 2077. BREDL continues as follows:

By changing the definition of the design basis threat, the Commission has changed the concept of what constitutes “no undue risk” to public health and safety and the common defense and security, such that mere compliance with NERC [*sic*] regulations will not suffice. . . . Even if it were to demonstrate compliance with [NRC’s published regulations for maintaining security of formula quantities of strategic special nuclear material], however, Duke still would not be entitled to a license, unless it could demonstrate compliance with the no undue risk standard as it is currently conceived by the Commission.¹⁵

In short, BREDL says first that the NRC has revised the design basis threat applicable to Catawba, and Duke has ignored the revision in its license amendment request. In the alternative, BREDL maintains that compliance with NRC regulations is insufficient under NRC’s statutory mandate to protect the public health and safety.

¹³The “design basis threat” is the postulated threat that the physical protection system must have the capability to withstand. Design basis threats are “used to design safeguards systems to protect against acts of radiological sabotage and to prevent the theft of special nuclear material.” 10 C.F.R. § 73.1(a). Our rules describe the design basis threats for radiological sabotage and for theft or diversion of formula quantities of strategic special material at 10 C.F.R. § 73.1(a)(1) and § 73.1(a)(2), respectively.

¹⁴LBP-04-10, 59 NRC at 310.

¹⁵“Blue Ridge Environmental Defense League’s Brief in Response to CLI-04-11, Regarding Admissibility of BREDL Security Contention 1; and Request for Reconsideration of CLI-04-06” at 4 (May 5, 2004), *quoting* “Blue Ridge Environmental Defense League’s Contentions on Duke’s Security Plan Submittal” at 3-4 (Mar. 3, 2004).

II. DISCUSSION

A. Admissibility of Security Contention 1

BREDL's chief argument is that the Commission has made a *de facto* change in the design basis threat for all Category I fuel cycle facilities. BREDL's argument rests on a pair of post-9/11 enforcement orders issued to the only two Category I facilities now in existence, NFS and BWXT.¹⁶ As BREDL says in its Security Contention 1 basis statement and in its brief, in those orders the Commission imposed security upgrades at Category I facilities (and at nuclear power reactors):

The Commission's review [of its security-related regulations for all licensed facilities in the aftermath of September 11] resulted in the issuance of enforcement orders imposing security upgrades at all operating nuclear power plants and Category I facilities. For the Category I facilities, the NRC explicitly declared that the revised design basis threat "supercedes [*sic*] the Design basis Threat (DBT) specified in 10 CFR 73.1." (Citation omitted). Thus, for Category I facilities, the NRC has revised and replaced the design basis threat that is specified in 10 CFR § 73.1.¹⁷

BREDL stresses a statement in the Commission's orders that it was "imposing a revised DBT," as set forth in an unpublished classified attachment to each of the orders.¹⁸ BREDL faults Duke for not addressing this revised design basis threat in its security plan.

BREDL's argument is flawed because it ignores both NRC practice and fundamental principles of administrative law. *There has been no change in the Category I design basis threat applicable to Catawba.* The NRC Staff measures license applications against regulatory standards, not against enforcement orders.¹⁹ A licensee must comply with regulations for its category of facility and with individual enforcement orders directed to its facility. The enforcement orders imposing security upgrades at NFS and BWXT did not create a universal design basis threat applicable to any other facility (such as Catawba) that might possess Category I material in the future. It is true, as BREDL argued, that the orders directed to the two existing Category I facilities add security requirements to the existing section 73.1 design basis threat. What BREDL overlooks, however, is that the orders in question added to the requirement *only* for those two facilities. They did not affect any other facility or change the prospective applicability

¹⁶ See note 9.

¹⁷ BREDL Brief at 4.

¹⁸ See 68 Fed. Reg. at 26,675, 26,677.

¹⁹ See CLI-04-6, 59 NRC at 72 n.21.

of the regulations.²⁰ NFS and BWXT are not the subject of this proceeding. Under established principles of administrative law, Commission orders determine requirements only for those licensees and facilities to whom the orders are issued. Such orders do not amend NRC regulations, nor do they set — either by law or in practice — a new review standard for other licensees or applicants.

Thus, the answer to the question whether the Commission has increased the general security standard for Category I facilities is “no.” Security Contention 1 is inadmissible because it points to no genuine dispute with Duke about the level of security required to satisfy section 73.1, the regulatory licensing standard for the Catawba facility.²¹ The contention relies on alleged changes in the design basis threat for all Category I facilities, present and future. But there has been no such change. The Commission’s NFS and BWXT enforcement orders have no across-the-board effect. They apply to those facilities only.

BREDL argues that we should direct the Board to inquire, as a factual matter, whether the circumstances of the Catawba reactor are so different as to render the post-9/11 orders to Category I facilities irrelevant. But, as we have just held, as a matter of law our NFS and BWXT security orders do not apply to Catawba. Moreover, the security needs at Catawba, on the one hand, and at NFS and BWXT, on the other, are visibly different:

[T]he MOX material, while technically meeting the criteria of a formula quantity, is not attractive to potential adversaries from a proliferation standpoint due to its low Pu concentration, composition, and form (size and weight). The MOX fuel consists of Pu oxide particles dispersed in a ceramic matrix of depleted uranium oxide with a Pu concentration of less than six weight percent. The MOX LTAs will consist of conventional fuel assemblies designed for a commercial light-water power reactor that are over 12 feet long and weigh approximately 1500 pounds. Therefore, the MOX LTAs represent a significantly less attractive theft or diversion target, from a proliferation standpoint, as compared to the materials at the Category I fuel fabrication facilities, which 10 CFR. 73.45 and 73.46 were primarily intended to address. A large quantity of MOX fuel and an elaborate extraction process would

²⁰ Moreover, they will remain in effect only until the Commission determines otherwise. *See* Fed. Reg. at 26,675, 26,677.

²¹ Each contention must state “[s]ufficient information . . . to 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). *See, e.g., Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358, 363 (2002). The NRC recently amended its adjudicatory procedural rules in 10 C.F.R. Part 2. *See* Final Rule: “Changes to Adjudicatory Process,” 69 Fed. Reg. 2182 (Jan. 14, 2004). The new procedural rules apply only to proceedings noticed on or after February 13, 2004, and therefore do not apply to this proceeding.

be required to yield enough material for use in an improvised nuclear device or weapon.²²

In short, contrary to BREDL's (implicit) claim, it is not inevitable that we ultimately will impose the same enhanced security requirements at Catawba, once it comes into possession of four MOX assemblies, as we have imposed at NFS and BWXT.

In a related argument, BREDL contends that, at a minimum, there is a genuine dispute whether the Commission's security orders — elevating the security standard for the NFS and BWXT facilities — demonstrate that compliance with the NRC's security regulation, 10 C.F.R. § 73.1, is no longer sufficient to satisfy the AEA's "no undue risk" standard. Again, however, the Commission's security pronouncements in its enforcement orders — even if equated to a "no undue risk" standard — apply only to the two existing Category I facilities. The Commission has not, by means of its post-9/11 orders, elevated the general security standard for Category I facilities. Issuance of enforcement orders to licensees — indeed, even to all licensees currently in the category — does not amend section 73.1 or change our licensing standards for new facilities. As a general matter, compliance with applicable NRC regulations ensures that public health and safety are adequately protected in areas covered by the regulations.²³

We hold that the possibility of a future security order being directed to Catawba does not require consideration of the already-issued NFS and BWXT orders in this licensing adjudication. As we have stressed repeatedly, those orders are facility-specific, not generic. And, even on their own terms, they "do not impose immutable requirements, but are subject to change depending on updated assessments of the terrorist threat."²⁴ Such facility-specific orders are not appropriate measuring rods for evaluating whether to license future activity at a different facility.

In sum, BREDL has given us no valid reason why the Licensing Board should not follow current security regulations. BREDL might have suggested, but did not, a waiver of the regulations.²⁵ And BREDL has had an opportunity to litigate the

²² "Safety Evaluation by the Office of Nuclear Security and Incident Response, Renewed Facility Operating License NPF-35 and Renewed Facility Operating License NPF-52, Duke Energy Corporation, et al., Catawba Nuclear Station, Units 1 and 2, Docket Nos. 50-413 and 50-414," at 2 (May 5, 2004).

²³ See *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-03-7, 58 NRC 1, 7 (2003).

²⁴ CLI-04-6, 59 NRC at 73.

²⁵ A party to an adjudicatory proceeding may petition that the application of a specified regulation be waived or an exception made for a particular proceeding if "special circumstances . . . are such that the application of the rule or regulation . . . would not serve the purposes for which the rule or regulation

(Continued)

special security arrangements (exemptions) Duke has proposed.²⁶ But speculation about future changes in the regulations or the content of future enforcement orders that might be directed to Catawba does not affect the standard for judging the pending application.

B. Reconsideration of CLI-04-6

We turn next to the question of the Category I fuel facility security orders in the context of our decision in CLI-04-6 regarding “need to know.” The thrust of that decision was that the current proceeding has nothing to do with the NRC’s post-9/11 general security orders and that the parties may safely assume as a baseline that the Catawba facility will comply with all applicable general security requirements, whether prescribed by regulation or by enforcement order.²⁷ The focus of this adjudication is the license application, which proposes specific measures — enhancements of security requirements for commercial reactors — necessary to protect the MOX fuel from theft or diversion. Contentions, then, should point out vulnerabilities; i.e., why the measures Duke plans to take are defective or insufficient.²⁸ We see no basis to reconsider any aspect of CLI-04-6. Given that the enhancements must be measured against the correct standard, BREDL’s erroneous insistence in Security Contention 1 that some other standard applies here does not beget an admissible contention or create a need to know additional safeguards information.

was adopted.” 10 C.F.R. § 2.758(b). See *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-03-7, 58 NRC 1, 8 (2003); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 595-97 (1988). Absent a waiver, NRC regulations are not subject to enhancement or collateral attack in agency hearings. See, e.g., *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 394-95 (1987).

²⁶ See CLI-04-6, 59 NRC at 72.

²⁷ See CLI-04-6, 59 NRC at 73. “All parties to this adjudication, including BREDL, may safely assume, as a baseline, that Duke’s Catawba facility will comply with all applicable general security requirements, both those prescribed in NRC rules and those prescribed by NRC order. That’s not at issue in this MOX license amendment case. At stake here is the appropriate increment — the appropriate heightening of security measures — necessitated by the proposed presence of MOX fuel assemblies at the Catawba reactor site.” *Id.*

²⁸ See CLI-04-6, 59 NRC at 72-73. “We see no reason why BREDL cannot evaluate Duke’s proposed incremental changes to its security plan related to the presence of MOX fuel assemblies and decide whether to challenge Duke’s proposed security arrangements as inadequate to accommodate the use of MOX fuel at Catawba.” *Id.*

III. CONCLUSION

For the foregoing reasons, we hold that BREDL's Security Contention I is inadmissible. Further, we decline to reconsider CLI-04-6.
IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of July 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

**Docket No. PAPO-00
(Pre-application Matters)**

**U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository)**

July 7, 2004

The Commission appoints a Pre-License Application Presiding Officer (PAPO) to resolve disputes regarding document availability in the Licensing Support Network (LSN), established for use in any eventual proceeding on a high-level radioactive waste repository application, and sets forth the PAPO's jurisdiction and authority.

**PRE-LICENSE APPLICATION PRESIDING OFFICER:
DESIGNATION**

The Commission hereby designates the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel as the PAPO.

**PRE-LICENSE APPLICATION PRESIDING OFFICER:
DELEGATION**

The Commission authorizes the PAPO to delegate his authority in whole or in part to any member or members of the Atomic Safety and Licensing Board Panel to serve singly or jointly on one or more boards.

PRE-LICENSE APPLICATION PRESIDING OFFICER: POWERS

The PAPO possesses all the general powers specified in 10 C.F.R. §§ 2.319 and 2.321(c) necessary to carry out its responsibilities.

PRE-LICENSE APPLICATION PRESIDING OFFICER: POWERS

The Commission's interest is in assuring the availability of information and not in dissipating resources on meaningless disputes. The PAPO has the authority to restrict irrelevant, unreliable, duplicative, or cumulative arguments and to regulate the course of the proceedings and the conduct of the participants.

**PRE-LICENSE APPLICATION PRESIDING OFFICER:
JURISDICTION**

The PAPO is granted this authority *solely* for the purpose of ruling on disputes over the electronic availability of documents, including disputes relating to claims of privilege or those relating to the implementation of recommendations of the Advisory Review Panel established under 10 C.F.R. § 2.1011(d).

**PRE-LICENSE APPLICATION PRESIDING OFFICER: APPEALS OF
PAPO ACTIONS**

A right of appeal from a PAPO order issued under 10 C.F.R. § 2.1010 is recognized under 10 C.F.R. § 2.1015(b). A notice of appeal, accompanied by a supporting brief, must be filed with the Commission no later than 10 days after service of the order.

**PRE-LICENSE APPLICATION PRESIDING OFFICER:
TERMINATION OF JURISDICTION**

The jurisdiction of the PAPO shall terminate when an Atomic Safety and Licensing Board has been appointed to preside over the high-level waste repository licensing proceeding, except that, unless the Chief Administrative Judge or the Commission rules otherwise, the PAPO shall retain jurisdiction over those disputes pending before it at the time a Licensing Board is appointed.

**PRE-LICENSE APPLICATION PRESIDING OFFICER: EX PARTE
CONTACTS AND SEPARATION OF FUNCTIONS**

The ex parte and separation of functions rules shall apply to those limited matters falling within the PAPO's jurisdiction and to appeals to the Commission of PAPO rulings.

ORDER

The Commission has promulgated regulations, found in 10 C.F.R. Part 2, Subpart J, which, among other things, provide for the use of an electronic information management system to make documents available to the participants in any eventual licensing proceeding on a high-level radioactive waste repository. Requiring participants to place pertinent documents into the Licensing Support Network (LSN) for use by the other participants obviates the need for the traditional means of document discovery and will allow potential parties to use some part of the pre-application period to review documentary information and prepare contentions for filing in petitions to intervene. In promulgating its regulations, the Commission recognized that there is a potential for disputes among the participants regarding document withholding from the LSN.

Section 2.1010 of Subpart J requires that the Commission designate an official to rule on those disputes, a Pre-License Application Presiding Officer (PAPO). Subpart J defines the PAPO as “one or more members of the Commission, or an atomic safety and licensing board (ASLB), or a named officer who has been delegated final authority in the pre-license application phase with jurisdiction specified at the time of designation.” 10 C.F.R. § 2.1010(a)(1). That official is to be designated no later than 15 days after the Department of Energy (DOE) — the potential applicant for a license authorizing construction of a high-level radioactive waste repository — provides a written certification to the NRC pursuant to 10 C.F.R. § 2.1009(b) that DOE has identified the pertinent documentary information and made it electronically available.¹ DOE provided that certification to NRC on June 30, 2004. The purpose of this Order is to designate a PAPO and set forth the jurisdiction of that official.

I. DESIGNATION OF THE PAPO

The Commission hereby designates the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, G. Paul Bollwerk, III, as the PAPO. As set forth below, he is authorized to delegate that authority.

¹We note receipt of a June 2, 2004 letter from counsel for the State of Nevada requesting the Commission “to appoint a Pre-Application Presiding Officer immediately.” This Order addresses that request.

II. PAPO'S POWERS AND JURISDICTION

The Commission authorizes the PAPO to delegate his authority in whole or in part to any member or members of the Atomic Safety and Licensing Board Panel to serve singly or jointly on one or more boards.

Pursuant to 10 C.F.R. § 2.1010(e), the PAPO possesses all the general powers specified in 10 C.F.R. §§ 2.319 and 2.321(c) that the PAPO requires to carry out its responsibilities. As provided by 10 C.F.R. § 2.1010(a)(1) and (b), the PAPO is granted this authority *solely* for the purpose of ruling on disputes over the electronic availability of documents, including disputes relating to claims of privilege and those relating to the implementation of recommendations of the Advisory Review Panel established under 10 C.F.R. § 2.1011(d). Pursuant to 10 C.F.R. § 2.1010(b), the PAPO shall rule on any claim of document withholding except as otherwise provided in this Order or subsequent order of the Commission. In 10 C.F.R. § 2.1005, the Commission has delineated classes of documents that are to be excluded from the LSN. The Commission calls attention to recent changes to that section of the regulations. *See* 69 Fed. Reg. 32,836 (June 14, 2004). No issue lacking a direct relation to the LSN is to be entertained by the PAPO.

The Commission's interest is in assuring the availability of information and not in dissipating resources on meaningless disputes. The PAPO possesses authority under 10 C.F.R. §§ 2.1010(e) and 2.319 to restrict irrelevant, unreliable, duplicative, or cumulative arguments and to regulate the course of the proceedings and the conduct of the participants. The Commission expects the PAPO to use this authority to ensure a fair and impartial process.

III. CLARIFICATION REGARDING APPEALS OF PAPO ACTIONS

Although 10 C.F.R. § 2.1010(a)(1) refers to “a named officer who has been delegated *final* authority on the matter to serve as the [PAPO]” (emphasis added), a right of appeal from a PAPO order issued under 10 C.F.R. § 2.1010 is recognized under 10 C.F.R. § 2.1015(b). A notice of appeal, accompanied by a supporting brief, must be filed with the Commission no later than 10 days after service of the order in accordance with 10 C.F.R. § 2.1015.

IV. TERMINATION OF JURISDICTION

The jurisdiction of the PAPO shall terminate at the time that an Atomic Safety and Licensing Board has been appointed to preside over the high-level waste

repository licensing proceeding,² except that, unless the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel or the Commission rules otherwise, the PAPO shall retain jurisdiction over those disputes pending before it at the time a Licensing Board has been appointed for the high-level waste repository licensing proceeding.

V. APPLICATION OF EX PARTE AND SEPARATION OF FUNCTIONS RULES

The ex parte and separation of functions rules (10 C.F.R. §§ 2.347 and 2.348, respectively) shall apply to those limited matters falling within the PAPO's jurisdiction and to appeals to the Commission of PAPO rulings.

VI. TECHNICAL REQUIREMENTS FOR LEGAL FILINGS

An addendum to the Order discusses and displays how the participants shall caption any filing seeking a ruling or other action from the PAPO. The caption includes, as will be noted, both the identification of the originator of the request and the number of the request by that particular originator. Subsequent responses and any other related papers should carry the same caption. This will aid electronic retrieval of the documents and facilitate identification of filings and rulings on any specified dispute.

Other requirements governing submissions shall be as the Part 2 rules provide unless the PAPO or the Commission provides otherwise.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of July 2004.

²The Commission expects that none of the one or more Atomic Safety and Licensing Boards that may be needed for such proceeding will be appointed until after DOE files an application, the application has been docketed by the NRC Staff, a Notice of Opportunity for Hearing has been published by the NRC, and at least one person has filed a petition to intervene and request a hearing.

ADDENDUM TO CLI-04-20

The caption used on the above Order appointing a PAPO should be used for all filings with the PAPO.

Beneath the caption, the participant shall number each of its requests for action by the PAPO. Thus, for example, a participant's first request should be numbered [name of participant]-01. Its second request will be numbered [name of participant]-02. By requiring each of the participants to number its requests, it will make it easy for the PAPO and the participants to refer to the various requests.

Thus were a participant to file a request, its first filing would read as follows:

U.S. Dept of Energy: High-Level Waste Repository
Pre-application Matters

Docket No. PAPO-00
Name of Participant-01

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

**Docket Nos. 50-413-OLA
50-414-OLA**

**DUKE ENERGY CORPORATION
(Catawba Nuclear Station,
Units 1 and 2)**

July 29, 2004

In this license amendment proceeding to authorize the use of four lead test assemblies of mixed oxide fuel at one of Duke Energy Corporation's Catawba nuclear reactors, the Commission holds that the Licensing Board did not abuse its discretion by ruling that the Intervenor presented sufficient information to qualify a witness as an expert in the area of nuclear security. The Commission also provides guidance on fortifying its standard approach to expert witnesses with additional precautions needed in the safeguards/security arena.

RULES OF PRACTICE: INTERLOCUTORY APPEALS

Although the Commission disfavors interlocutory review, we will take review if an appeal meets one of two criteria in 10 C.F.R. § 2.786(g) — irreparable harm or pervasive or unusual effect on the basic structure of the proceeding. *See, e.g., Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 70-71 (2004); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 214 n.15 (2002).

NRC: COMMISSION POLICY (INTERLOCUTORY REVIEW)

COMMISSION: SUPERVISORY AUTHORITY

The Commission sometimes takes interlocutory review as an exercise of its inherent supervisory authority over agency adjudicatory proceedings. *See, e.g., Savannah River*, CLI-02-7, 55 NRC at 214 n.15 (2002); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 29 (2000).

LICENSING BOARD: DISCRETION (EXPERT WITNESSES)

RULES OF PRACTICE: STANDARD OF REVIEW

A licensing board normally has considerable discretion in making evidentiary rulings, such as deciding whether a witness is qualified to serve as an expert. The Commission's standard for review of a board evidentiary ruling is abuse of discretion. *See Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982).

RULES OF PRACTICE: BURDEN OF PROOF; EXPERT WITNESSES

EXPERT WITNESSES: QUALIFICATIONS

The party who offers a witness has the burden of demonstrating that the witness is qualified to serve as an expert. *See McGuire*, ALAB-669, 15 NRC at 475; *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 250 (2001).

EXPERT WITNESSES: QUALIFICATIONS

LICENSING BOARD: DISCRETION (EXPERT WITNESSES)

A witness may qualify as an expert by “ ‘knowledge, skill, experience, training, or education’ to testify ‘[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.’ ” *McGuire*, ALAB-669, 15 NRC at 475, *quoting* Federal Rule of Evidence 702. This standard, of course, is not rigid or self-defining. Rather, it gives room to our boards to decide whether the expert witness will be of assistance.

LICENSING BOARD: DISCRETION (EXPERT WITNESSES)

After hearing *voir dire* and the parties' arguments, the Board specifically found that the witness had the knowledge, skill, experience, training, and education to

assist the Board in making its determinations in this case. This was a reasonable finding, given various factors catalogued by the Board.

**SAFEGUARDS INFORMATION: EXPERT WITNESS
QUALIFICATIONS**

RULES OF PRACTICE: EXPERT WITNESSES

EXPERT WITNESSES: QUALIFICATIONS

In the area of reactor security plans, the expertise of the intervenor's witness is general rather than specific. But "broad, general experience" may be useful. *Huval v. Offshore Pipelines, Inc.*, 86 F.3d 454, 457-58 (5th Cir. 1996). *But cf. McGuire*, ALAB-669, 15 NRC at 475. Gaps in specific knowledge may go to the "weight" of the expert testimony rather than to its admissibility. *Id.* See also *First Tennessee Bank National Association v. Barreto*, 268 F.3d 319, 333 (6th Cir. 2001); *Shearon Harris*, 53 NRC at 251.

EVIDENCE: EXPERT WITNESS (WAIVER OF OBJECTION)

The intervenor's witness is already — without NRC Staff or Duke objection — privy to some safeguards information in this case. He acquired the safeguards documents in his asserted capacity as the Intervenor's expert on security. Under the specific circumstances of this case, it is too late to decide now that the witness does not qualify as a security expert.

**SAFEGUARDS INFORMATION: ACCESS; EXPERT WITNESS
QUALIFICATIONS**

To gain access to safeguards information, a witness must possess the technical expertise to evaluate the information requested. Our adjudicatory rules limit the disclosure of safeguards information during litigation to witnesses who are *qualified*. See 10 C.F.R. § 2.744(e).

**SAFEGUARDS INFORMATION: ACCESS; EXPERT WITNESS
QUALIFICATIONS**

Before any witness may be shown any portion of a security plan, the witness's sponsor must demonstrate to the Licensing Board's satisfaction that the witness possesses the *technical competence* necessary to evaluate it. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1404, *review denied*, CLI-77-23, 6 NRC 455 (1977).

**SAFEGUARDS INFORMATION: EXPERT WITNESS
QUALIFICATIONS**

RULES OF PRACTICE: EXPERT WITNESSES

“‘[T]echnical competence’ to evaluate the components of a security plan *ideally* requires practical knowledge flowing from working with [the security system]. . . . We recognize that the Board must make a subjective determination . . . we believe that the burden will not have been met unless there exists evidence of actual practical knowledge *or its equivalent.*” *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-36, 8 NRC 567, 569 (1978) (emphasis added).

**SAFEGUARDS INFORMATION: EXPERT WITNESS
QUALIFICATIONS**

RULES OF PRACTICE: EXPERT WITNESSES

EXPERT WITNESSES: QUALIFICATIONS

Practical, “hands-on” experience, while desirable, is not indispensable in all cases. Unwarranted and inflexible barriers, such as too great an insistence on “specific” knowledge in selected aspects of the subject, should not disqualify an expert witness who possesses a strong general background and specialized knowledge in the relevant field. *See Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 155 (3d Cir. 1999) (“[E]ach stage [of the expert’s testimony] must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules.”)

LICENSING BOARDS: RESPONSIBILITIES

**SAFEGUARDS INFORMATION: EXPERT WITNESS
QUALIFICATIONS**

Licensing boards must assure themselves that a purported security “expert” has authentic credentials or experience in security. In the security arena, boards ought not tolerate “fishing expeditions” by untutored laypersons.

MEMORANDUM AND ORDER

This proceeding arises from the application of Duke Energy Corporation to amend its operating license to allow the use of four mixed oxide (MOX) lead test assemblies at its Catawba Nuclear Station. The Commission holds that the

Licensing Board did not abuse its discretion by ruling that the Intervenor, Blue Ridge Environmental Defense League (BREDL), presented sufficient information to qualify a witness as an expert in the area of nuclear security.

I. BACKGROUND

The background of this proceeding is described at length in earlier orders we issued in this docket.¹ Today's Order responds to the NRC Staff's petition for interlocutory review of a Licensing Board ruling accepting Dr. Edwin Lyman as an expert witness. BREDL had selected Dr. Lyman as an expert in nuclear security. The NRC Staff, asserting that BREDL had not established Dr. Lyman as an expert on security matters, refused to undertake a "need-to-know" determination regarding safeguards documents BREDL requested during discovery. According to the Staff, Dr. Lyman lacked adequate expert credentials, and the Staff objected to producing any safeguards documents to him.²

The Board heard oral argument on the issue of Dr. Lyman's credentials, permitted *voir dire* as to his nuclear security-related qualifications, and found him qualified to testify as an expert:

We have considered all your arguments and we appreciate Dr. Lyman's testimony. We find that he has been very straightforward in telling us what he does know and what experience he does have, what experience and knowledge he does not have and we find that he has demonstrated sufficient knowledge, skill, experience, training and education to be able to ask the probing questions and do the evaluations on behalf of the Intervenor that would assist and aid us in making our determinations in this case.

We find that he has shown skill and ability to understand, analyze and utilize the sort of specific information that would be relevant in such a way that it would aid us in our determinations and so while we will be issuing something in writing later to confirm our ruling today, we are going to go ahead and make that ruling today, verbally on the record now, so that we won't hold up the Staff in going ahead

¹ See *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 NRC 203, 205-07 (2004); CLI-04-6, 59 NRC 62, 67-70 (2004).

² The Staff divided its need-to-know determination into two parts, the proffered expert's qualifications and the indispensability of the information to the requester. At the time of the Licensing Board hearing, the Staff had not made the second part of its "need-to-know" determination; specifically, it had not examined the documents to determine whether it was necessary for a qualified expert to know their contents in order to assist the Intervenor in this proceeding.

and making your need-to-know determination on the necessity and indispensability aspects of the need issue.³

On June 30, the NRC Staff filed its petition for review and sought a stay of the Board's order.⁴ We entered a "housekeeping stay"⁵ on July 1, 2004, and established dates for Duke and BREDL to submit responses to both Staff pleadings. On July 2, 2004, the Board issued a written order confirming its earlier bench ruling.⁶

II. DISCUSSION

A. Interlocutory Review

The NRC Staff cites 10 C.F.R. § 2.786(b)(4) and bases its petition for interlocutory review on an assertion that the disputed Board ruling presents a substantial question regarding a legal conclusion that is contrary to established law and requires a prompt decision by the Commission.⁷ The cited standard, however, applies to review of a full or partial initial decision, not to an interlocutory Board ruling on a discovery dispute.

Although the Commission disfavors interlocutory review, we will take review if an appeal meets one of two criteria in 10 C.F.R. § 2.786(g) — irreparable harm or pervasive or unusual effect on the basic structure of the proceeding.⁸ And we

³ June 25 transcript at 2029-30. The transcript, designated "safeguards," is not available to the public.

⁴ See "NRC Staff's Petition for Review of the Licensing Board's Ruling Related to BREDL's Proffered Security Expert" (June 30, 2004) and "NRC Staff's Motions for Temporary Stay To Preserve the Status Quo and for Stay Pending Interlocutory Review of the Licensing Board's June 25, 2004 Finding Regarding Dr. Edwin Lyman's Expertise" (June 30, 2004). The NRC Staff also submitted a "Motion for Leave To Reply to BREDL's Opposition to NRC Staff's Petition for Review Regarding BREDL's Security Expert" (July 19, 2004). We grant the Staff's motion.

⁵ See *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), unpublished Order (Jan. 30, 2004); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), 1996 WL 627, 640 (NRC) (Oct. 2, 1996).

⁶ See "Memorandum and Order (Confirming June 25, 2004, Bench Ruling Regarding Expertise of Dr. Edwin S. Lyman)" (July 2, 2004), re-served as LBP-04-13, 60 NRC 33 (2004) ("Qualifications Order").

⁷ The NRC recently amended its adjudicatory procedural rules in 10 C.F.R. Part 2. See Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182 (Jan. 14, 2004). The new procedural rules do not apply to this proceeding.

⁸ See, e.g., *Catawba*, CLI-04-6, 59 NRC at 70-71; *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 214 n.15 (2002).

sometimes take interlocutory review as an exercise of our inherent supervisory authority over agency adjudicatory proceedings.⁹

The NRC Staff's petition for review is presumably founded on the (unstated) threat of serious and irreparable harm resulting from the alleged misapplication of need-to-know standards. Because dissemination of safeguards information can lead to irreparable harm, we have already visited this case once on interlocutory appeal.¹⁰ That appeal concerned BREDL's need to know (and access to) safeguards information at the contention formulation stage of the proceeding. The current appeal does not involve access to information directly. It involves expert witness qualifications in a security context. In today's environment, we anticipate that questions about expert witnesses on security may arise frequently in adjudications. We will therefore exercise our discretion to undertake interlocutory appellate review, and we will examine the Board's decision finding Dr. Lyman a qualified expert witness.¹¹

B. Standard for Review

As an initial matter, we note that a licensing board normally has considerable discretion in making evidentiary rulings, such as deciding whether a witness is qualified to serve as an expert. For our part, the Commission's standard for review of a board evidentiary ruling is abuse of discretion.¹²

Our precedents, drawing on guidance from the Federal Rules of Evidence, place the burden of demonstrating that a witness is qualified to serve as an expert on the party who offers the witness.¹³ A witness may qualify as an expert by "knowledge, skill, experience, training, or education" to testify "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand

⁹ See, e.g., *Savannah River*, CLI-02-7, 55 NRC at 214 n.15; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 29 (2000).

¹⁰ See CLI-04-6, 59 NRC 62.

¹¹ In *Catawba*, CLI-04-6, 59 NRC at 74-75, we offered general guidance to licensing boards for their "need to know" determinations. Our earlier focus was on judging which information was indispensable to intervenors in presenting their cases. We did, however, also state that boards should restrict access to safeguards information to "qualified, 'cleared' representatives of intervenors." *Id.* at 75 (emphasis added). In this Order we address the "qualified" issue.

¹² See *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982).

¹³ See *McGuire*, ALAB-669, 15 NRC at 475; *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 250 (2001).

the evidence or to determine a fact in issue.’¹⁴ This standard, of course, is not rigid or self-defining. Rather, it gives room to our boards to decide whether the expert witness will be of assistance. Like our judicial counterparts, we are reluctant to overturn a licensing board’s decision about the suitability or qualifications of a witness a party offers as an expert.¹⁵ Here, we see no sound reason to overturn the Board’s decision to grant Dr. Lyman expert status.

To begin with, the Board made a careful inquiry into Dr. Lyman’s qualifications in the security arena. After hearing *voir dire* and the parties’ arguments, the Board specifically found that Dr. Lyman had the knowledge, skill, experience, training, and education to assist the Board in making its determinations in this case. The Board was made aware, and acknowledged, that Dr. Lyman lacked knowledge of “certain particular detailed tactical information.”¹⁶ The Board nonetheless found that he had “extensive knowledge and experience at the conceptual and strategic level.”¹⁷

This was a reasonable finding, given various factors catalogued by the Board.¹⁸ For example, Dr. Lyman holds three degrees in physics and did postdoctoral work researching issues associated with security and safety of nuclear materials and nuclear weapons, including physical protection for plutonium and MOX fuel. During his tenure at the Nuclear Control Institute, he focused on nuclear nonproliferation, including the physical protection of special nuclear materials and nuclear facilities against sabotage. He has presented papers regularly on physical protection issues; has briefed a congressional committee on security issues relating to nuclear terrorism; has participated in meetings with NRC Staff and the nuclear industry on nuclear power plant security, force-on-force exercises, and the revised rulemaking on 10 C.F.R. Part 73; has been invited to be a member of panels on NRC safeguards policy at the NRC Regulatory Information Conference; has counseled Lawrence Livermore Laboratory scientists on a security issue; has published articles in scientific journals, including a double-blind peer-reviewed

¹⁴ *McGuire*, ALAB-669, 15 NRC at 475, quoting Federal Rule of Evidence 702. In judicial counterparts of administrative adjudications, the trial judge must ensure that scientific testimony admitted is not only relevant, but reliable. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). The trial court thus functions as a “gatekeeper.” *Id.* Whether a witness is sufficiently qualified as an expert is a matter within the discretion of the trial court, and the trial court “must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.” *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). Moreover, the trial court’s discretion will not ordinarily be disturbed on appeal unless there is an abuse of that discretion. See *General Electric Co. v. Joiner*, 522 U.S. 136, 141 (1997).

¹⁵ See *McGuire*, 15 NRC at 473-77.

¹⁶ Qualifications Order, LBP-04-13, 60 NRC at 36.

¹⁷ *Id.* at 38.

¹⁸ *Id.*

journal; and is currently employed as a Senior Staff Scientist with the Union of Concerned Scientists.

Given these credentials, we cannot say that the Board abused its discretion in finding that Dr. Lyman's testimony will aid the Board in deciding security issues in this case. It is true, as the NRC Staff stresses, that in the area of reactor security plans Dr. Lyman's expertise is general rather than specific. But "broad, general experience" may be useful.¹⁹ Gaps in specific knowledge may go to the "weight" of the expert testimony rather than to its admissibility.²⁰

As BREDL points out in its brief, Dr. Lyman is already — without NRC Staff or Duke objection — privy to some safeguards information in this case:

The Staff does not explain why, after making five separate need-to-know determinations granting Dr. Lyman access to safeguards documents, it has decided at this late juncture that it would be generally harmful to the public interest to grant Dr. Lyman access to such documents. It is simply far too late now to make such a claim.²¹

Dr. Lyman acquired the safeguards documents in his asserted capacity as BREDL's expert on security. We agree with BREDL that, under the specific circumstances of this case, it is too late to decide now that Dr. Lyman does not qualify as a security expert.

One last point. Our decision today, standing alone, goes only to the question of Dr. Lyman's qualifications as an expert witness; thus, it does not directly result in the release of any safeguards documents. The Staff should forthwith complete the "indispensability" portion of its need-to-know determinations regarding the documents BREDL has requested.²²

C. Expert Witness Qualifications in a Security Context

Security considerations, of course, require us to take special care that safeguards information ends up in as few hands as possible, whether in adjudications or otherwise. Accordingly, we take this opportunity to provide guidance on how to fortify our standard approach to expert witnesses with additional precautions needed in the safeguards/security arena.

¹⁹ *Huval v. Offshore Pipelines, Inc.*, 86 F.3d 454, 457-58 (5th Cir. 1996). *But cf. McGuire*, ALAB-669, 15 NRC at 475.

²⁰ *See Huval*, 86 F.3d at 457-58. *See also First Tennessee Bank National Association v. Barreto*, 268 F.3d 319, 333 (6th Cir. 2001); *Shearon Harris*, LBP-01-9, 53 NRC at 251.

²¹ "Blue Ridge Environmental Defense League's Opposition to NRC Staff Petition for Review of ASLB Ruling on BREDL Security Expert Qualifications and Opposition to Motion for Stay" at 7 (July 9, 2004).

²² Both BREDL and Duke have informed us that, based on our ruling in CLI-04-19, 60 NRC 5 (2004), BREDL has withdrawn the bulk of its earlier document request.

Our decision today notwithstanding, we fully agree with the NRC Staff's general view that, to gain access to safeguards information, a witness must possess the technical expertise to evaluate the information requested. Our adjudicatory rules limit the disclosure of safeguards information during litigation to witnesses who are *qualified*.²³ Thus, the Staff properly treated the qualifications of the witness as one part of a two-part test for releasing the safeguards information BREDL requested during discovery.

None of our recent adjudicatory decisions addresses expert witness qualifications in the security arena. In a 1979 case, however, the Appeal Board emphasized that, before any witness may be shown any portion of a security plan, the witness's sponsor must demonstrate to the Licensing Board's satisfaction that the witness possesses the *technical competence* necessary to evaluate it.²⁴ Declining to review that decision, the Commission recognized — as do we — the difficulty of the issue. The Commission endorsed the Appeal Board's view:

[T]he prospect of even limited disclosure of physical security plans for nuclear facilities poses serious and difficult questions. . . . Nonetheless, our responsibilities require the Commission to make certain findings and determinations before issuing an operating license for a nuclear power reactor, and the sufficiency of an applicant's proposed safeguards plans and procedures are relevant to those findings and determinations. The extent to which . . . the facts of this case require disclosure beyond the general outlines and criteria of the applicant's security plan is a matter for the Licensing Board to decide in the first instance and under the guidelines of ALAB-410²⁵

The Licensing Board in *Diablo Canyon* later stated:

We believe that "technical competence" to evaluate the components of a security plan *ideally* requires practical knowledge flowing from working with [the security system]. . . . We recognize that the Board must make a subjective determination here, but . . . we believe that the burden will not have been met unless there exists evidence of actual practical knowledge *or its equivalent*.²⁶

We endorse that guidance today.

²³ See 10 C.F.R. § 2.744(e). Under our new adjudicatory rules, most proceedings will be less formal than previously. Instead of discovery, the NRC Staff will compile a hearing file. See 10 C.F.R. § 2.1203. Nonetheless, we anticipate that numerous disputes, including those over witness qualifications, will arise regarding the need to know safeguards information.

²⁴ *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1404, *review denied*, CLI-77-23, 6 NRC 455 (1977).

²⁵ *Diablo Canyon*, CLI-77-23, 6 NRC at 456.

²⁶ *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-36, 8 NRC 567, 569 (1978) (emphasis added).

The Staff in its current petition, however, appears to have lost sight of the italicized words. Duke agrees with the Staff and maintains that the Board confused “Dr. Lyman’s experience in broad nuclear energy policymaking issues with specific expertise in the development, implementation, and analysis of nuclear plant security plans.”²⁷ But practical, “hands-on” experience, while desirable, is not indispensable in all cases. Unwarranted and inflexible barriers, such as too great an insistence on “specific” knowledge in selected aspects of the subject, should not disqualify an expert witness who possesses a strong general background and specialized knowledge in the relevant field.²⁸ On the other hand, boards must assure themselves that a purported security “expert” has authentic credentials or experience in security. In the security arena, boards ought not tolerate “fishing expeditions” by untutored laypersons. Boards, like the Commission itself, must keep in mind “the delicate balance between fulfilling our mission to protect the public and providing the public enough information to help us discharge that mission.”²⁹

For our part, the Commission will continue to review safeguards-related cases closely. But the Board has not abused its discretion in this case. Thus, we will not disturb the ruling of the Board.

III. CONCLUSION

We accept review of the Staff’s petition and affirm the Board’s evidentiary ruling because it was not an abuse of the Board’s discretion. We direct the NRC Staff to complete outstanding need-to-know determinations in this case forthwith. We also terminate the housekeeping stay that we entered in this case on July 1, 2004.

²⁷ “Duke Energy Corporation’s Response to the NRC Staff’s Appeal of the Licensing Board’s Finding That Dr. Edwin S. Lyman is an Expert in Nuclear Power Plant Security” (July 9, 2004).

²⁸ See *Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 155 (3d Cir. 1999) (“[E]ach stage [of the expert’s testimony] must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules”).

²⁹ *Catawba*, CLI-04-6, 59 NRC at 73.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 29th day of July 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Ann Marshall Young, Chair
Anthony J. Baratta
Thomas S. Elleman

In the Matter of

Docket Nos. 50-413-OLA
50-414-OLA
(ASLBP No. 03-815-03-OLA)

DUKE ENERGY CORPORATION
(Catawba Nuclear Station, Units 1
and 2)

July 2, 2004*

In this proceeding, in which Duke Energy applies to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) fuel lead test assemblies (LTAs) as part of the ongoing U.S.-Russian Federation plutonium disposition program, the Licensing Board finds Intervenor's expert to be qualified as an expert in nuclear power plant security.

RULES OF PRACTICE: EXPERT WITNESS(ES)

While giving considerable deference to the Staff in its determination that Intervenor did not have a "need to know" with regard to certain safeguards information because Intervenor's expert was not qualified as an expert in nuclear power plant security, the Licensing Board finds that, despite some lack of knowledge of certain particular detailed tactical information, the Intervenor's proffered expert demonstrated sufficient knowledge and experience at the conceptual and strategic

*Re-served July 8, 2004.

level, particularly with regard to the integrated nature of nuclear power plant security and its many facets, including training, communications, detection, and physical protection, among others, to understand, analyze, utilize, and explain the significance of the sort of information, both conceptual and detailed, that would be relevant and that would aid the Board in the security-related determinations it is called upon to make in this proceeding.

RULES OF PRACTICE: EXPERT WITNESS(ES)

Intervenor expert demonstrated sufficient knowledge and experience to satisfy the standard, from Federal Rule of Evidence 702, that “a witness qualified as an expert by ‘knowledge, skill, experience, training, or education,’ [may] testify ‘if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue,’ ” and sufficient practical ability to analyze the matters at issue in a manner consistent with relevant legal standards so as to render him an acceptable expert to examine, with his NRC-issued “L” level clearance, appropriate documents, or portions thereof, that may be safeguards information.

RULES OF PRACTICE: EXPERT WITNESS(ES)

Licensing boards will give expert testimony appropriate weight commensurate with the expertise and qualifications of the expert.

**MEMORANDUM AND ORDER
(Confirming June 25, 2004, Bench Ruling Regarding
Expertise of Dr. Edwin S. Lyman)**

During a closed session in this proceeding¹ held June 25, 2004, this Licensing Board made a verbal bench ruling relating to the expertise of Dr. Edwin S. Lyman on nuclear power plant security matters, finding that Dr. Lyman possessed sufficient knowledge, skill, experience, training, and education to be able to assist

¹ This proceeding involves Duke Energy Corporation’s (Duke’s) February 2003 application to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) lead test assemblies at the station. On September 17, 2003, this Licensing Board was established to preside over this proceeding. 68 Fed. Reg. 55,414 (Sept. 25, 2003). By Memoranda and Orders dated March 5 and April 12, 2004 (the latter sealed as Safeguards Information; redacted version issued May 28, 2004), the Licensing Board granted BREDL’s request for hearing and admitted various non-security-related and security-related contentions. LBP-04-4, 59 NRC 129 (2004); LBP-04-10, 59 NRC 296 (2004).

and aid the Board in making our determinations on the security issues in this proceeding. Tr. 2029. The need for this ruling arose out of the NRC Staff's June 23, 2004, determination, in response to a Blue Ridge Environmental Defense League [BREDL] June 19, 2004, Request for Need To Know Determination regarding various documents sought in discovery on security-related issues, that "BREDL does not have a need to know for the documents" in question, based on the Staff's finding that "there is insufficient basis on the record to find that BREDL's proffered security expert, Dr. Lyman, is an expert on security matters." NRC Staff's Reponse to the [BREDL]'s Request for a Need To Know Determination (June 23, 2004), at 2; *see* Letter from Diane Curran to Susan L. Uttal, Esq. (June 19, 2004).

The Board stated its ruling through the Chair, after having previously considered the Staff's June 23 written determination and the June 23 written arguments of Duke Energy Corporation (Duke), *see* Letter from Mark J. Wetterhahn to Antonio Fernández, Esq., and Susan L. Uttal, Esq. (June 23, 2004), and after holding *voir dire* examination of Dr. Lyman by all parties and the Board, and hearing the oral arguments of all parties. The Board found Dr. Lyman to be an expert on nuclear plant security issues, based upon his having demonstrated sufficient knowledge, skill, experience, training, and education to be able to ask appropriate probing questions and do appropriate evaluation on behalf of Intervenor BREDL so as to assist and aid the Board in making our determinations on the security issues in this proceeding. Tr. 2029.

As we indicated during the June 25 session, we then intended to issue a written confirmation of our verbal ruling at a later time, and this Memorandum and Order fulfills this statement of intent. We decided, however, to state our ruling from the bench during the June 25 session "so that we won't hold up the Staff in going ahead and making [its] need-to-know determination on the necessity and indispensability aspects of the need issue." Tr. 2029-30. The Staff had stated through counsel on June 25 that, if the Board on that date found Dr. Lyman to be an expert on the security matters at issue, the Staff would be able to provide its further determinations on other aspects of the need-to-know question, with regard to each affected document, by today's date, July 2, 2004.² Tr. 1967-68; *see* Tr. 1952.

² We note that the Staff has, since our June 25 session and verbal bench ruling, petitioned for review of our ruling by the Commission, and moved for a stay pending such review. NRC Staff's Petition for Review of the Licensing Board's Ruling Related to BREDL's Proffered Security Expert (June 30, 2004) [hereinafter Staff Petition for Review]; NRC Staff's Motions for Temporary Stay To Preserve the Status Quo and for Stay Pending Interlocutory Review of the Licensing Board's June 25, 2004 Finding Regarding Dr. Edwin Lyman's Expertise (June 30, 2004). Thereafter, the Commission issued a "housekeeping stay" of our ruling. Commission Order (July 1, 2004).

(Continued)

With regard to the grounds for our ruling as stated above, we wish to note that in making our ruling we gave, and continue to give, considerable deference to the Staff in its determination regarding Dr. Lyman's expertise, as required by the Commission in CLI-04-6, 59 NRC 62, 75 (2004). Balancing all the evidence and argument on this issue, however, we found that BREDL and Dr. Lyman clearly demonstrated his expertise in the area of nuclear security, sufficient to support our ruling under relevant law. As stated during the June 25 session, we found that Dr. Lyman was quite straightforward in stating both those specific matters in which he has knowledge and experience and those in which he does not. He also provided information about various nuclear security-related articles he has authored, as well as about other participation in nuclear security-related subjects, which we describe below. We found, and herein find, that he has, despite some lack of knowledge of certain particular detailed tactical information, demonstrated the requisite skill and ability to understand, analyze, utilize, and explain the significance of the sort of information, both conceptual and detailed, that would be relevant and that would aid us in the security-related determinations we are called upon to make in this proceeding. This, we found and do herein also find, satisfies the standard proposed by the Staff, from Federal Rule of Evidence 702, that "a witness qualified as an expert by 'knowledge, skill, experience, training, or education,' [may] testify 'if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue.'" See Tr. 2013; Staff Petition for Review at 4 (citing *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982) (citing Fed. R. Evid. 702)).

In order to clarify certain matters relating to the Staff's Petition for Review and provide whatever assistance we may offer in its resolution, we find it appropriate to note certain matters arising out of the Staff's petition. In it, the Staff argues that any delay in the portion of this proceeding that involves security issues will be "outweighed by the possibility that the Board's ruling at issue will result in the unwarranted release of [safeguards information (SGI)] to an individual who has not been shown to meet the standard to be declared an expert." Staff Petition for Review at 2. Given the Staff's agreement to provide its further determinations on other aspects of the need-to-know question with regard to each affected document by today's date, the possibility of unwarranted release of safeguards documents would seem to be limited to those documents that the Staff would have found are needed by BREDL because they are "indispensable" and "necessary" to BREDL in its preparation for the hearing on its Security Contention 5 — the criteria defined by the Commission in CLI-04-6, 59 NRC 62, 73, 75 (2004). We note this in order to clarify that, in contrast to the statement that we "instructed the NRC Staff to give BREDL access to the safeguards information on Friday, July 2, 2004," see Commission Order (July 1, 2004), at 1, what we actually expected was that the Staff, *in accordance with its agreement* cited in the text, would *provide its determinations* on the need-to-know aspects other than expertise by July 2, and would provide only those documents with regard to which *the Staff found a need to know from the standpoint of indispensability and necessity*, subject, of course, to appropriate appeal and determination(s) on appeal.

Specifically, we note Dr. Lyman's A.B., M.S., and Ph.D. in physics, as well as his postdoctoral work for 3 years at the Center for Energy and Environmental Studies in the School of Engineering at Princeton University, where he researched issues associated with security and safety of nuclear materials and nuclear weapons, including the physical protection regime for the security of plutonium in general and MOX fuel in particular, and including his review of all publicly available documents at Princeton referring to the security and safety of the storage and processing of plutonium. *See* Tr. 1971-72.

In addition, we note Dr. Lyman's experience, including: (1) his tenure from 1995 to April 2003 first as scientific director and then as president of the Nuclear Control Institute, where he focused on nuclear nonproliferation and evaluated publicly available aspects of the security and safety of the nuclear fuel cycle, the physical protection of special nuclear materials and nuclear facilities against sabotage, Tr. 1973; (2) as a member of the Institute of Nuclear Materials Management since 1996, providing at least one paper every year at the institute's annual conference, many of which pertain to physical protection issues, *id.*, *see also* Tr. 2003-06; (3) his being invited to brief the Joint Atomic Energy Intelligence Committee on issues associated with post-September 11 security issues relating to nuclear terrorism, as well as briefing the National Intelligence Council and the Central Intelligence Agency on issues of security of spent fuel storage, *id.*, *see also* Tr. 2001; (4) his participation in routine meetings with NRC Staff and the nuclear industry on issues pertaining to the security of nuclear power plants, force-on-force exercises, and the revised rulemaking on 10 C.F.R. Part 73, *id.*; (5) his speaking twice on being invited to be a member of panels on NRC safeguards policy at the NRC Regulatory Information Conference, Tr. 1974; (6) his expertise being sought out by Lawrence Livermore National Laboratory scientists on a particular vulnerability with regard to the use of nuclear materials in a radiological device, Tr. 1974-75; (7) his study and writing on the useability of reactor-grade plutonium in nuclear weapons, including verification of a statement of J. Robert Oppenheimer regarding the potential yield of nuclear weapons, Tr. 1975; and (8) his current employment as a Senior Staff Scientist with the Union of Concerned Scientists, *see* Curriculum Vitae of Edwin Stuart Lyman, Attachment to [BREDL] Supplemental Petition to Intervene (Oct. 21, 2003) [hereinafter Lyman CV].

We also note articles of Dr. Lyman in the journals, *Science* and *Science and Global Security*, among others, on subjects including "Revisiting Nuclear Power Plant Safety" in the former, in 2003, and "The Proliferation Risks of Plutonium Mines" in the latter, in 2000. Lyman CV; *see* Tr. 1999-2003. He also published articles on spent fuel pool and repository security-related issues in *Science and Global Security*. We note that *Science and Global Security* is a double-blind peer-reviewed journal. Tr. 1996-2003.

We find that the preceding information qualifies Dr. Lyman as an expert under all relevant standards, including FRE 702 as well as NRC precedent, and further find that the NRC Staff in making its determination on Dr. Lyman's expertise gave insufficient attention to this information and to the nature of his education, research, and other experience, including his having provided the benefits of his expertise to various respected entities on issues relevant to our inquiry herein, his writing on pertinent subjects, as well as his current employment and work on nuclear security-related issues.

These qualifications and experience, we find, demonstrate that Dr. Lyman possesses the "technical competence necessary to evaluate [relevant portions of a nuclear plant security] plan," and constitute "extensive training and experience" in fields that are closely related to nuclear plant security so as to enable him to "assess overall plant security with an appreciation for its interrelated aspects," as required, respectively, under *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1404 (1977), cited by the Staff in its June 23 determination; and *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-82-51, 16 NRC 167, 176 (1982), cited by Duke in its June 23, 2004, letter to NRC Staff counsel regarding BREDL's need-to-know request.

Thus, as in *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239 (2001), another case cited by the Staff in its June 23 determination, while BREDL's expert may have little actual detailed tactical experience in nuclear plant security, given his combination of education and experience, we find he has sufficient knowledge and experience that "can aid the Board in its determinations." *Id.* at 251; *see id.* at 250. Specifically, we find that Dr. Lyman has extensive knowledge and experience at the conceptual and strategic level, particularly with regard to the integrated nature of nuclear power plant security and its many facets, including training, communications, detection, and physical protection, among others. *See* Tr. 1989-92, 2010-11. We find that this knowledge and experience provides him with sufficient practical ability to analyze the matters at issue in a manner consistent with the relevant legal standards, and assist us in our deliberations, so as to render him an acceptable expert to examine, with his NRC-issued "L" level clearance, appropriate documents, or portions thereof, that may be safeguards information.³ We will, as in *Shearon Harris*, of course, give any testimony of Dr. Lyman "appropriate weight commensurate

³ We find that Dr. Lyman's education, knowledge, and experience all taken together, as elucidated in his *voir dire*, demonstrate not only that he is qualified, but that he is far more qualified to examine and analyze appropriate documents in this proceeding, and assist the Board in our deliberations in this proceeding, than the proffered but not accepted expert in the case of *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-36, 8 NRC 567 (1978), was with

(Continued)

with his expertise and qualifications.’’ *See Shearon Harris*, LBP-01-9, 53 NRC at 250.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Anthony J. Baratta
ADMINISTRATIVE JUDGE

Thomas S. Elleman
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 2, 2004⁴

regard to the issues in that proceeding, with that licensing board. *See id.* at 569-73. In that case, the expert did not have either the demonstrated academic science knowledge or experience in nuclear security-related matters that Dr. Lyman has.

⁴Copies of this document were sent this date by Internet e-mail to all parties.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Paul B. Abramson
Dr. Charles N. Kelber

In the Matter of

Docket No. 70-3103-ML
(ASLBP No. 04-826-01-ML)

LOUISIANA ENERGY SERVICES, L.P.
(National Enrichment Facility)

July 19, 2004

In response to petitions filed by two state governmental entities and two public interest organizations seeking to intervene in this proceeding regarding the application of Louisiana Energy Services, L.P. (LES), for authorization to possess and use source, byproduct, and special nuclear material to enrich natural uranium by the gas centrifuge process, the Licensing Board concludes that, having established the requisite standing and proffering at least one admissible contention, each of the Petitioners is admitted as a party to the proceeding.

RULES OF PRACTICE: INTERVENTION PETITION (PLEADING REQUIREMENTS)

Agency regulations have long required that any individual, group, or business or governmental entity that wishes to intervene as a party in an adjudicatory proceeding addressing a proposed licensing action must (1) file a timely written request to intervene, (2) establish that it has standing to intervene, and (3) offer at least one admissible contention that is litigable in the proceeding. *See* 10 C.F.R. § 2.309(a)-(b).

RULES OF PRACTICE: STANDING TO INTERVENE

Procedurally, a petitioner seeking to establish that it has standing as of right to participate in an adjudicatory proceeding must provide information in its petition for leave to intervene concerning (1) the nature of the petitioner's right under the Atomic Energy Act to be made a party; (2) the petitioner's property, financial, or other interests in the proceeding; and (3) the potential effect that any decision reached within the proceeding may have on the petitioner's interest. *See* 10 C.F.R. § 2.309(d)(1)(ii)-(iv).

RULES OF PRACTICE: CONTENTIONS (SPECIFICITY AND BASIS)

Section 2.309(f) of the Commission's rules of practice specifies the requirements that must be met if a contention is to be deemed admissible. Specifically, a contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. *See* 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), and (vi). In addition, the petitioner must demonstrate that the issue raised in the contention is both "within the scope of the proceeding" and "material to the findings the NRC must make to support the action that is involved in the proceeding." *Id.* § 2.309(f)(1)(iii)-(iv). Failure to comply with any of these requirements is grounds for the dismissal of a contention. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE OF COMMISSION RULE)

With limited exception, no rule or regulation of the Commission can be challenged in an adjudicatory proceeding. *See* 10 C.F.R. § 2.335; *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003). By the same token, any contention that amounts to an attack on applicable statutory requirements or represents a challenge to the basic structure of the Commission's regulatory process must be rejected.

See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982) (citing *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974)). Similarly, any contention that seeks to impose stricter requirements than those set forth by the regulations is inadmissible. *See 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); *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001). Additionally, the adjudicatory process is not the proper venue for a petitioner to set forth any contention that merely addresses his or her own view regarding the direction regulatory policy should take. *See Peach Bottom*, ALAB-216, 8 AEC at 21 n.33.

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)

All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board. *See Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). As a consequence, any contention that falls outside the specified scope of the proceeding must be rejected. *See Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

It is the obligation of the petitioner to present the factual information and expert opinions necessary to support its contention adequately. *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff'd in part*, CLI-95-12, 42 NRC 111 (1995). Failure to provide such an explanation regarding the bases of a proffered contention requires the contention be rejected. *See Palo Verde*, CLI-91-12, 34 NRC at 155. In this connection, neither mere speculation nor bare assertions alleging that a matter should be considered will suffice to allow the admission of a proffered contention. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner neglects to provide the requisite support to its contentions, it is not within a licensing board's power to make assumptions of fact that favor

the petitioner, nor may a licensing board supply information that is lacking. *See Georgia Tech Research Reactor*, LBP-95-6, 41 NRC at 305; *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

Providing any material or document as a basis for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention. *See Fansteel*, CLI-03-13, 58 NRC at 205. Along these lines, any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to licensing board scrutiny. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996). Thus, the material provided in support of a contention will be carefully examined by a licensing board to confirm that it does indeed supply an adequate basis for the contention as asserted by the petitioner. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990).

RULES OF PRACTICE: CONTENTIONS (MATERIALITY)

In order to be admissible, the regulations require that all contentions assert an issue of law or fact that is material to the outcome of a licensing proceeding, that is to say, the subject matter of the contention must impact the grant or denial of a pending license application. *See* 10 C.F.R. § 2.309(f)(1)(iv). This requirement of materiality often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment. *See Yankee Nuclear*, LBP-96-2, 43 NRC at 75; *see also Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), *petition for review denied*, CLI-03-12, 58 NRC 185, 191 (2003). Similarly, in the context of a decommissioning funding estimate the Commission has held that, to gain admission of a contention alleging an error in the estimate, the petitioner must also show that there exists no reasonable assurance that the amount in question will be paid by the applicant. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 9 (1996).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE TO LICENSE APPLICATION)

All properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the application (including the SAR and ER). *See* 10 C.F.R. § 2.309(f)(1)(vi). Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

RULES OF PRACTICE: CONTENTIONS (SCOPE)

Although licensing boards generally are to litigate “contentions” rather than “bases,” it has been recognized that “[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases.” *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002).

RULES OF PRACTICE: CONTENTIONS (PLEADING BY A GOVERNMENTAL AGENCY)

Although the standing requirements set forth in 10 C.F.R. § 2.309 explicitly differentiate between governmental and nongovernmental petitioners, the other provisions in section 2.309 regarding hearing petitions and associated submissions, including the contentions submitted by petitioners, do not contain such a distinction. *See Diablo Canyon*, LBP-02-23, 56 NRC at 453-57. The same is true for the other provisions in section 2.309, including those relating to the scope of a petitioner’s section 2.309(h)(2) reply to the responses of an applicant and/or the NRC Staff to a hearing request.

RULES OF PRACTICE: CONTENTIONS (PLEADING BY A GOVERNMENTAL AGENCY); PARTICIPATION BY AN INTERESTED STATE OR LOCAL GOVERNMENT

The special relationship that exists between state and local governmental entities and their citizens is the premise of the authority granted to governmental

entities under section 2.315(c), which affords an interested governmental entity an opportunity to participate in the evidence formulation process at a hearing (e.g., introduce evidence, interrogate witnesses if party cross-examination is permitted) on an admitted contention without requiring the governmental entity to take a position on the issue. Under the agency's rules of practice, however, that relationship does not provide the basis for a licensing board to essentially waive or suspend the requirements governing contention formulation and the late-filed submission of contention amendments or revisions.

LICENSING BOARD(S): DISCRETION IN MANAGING PROCEEDINGS (LEAD INTERVENORS OR PARTIES)

RULES OF PRACTICE: INTERVENTION (LEAD INTERVENORS OR PARTIES)

Pursuant to 10 C.F.R. § 2.319, the presiding officer possesses the authority to control the prehearing and hearing process by consolidating parties and/or designating a lead party to represent interests held in common by multiple groups, in order to eliminate duplicative or cumulative evidence and arguments. When an admissible contention is adopted by another party, or when several admissible contentions are consolidated because of their similar subject matter, the prudent approach is to designate "lead" parties for the litigation of each of these contentions.

RULES OF PRACTICE: INTERVENTION (LEAD INTERVENORS OR PARTIES)

A party designated as the "lead" has the primary responsibility for the litigation of a contention. These litigation responsibilities of the lead party include, absent other instruction from the licensing board, the conduct of all discovery related to the contention; filing and responding to any dispositive or other motions related to the contention; submitting any required prehearing briefs regarding the contention; preparing prefiled direct testimony, conducting any redirect examination, providing any surrebuttal testimony in connection with the contention; and preparing posthearing proposed findings of fact and conclusions of law regarding the contention. The lead party is responsible for consulting with the other parties involved (i.e., any party adopting the contention or filing a contention that has been consolidated) regarding the activities related to the litigation of the contention.

RULES OF PRACTICE: DISCOVERY (MEETING OF PARTIES)

As Commission rules require, as soon as practicable after issuance of a memorandum and order admitting parties and issues (but in any event no more than 30 days after that issuance), the parties are to meet to discuss their particular claims and defenses and the possibility of settlement or resolution of any part of the proceeding, develop a plan for discovery, and make arrangements for the required disclosures under 10 C.F.R. § 2.704. *See* 10 C.F.R. § 2.705(f).

RULES OF PRACTICE: DISCOVERY (PRODUCTION OF DOCUMENTS)

Pursuant to 10 C.F.R. § 2.704(a), all lead parties, except the Staff, are to make available within forty-five (45) days of the issuance of a memorandum and order admitting parties and issues (1) the name and, if known, the address and telephone number of those individuals likely to possess discoverable information that is relevant to the admitted contentions and their supporting bases; and (2) copies of, or descriptions by category and locations of, all documents, data compilations, and tangible things in the possession, custody, or control of the lead party that are relevant to the admitted contentions and their supporting bases. Where such material is publicly available from a different source, it will suffice to provide the location, title, and page reference to the relevant document, data compilation, or tangible thing. A party complying with this rule is under a duty to supplement its disclosures within a reasonable time after it learns that the information disclosed is incomplete or incorrect in some material respect, if this additional information has not otherwise been made known during discovery or in writing. *See* 10 C.F.R. § 2.704(e)(1). Additionally, each section 2.704 disclosure must be signed by at least one attorney of record, certifying that to the best of his or her knowledge, after reasonable inquiry, the information is correct and complete at the time of submission. *See* 10 C.F.R. § 2.705(g)(1).

RULES OF PRACTICE: DISCOVERY (PLAN FOR DISCOVERY)

A discovery plan, which is to be submitted to the presiding officer within ten (10) days of the 10 C.F.R. § 2.705(f) meeting on discovery, must indicate the views of the parties and their proposals regarding (1) any changes that may be needed in the timing, form, or requirements for disclosures under section 2.704(a); (2) the subjects on which discovery will be needed, when it should be completed, and whether it should be conducted in phases or limited to particular issues; (3) any changes or additions to existing discovery limitations; and (4) any other orders that should be issued by the presiding officer under section 2.705(c). *See* 10 C.F.R. § 2.705(f).

RULES OF PRACTICE: DISCOVERY

A licensing board will oversee the discovery process through status reports and/or conferences, and expects that each of the parties will comply with the process to the maximum extent possible. Failure to do so may result in appropriate licensing board sanctions.

RULES OF PRACTICE: DISCOVERY (PRIVILEGED MATTER)

When a party claims privilege and withholds information otherwise discoverable under the rules, the party shall expressly make the claim and describe the nature of what is not being disclosed to the extent that, without revealing what is sought to be protected, other parties will be able to determine the applicability of the privilege or protection. *See* 10 C.F.R. § 2.705(b)(4). The claim and identification of privileged materials must occur within the time provided for such disclosure of the withheld materials. *See id.*

RULES OF PRACTICE: DISCOVERY (MOTIONS TO COMPEL)

Any attempt to compel discovery by filing a motion with the Board must be preceded by the moving party either conferring or attempting in good faith to confer with the other party in an effort to resolve the dispute without licensing board intervention. *See* 10 C.F.R. § 2.705(h)(1).

MEMORANDUM AND ORDER
(Rulings Regarding Standing, Contentions, and
Procedural/Administrative Matters)

Before the Licensing Board are three requests of Petitioners seeking to intervene in this proceeding regarding the application of Louisiana Energy Services, L.P. (LES), for authorization to possess and use source, byproduct, and special nuclear material in order to enrich natural uranium to a maximum of 5% uranium-235 (U²³⁵) by the gas centrifuge process. LES proposes to do this at a facility — denominated the National Enrichment Facility (NEF) — to be constructed near Eunice, New Mexico. Two of the petitions were filed by governmental entities associated with the State of New Mexico — the New Mexico Environment Department (NMED) and the Attorney General of New Mexico (AGNM) — while the third was submitted by two public interest organizations, the Nuclear Resource and Information Service and Public Citizen (NIRS/PC).

For the reasons set forth below, we find that all the Petitioners have established the requisite standing to intervene in this proceeding and each has submitted at least one admissible contention concerning the LES application. Accordingly, we admit each Petitioner as a party to this proceeding. Further, given the policy and/or legal issues relating to several of our contention admission determinations, we refer several of these rulings to the Commission for its consideration. Finally, we outline certain procedural and administrative rulings, including the designation of “lead” parties for certain of the admitted contentions, all of which are set forth in an Appendix to this decision.

I. BACKGROUND

A. LES Application, the Proposed NEF, and Applicant LES

In an effort to obtain a 30-year 10 C.F.R. Part 70 license to operate its proposed NEF, on December 12, 2003, LES filed with the agency an application that includes a safety analysis report (SAR), an environmental report (ER), an emergency plan (EP), a physical security plan (PSP), and a fundamental nuclear material control plan (FNMCP). The enrichment process at the facility, which is intended to produce commercial nuclear power plant fuel, is described in the application as follows:

The primary function of the facility is to enrich natural uranium hexafluoride (UF_6) by separating a feed stream containing the naturally occurring proportions of uranium isotopes into a product stream enriched in ^{235}U and a tails stream depleted in the ^{235}U isotope. The feed material for the enrichment process is uranium hexafluoride (UF_6) with a natural composition of isotopes ^{234}U , ^{235}U , and ^{238}U . The enrichment process is a mechanical separation of isotopes using a fast rotating cylinder (centrifuge) based on a difference in centrifugal forces due to differences in molecular weight of the uranic isotopes. No chemical changes or nuclear reactions take place. The feed, product, and tails streams are all in the form of UF_6 .

[LES] NEF SAR at 1.1-7 (Rev. 0 Dec. 2003) [hereinafter SAR]. Further, to perform this process, the LES facility would incorporate a number of structures on a 543-acre site, including (1) three separations building modules, each of which consists of two cascade halls that, in turn, each contain eight cascades consisting of hundreds of centrifuges capable of producing a total of approximately 500,000 separative work units (SWU) per year; (2) a centrifuge assembly building, which is used to put together each centrifuge prior to moving it into a cascade hall and inserting it into a cascade; (3) a cylinder receipt and dispatch building, which is used to receive and store cylinders sent to the plant containing UF_6 feedstock, to store and dispatch to customers cylinders containing enriched UF_6 , and to store

and dispatch filled uranium byproduct cylinders (UBCs) to the UBC storage pad; and (4) the UBC storage pad, which is used to store cylinders containing UF₆ that is depleted in U²³⁵. *See* SAR at 1.1-3 to -6.

In its application, LES also describes its general corporate structure and financial qualifications. According to the application, the LES limited partnership is comprised of two general partners — Urenco Investments, Inc. (Urenco), and Westinghouse Enrichment Company, L.L.C. — and six limited partners. Funding for the facility, the application indicates, is to be derived from equity contributions by the partners' parents and affiliates of at least 30% of project costs with firm commitments of funds for the remainder. Additionally, LES states that it will require long-term enrichment contracts (i.e., 5 years) with prices sufficient to cover construction and operation costs, including a return on investment, to be in place prior to proceeding with the project. *See id.* at 1.2-1 to -4.

B. Hearing Requests/Intervention Petitions and Responses

1. Initial Petitions and Supplemental Filings

In a January 30, 2004 issuance, CLI-04-3, 59 NRC 10 (2004) (69 Fed. Reg. 5873 (Feb. 6, 2004)), the Commission provided notice of the receipt and availability of the LES application, including the accompanying ER, and of the opportunity for a hearing on the application. Additionally, the Commission provided instructions on a number of matters related to any potential adjudication, including the determination of contentions, discovery management, and scheduling.

Several entities responded by filing hearing requests/intervention petitions asking to be admitted as a party to any proceeding conducted on the application. On March 23 and April 5, respectively, NMED and the AGNM each submitted a petition to intervene pursuant to 10 C.F.R. § 2.309(a). *See* [NMED] Request for Hearing and Petition for Leave To Intervene (Mar. 23, 2004) [hereinafter NMED Petition]; [AGNM] Request for Hearing and Petition for Leave To Intervene (Apr. 5, 2004) [hereinafter AGNM Petition]. Both challenged certain aspects of the LES application. Additionally, NIRS/PC filed a joint intervention petition on April 6, 2004. *See* Petition To Intervene by [NIRS/PC] (Apr. 6, 2004) [hereinafter NIRS/PC Petition]. NIRS/PC oppose the grant of the LES application.

In its January 30 issuance, the Commission indicated that it would rule upon the standing of any petitioners and the admissibility of any contentions regarding National Environmental Policy Act (NEPA) environmental justice matters. *See* CLI-04-3, 59 NRC at 13-15. In memoranda to the Chief Administrative Judge dated April 1 and 6, 2004, noting they did “not raise issues of standing or environmental justice,” the Commission referred the respective NMED and AGNM petitions for appointment of a presiding officer. *See* Memorandum to Chief Administrative Judge G.P. Bollwerk, III, from A. Vietti-Cook, NRC

Secretary (Apr. 1, 2004); Memorandum to Chief Administrative Judge G.P. Bollwerk, III, from J.S. Walker, Acting NRC Secretary (Apr. 6, 2004); *see also* CLI-04-15, 59 NRC 256, 256-57 (2004).

With its April 15, 2004 designation, 69 Fed. Reg. 22,100 (Apr. 23, 2004), this Licensing Board issued an initial prehearing order that same day in which both NMED and the AGNM were directed to supplement their initial filings by categorizing each of their already-submitted issue statements within at least one of three groups, i.e., as a technical contention (TC) relating primarily to the SAR; an environmental contention (EC) relating primarily to the ER; or a miscellaneous contention (MC) that does not fall into one of those two categories. Additionally, the two petitioners were asked to examine the contentions of the other and identify which, if any, were appropriate for co-sponsorship or adoption under 10 C.F.R. § 2.309(f)(3). *See* Licensing Board Memorandum and Order (Initial Prehearing Order) (Apr. 15, 2004) at 2-3. Seven days later, the Licensing Board scheduled an initial prehearing conference for June 15, 2004, in the Hobbs, New Mexico area. *See* Licensing Board Memorandum and Order (Scheduling Initial Prehearing Conference) (Apr. 22, 2004) at 1.

NMED and the AGNM timely submitted a joint supplement to their earlier-filed petitions to intervene with regard to the potential similarities of their respective contentions, as well as separate supplemental requests for hearing in which they categorized each of their filed contentions. *See* [NMED] and [AGNM] Supplement to Petitions for Leave To Intervene To Designate Similar Contentions (Apr. 23, 2004) [hereinafter NMED/AGNM Joint Supplement to Petitions]; Supplemental Request of the [AGNM] for Hearing and Petition for Leave To Intervene (Apr. 23, 2004) [hereinafter AGNM Supplemental Request]; NMED's Supplement to Its Petition for Leave To Intervene (Apr. 23, 2004) [hereinafter NMED Supplemental Request]. In their joint submission, while acknowledging some overlap, NMED and the AGNM indicated they did not feel that any of the contentions were sufficiently similar to warrant co-sponsorship. The AGNM did, however, adopt one contention submitted by NMED. *See* NMED/AGNM Joint Supplement to Petitions at 1-2.

Relative to the NIRS/PC petition, in a May 20, 2004 order, CLI-04-15, 59 NRC at 256-57, the Commission found that these Petitioners had standing and had not raised any environmental justice issues. It thus referred their petition to the Licensing Board as well. The Board then directed NIRS/PC to supplement their initial filing by categorizing each of their already-submitted contentions within the previously specified three groups and asked that all the Petitioners examine the contentions of the other Petitioners and identify which, if any, they wished to adopt. *See* Licensing Board Order (Supplements Regarding Contentions) (May 24, 2004) at 1. NIRS/PC provided such a supplement on May 27, 2004, in which they sorted their contentions and indicated they did not wish to adopt any of the other Petitioners' contentions. *See* Supplement to Petition To Intervene on

Behalf of [NIRS/PC] (May 27, 2004) at 1-5 [hereinafter NIRS/PC Supplemental Request].

2. Responses to Petitions To Intervene

Both LES and the Staff submitted pleadings responding to the above-mentioned petitions and supplemental filings of the Petitioners. LES, while acknowledging that each of the three Petitioners had standing to participate in the proceeding, opposed each of the contentions submitted by the AGNM and NIRS/PC, but indicated that, in its view, NMED had offered at least one admissible contention. *See* Answer of [LES] to the [NMED] Request for Hearing and Petition for Leave To Intervene (Apr. 19, 2004) [hereinafter LES NMED Petition Response]; Answer of [LES] to the Requests for Hearing and Petitions for Leave To Intervene of the [AGNM] and [NIRS/PC] (May 3, 2004) [hereinafter LES AGNM and NIRS/PC Petition Response].

The Staff responded to each of the Petitioners' intervention petitions as well. While likewise indicating its belief that all three of the Petitioners had met the requirements to establish standing, the Staff asserted that only NMED and NIRS/PC had submitted admissible contentions, opposing all of the contentions submitted by the AGNM. *See* NRC Staff Response to the [NMED] Request for Hearing and Petition for Leave To Intervene (Apr. 19, 2004) [hereinafter Staff NMED Petition Response]; NRC Staff Response to Request of the [AGNM] for Hearing and Petition for Leave To Intervene (Apr. 30, 2004) [hereinafter Staff AGNM Petition Response]; NRC Staff's Response to Petition To Intervene by [NIRS/PC] (May 3, 2004) [hereinafter Staff NIRS/PC Petition Response].

All three Petitioners answered with replies to the LES and Staff responses. *See* Reply in Support of NMED's Petition To Intervene (May 10, 2004) [hereinafter NMED Reply]; Reply by [NIRS/PC] to Answers of Nuclear Regulatory Commission Staff and [LES] (May 10, 2004) [hereinafter NIRS/PC Reply]; [AGNM] Reply in Support of Petition for Leave To Intervene and Request for Hearing (May 24, 2004) [hereinafter AGNM Reply]. Relative to the AGNM, however, prior to filing her reply she requested an extension of time based in part on her purported inability to gain access to proprietary material cited in the LES application. *See* [AGNM] Motion for Extension of Time (May 5, 2004) at 2-3. Finding that, in contrast to application-related, nonpublic classified information, there had been no explicit reference in the notice of hearing regarding the process for gaining access to nonpublic proprietary information, the Board directed that LES should, after Board entry of an appropriate protective order, provide the AGNM with access to the application-referenced proprietary information and that any AGNM reply relative to the contention identified as relevant to that information would not be due until after access was provided. *See* Licensing Board Memorandum and Order (Ruling on Request for Access to Proprietary

Information) (May 12, 2004) at 2-3. The protective order was entered by the Board on May 21, 2004, *see* Licensing Board Memorandum and Order (Protective Order Governing Disclosure of Protected Materials) (May 21, 2004), and, after receiving the material from LES, the AGNM filed her proprietary information-based reply on June 10, 2004, *see* [AGNM] Reply in Support of Technical Contention ii of Her Supplemental Petition for Leave To Intervene and Request for Hearing (June 10, 2004) [hereinafter AGNM TC-ii Reply].

Further in the case of NMED and the AGNM, their reply submissions engendered LES and/or Staff requests to file surreplies. LES sought permission to file a surreply to the reply of NMED, while the Staff asked for leave to submit surreplies to the replies of both NMED and the AGNM, all of which the Board allowed. *See* Licensing Board Order (Granting Requests To File Surreply) (May 20, 2004); Licensing Board Memorandum and Order (Granting Motion for Leave To File Surreply; Requesting Status on Proprietary Material Disclosure) (June 1, 2004). Thereafter, LES and Staff submitted their surreplies. *See* NRC Staff Surreply to Reply of NMED (May 24, 2004) [hereinafter Staff Surreply to NMED]; Surreply of [LES] to Reply in Support of NMED's Petition To Intervene (May 24, 2004) [hereinafter LES Surreply to NMED]; NRC Staff Surreply to [AGNM]'s Reply in Support of Petition for Leave To Intervene and Request for Hearing (June 3, 2004) [hereinafter Staff Surreply to AGNM].

C. Initial Prehearing Conference

Finally, on June 15, 2004, the Licensing Board conducted a 1-day prehearing conference with the Petitioners, LES, and the Staff in Hobbs, New Mexico, during which these participants made oral presentations regarding the admissibility of the thirty-two submitted contentions. *See* Tr. at 1-277. Additionally, at the conclusion of the prehearing conference, the Board addressed briefly several matters pertaining to scheduling, discovery, and summary disposition.¹ *See id.* at 278-90.

¹Subsequent to the prehearing conference, acting at the request of the Board, *see* Tr. at 119, LES submitted an appraisal of the outcome of discussions between the parties regarding the potential resolution of certain contentions proffered by NIRS/PC and the AGNM relating to the contingency factor used by LES in its decommissioning cost estimate. *See* Notification of Licensing Board of Status of Discussions on Facility Decommissioning Contingency Factor Issue (July 7, 2004) [hereinafter LES Contingency Factor Update]. In this update, LES indicated NIRS/PC were not satisfied with a 25% contingency factor commitment by LES. *See id.* at 2. Two days later, the AGNM filed her own update regarding the discussions, indicating she was not satisfied by the LES commitment either. *See* [AGNM] Notification of Licensing Board of Status of Position on Facility Decommissioning Contingency Factor Issue (July 9, 2004) at 1 [hereinafter AGNM Contingency Factor Update].

II. ANALYSIS

Agency regulations have long required that any individual, group, or business or governmental entity that wishes to intervene as a party in an adjudicatory proceeding addressing a proposed licensing action must (1) file a timely written request to intervene; (2) establish that it has standing to intervene; and (3) offer at least one admissible contention that is litigable in the proceeding. *See* 10 C.F.R. § 2.309(a)-(b).² The three intervening participants have all maintained they meet each of these requirements for party status.

A. Standing

Procedurally, a petitioner seeking to establish that it has standing as of right to participate in an adjudicatory proceeding must provide information in its petition for leave to intervene concerning (1) the nature of the petitioner's right under the Atomic Energy Act to be made a party; (2) the petitioner's property, financial, or other interests in the proceeding; and (3) the potential effect that any decision reached within the proceeding may have on the petitioner's interest. *See* 10 C.F.R. § 2.309(d)(1)(ii)-(iv). Consistent with its January 2004 issuance in which it indicated it would make all threshold determinations regarding standing, including all petitions filed by governmental entities under 10 C.F.R. § 2.309(d)(2), *see* CLI-04-3, 59 NRC at 13-15, the Commission made determinations with respect to each of the three petitioners. As was noted previously, *see supra* p. 49, relative to NMED and the AGNM — both of which are governed by section 2.309(d)(2) which allows a state entity to file a petition to participate in an agency proceeding involving a proposed facility within its borders without having to establish standing — in separate memoranda dated April 1 and 6 referring those petitions for Licensing Board consideration, the Commission found no issues as to their standing.³ So too, noting the close proximity of individual members of each

² Recently, the agency adopted a set of extensive revisions to its 10 C.F.R. Part 2 procedural rules governing the conduct of adjudications. *See* 69 Fed. Reg. 2182 (Jan. 14, 2004). Under the terms of the revisions, they were to be applicable to any licensing action for which a notice of hearing was issued on or after its effective date of February 13, 2004. *See id.* at 2182. Although the hearing notice for this proceeding was issued on January 30, the Commission directed that the newly revised Part 2 is applicable to this case. *See* CLI-04-3, 59 NRC at 12 n.1.

³ To ensure there was no misunderstanding relative to the requirements of section 2.309(d)(2), *see* 69 Fed. Reg. at 2222, at the June 15 prehearing conference, we confirmed that both NMED and the AGNM agreed that the other had the requisite state constitutional authority to represent the interests of the State of New Mexico, with NMED acting as the representative of the Governor and the Attorney General appearing in accordance with her independent constitutional prerogatives. *See* Tr. at 17.

group to the proposed LES facility,⁴ and the potential effects that the construction, operation, and decommissioning of the facility could have on those individuals because of their location, in considering the NIRS/PC petition in its May 20, 2004 issuance the Commission determined that the requirements for standing had been satisfied as it referred the group's hearing request to the Board for further consideration. *See supra* p. 51. As such, no further Board consideration of the issue of the standing of any of the Petitioners is necessary.

B. Contentions

1. Contention Admissibility Standards

Section 2.309(f) of the Commission's rules of practice specifies the requirements that must be met if a contention is to be deemed admissible. Specifically, a contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. *See* 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), and (vi). In addition, the petitioner must demonstrate that the issue raised in the contention is both "within the scope of the proceeding" and "material to the findings the NRC must make to support the action that is involved in the proceeding." *Id.* § 2.309(f)(1)(iii)-(iv). Failure to comply with any of these requirements is grounds for the dismissal of a contention. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

The application of these requirements has been further developed by NRC case law, as is summarized below:

a. Challenges to Statutory Requirements/Regulatory Process/Regulations

With limited exception, no rule or regulation of the Commission can be challenged in an adjudicatory proceeding. *See* 10 C.F.R. § 2.335; *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2),

⁴In that regard, NIRS/PC provided supporting declarations from individuals living at distances of between 2.5 and 22 miles from the proposed LES facility. *See* NIRS/PC Petition at 3.

CLI-03-14, 58 NRC 207, 218 (2003). By the same token, any contention that amounts to an attack on applicable statutory requirements or represents a challenge to the basic structure of the Commission's regulatory process must be rejected. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982) (citing *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974)). Similarly, any contention that seeks to impose stricter requirements than those set forth by the regulations is inadmissible. *See 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); *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001). Additionally, the adjudicatory process is not the proper venue for a petitioner to set forth any contention that merely addresses his or her own view regarding the direction regulatory policy should take. *See Peach Bottom*, ALAB-216, 8 AEC at 21 n.33.

b. Challenges Outside Scope of Proceeding

All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board. *See Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). As a consequence, any contention that falls outside the specified scope of the proceeding must be rejected. *See Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

c. Need for Adequate Factual Information or Expert Opinion as Contention Basis

It is the obligation of the petitioner to present the factual information and expert opinions necessary to support its contention adequately. *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff'd in part*, CLI-95-12, 42 NRC 111 (1995). Failure to provide such an explanation regarding the bases of a proffered contention requires the contention be rejected. *See Palo Verde*, CLI-91-12, 34 NRC at 155. In this connection, neither mere speculation nor bare assertions alleging that a matter should be considered will suffice to allow the admission of a proffered contention. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

If a petitioner neglects to provide the requisite support to its contentions, it is not within the Board's power to make assumptions of fact that favor the petitioner, nor may the Board supply information that is lacking. *See Georgia Tech Research Reactor*, LBP-95-6, 41 NRC at 305; *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

Likewise, providing any material or document as a basis for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention. *See Fansteel*, CLI-03-13, 58 NRC at 205. Along these lines, any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996). Thus, the material provided in support of a contention will be carefully examined by the Board to confirm that it does indeed supply an adequate basis for the contention as asserted by the petitioner. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990).

d. Materiality

In order to be admissible, the regulations require that all contentions assert an issue of law or fact that is material to the outcome of a licensing proceeding, that is to say, the subject matter of the contention must impact the grant or denial of a pending license application. *See* 10 C.F.R. § 2.309(f)(1)(iv). This requirement of materiality often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment. *See Yankee Nuclear*, LBP-96-2, 43 NRC at 75; *see also Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), *petition for review denied*, CLI-03-12, 58 NRC 185, 191 (2003). Similarly, in the context of a decommissioning funding estimate the Commission has held that, to gain admission of a contention alleging an error in the estimate, the petitioner must also show that there exists no reasonable assurance that the amount in question will be paid by the applicant. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 9 (1996).

e. Improper Challenges to Application

All properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the application (including the SAR and ER). *See* 10 C.F.R. § 2.309(f)(1)(vi). Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

2. Scope of Contentions

Although licensing boards generally are to litigate “contentions” rather than “bases,” it has been recognized that “[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases.” *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002). As outlined below, exercising our authority under 10 C.F.R. §§ 2.316, 2.319, 2.329, we have acted to further define and/or consolidate contentions when the issues sought to be raised by one or more of the Petitioners appear related or when redrafting would clarify the scope of a contention.

3. Section 2.309 Standards as They Relate to Governmental Entities

Although, as was noted in section II.A above, the standing requirements set forth in section 2.309 explicitly differentiate between governmental and nongovernmental petitioners, the other provisions in section 2.309 regarding hearing petitions and associated submissions, including the contentions submitted by Petitioners, do not contain such a distinction. *See Diablo Canyon*, LBP-02-23, 56 NRC at 453-57. The same is true for the other provisions in section 2.309 relating to hearing petitions, including those relating to the scope of a petitioner’s section 2.309(h)(2) reply to the responses of an applicant and/or the Staff to a hearing request. Nonetheless, in several of their pleadings, NMED and the AGNM have suggested that their status as governmental entities somehow gives them additional latitude to comply with the requirements governing the pleading and amendment of contentions. *See* NMED’s Motion for Extension of Time To File Reply in Support of Petition for Leave To Intervene (Apr. 22, 2004) at 2; AGNM Reply at 2-5.

We, of course, do not dispute the special relationship that exists between state and local governmental entities and their citizens. Indeed, this is the premise of the authority granted to governmental entities under section 2.315(c), which affords an interested governmental entity an opportunity to participate in the evidence formulation process at a hearing (e.g., introduce evidence, interrogate witnesses if party cross-examination is permitted) on an admitted contention without requiring the governmental entity to take a position on the issue. Under the agency's rules of practice, however, that relationship does not provide the basis for the Licensing Board to essentially waive or suspend the requirements governing contention formulation and the late-filed submission of contention amendments or revisions.

Accordingly, in making our rulings below, we do so based on the issue statements provided in the initial NMED and AGNM hearing petitions, as they may have been legitimately amplified in those Petitioners' replies to the LES and Staff responses to their hearing petitions. The Commission declared in the statement of considerations that accompanied the recent final rule on the revised 10 C.F.R. Part 2 provisions applicable in this proceeding — which the Board reiterated in an April 27 issuance — that all section 2.309(h)(2) replies “should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer.” 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004); *see* Licensing Board Memorandum and Order (Granting Motion for Extension of Time) (Apr. 27, 2004) at 2 (unpublished). Notwithstanding that Commission declaration, in several instances subsequently submitted NMED and AGNM “reply” filings essentially constituted untimely attempts to amend their original petitions that, not having been accompanied by any attempt to address the late-filing factors in section 2.309(c), (f)(2), cannot be considered in determining the admissibility of their contentions.

Nonetheless, given the status of NMED and the AGNM as governmental entities and the fact that their filings were among the first made under the provisions of the recently amended Part 2 that require a hearing petition to include a petitioner's contentions, we refer several rulings to the Commission dismissing NMED and AGNM contentions in which our ruling on the admissibility of a contention includes a determination not to consider purportedly material supporting information that was first submitted as part of a reply pleading. In doing so, we follow the Commission's direction to us that we refer novel legal or policy issues that would benefit from early Commission consideration. *See* CLI-04-3, 59 NRC at 15-16.⁵

⁵ It is, of course, within the Commission's discretion as to whether to accept these referred rulings in whole or in part.

4. *Petitioner Contentions Rulings*

a. *NMED Contentions*

NMED TC-1/EC-1 — LONG-TERM STORAGE

CONTENTION: In its Application, LES requests to be allowed to buildup or store depleted uranium (DU) in the form of uranium hexafluoride (UF₆) throughout the life of the Facility. Application, § 4.13, Environmental Report, vol. 2. The life of the Facility is anticipated to be thirty years.

Buildup of DU waste for thirty years is not acceptable to the State of New Mexico and is contrary to the representations made by LES to the State. Storage of such highly dangerous waste over a thirty year period may pose a threat to the protection of health and property. 10 C.F.R. § 40.32(c). Furthermore, LES's proposed plan for storage of this waste is not sufficiently detailed, and does not demonstrate that issuance of a license will not be inimical to the health and safety of the public. 10 C.F.R. § 40.32(d).

Additionally, the DU waste could become a stockpile of legacy waste and, in the event of a default by LES, could become an above ground waste storage complex, for which adequate financial assurance is not provided. See [Contention TC-2/EC-3] below.

The DU waste should not be stored over the life of the Facility, but should be disposed of in a timely and safe manner.

DISCUSSION: NMED Petition at 2; LES NMED Petition Response at 5-9; Staff NMED Petition Response at 4-6; NMED Supplemental Request at 1; NMED Reply at 2-14; Staff Surreply to NMED at 3-7; LES Surreply at 2-8; Tr. at 130-35, 140-43, 147-53.

RULING: Inadmissible, in that this contention and its supporting bases fail to establish with specificity any genuine dispute with the SAR or the ER; and/or lack adequate factual or expert opinion support. *See* section II.B.1.c above. Nonetheless, because our ruling includes a determination not to consider information that was first submitted as part of a reply pleading and is purportedly material to the admission of this contention,⁶ in accord with section II.B.3 above we refer this ruling to the Commission. *See* 10 C.F.R. § 2.323(f).

⁶In this regard, NMED submitted information regarding (1) the LES proposal for treatment and disposition of depleted UF₆ material as a "plausible" strategy, *see* NMED Reply at 2-7; (2) failure of the LES application to demonstrate that storage of the depleted UF₆ material for up to 30 years and beyond will not be inimical to the public health and safety, *see id.* at 7-12; and (3) the adequacy of the LES emergency plan, *see id.* at 12-14.

NMED EC-2 — WASTE CLASSIFICATION AND DISPOSAL

CONTENTION: Section 4.13.3.1.3 of the Application states that LES may classify the DU waste as resource material instead of waste. The waste generated by LES's uranium enrichment process, UF₆ or uranium oxide waste, should not be classified as resource material. LES has not identified any use or economically viable market for this material. Therefore the material cannot be properly categorized as resource material. The material should be categorized as a waste, and the Application should adequately provide for timely and safe disposal of this waste.

DISCUSSION: NMED Petition at 2-3; LES NMED Petition Response at 9-11; Staff NMED Petition Response at 6-7; NMED Supplemental Request at 1-2; Tr. at 21-34, 49-77, 84-87.

RULING: Inadmissible, in that this contention, as it contests the acceptability of a proposed disposal strategy recognized by the Commission in its January 30, 2004 hearing opportunity notice as one that is "plausible," *see* CLI-04-3, 59 NRC at 22, represents an impermissible challenge to the Commission's regulations or rulemaking-associated generic determinations, fails to raise a material factual or legal dispute, and/or falls outside the scope of this proceeding. *See* section II.B.1.a, b, d above.

NMED TC-2/EC-3 — FINANCIAL ASSURANCE

CONTENTION: The proposed financial assurance amounts set forth in the Application are inadequate. Sections 4.13-10 and 10.3 of the Application set forth a cost estimate to decommission the Facility of \$850,000,000.00 and a cost estimate of approximately \$736,000,000.00 to dispose of the total DU.

The cost estimate provided in the Application fail[s] to include the cost of conversion to uranium oxide and is based upon a disposal rate of \$2.51 per pound of DU. Radiation specialists from NMED contacted outside entities (including Thomas Gray and Associates and US Ecology) to determine the actual cost, based on a price scale or regulated rate, to dispose of the amounts of DU set forth in the Application. NMED's review found the actual cost for disposal to be between \$1,900,000,000.00 and \$7,200,000,000.00. The cost estimate for the disposal of the DU, and the financial assurance associated with that cost, therefore are not adequate and do not meet the requirements [of] 10 C.F.R. § 70.25(a), (e).

DISCUSSION: NMED Petition at 3; LES NMED Petition Response at 11-13; Staff NMED Petition Response at 7-8; NMED Supplemental Request at 2; Tr. at 18.

RULING: This contention was withdrawn by NMED. *See* Tr. at 18.

NMED TC-3/EC-4 — RADIATION PROTECTION PROGRAM

CONTENTION: The Application does not comply with the requirements of 10 C.F.R. § 20.1101 because it fails to provide sufficient information to demonstrate the establishment of an adequate radiation protection program. Specifically, the Application is deficient in providing the technical bases for monitoring and assessing effluent discharge, and in estimating occupational and public radiation doses. *See, e.g.,* Application, §§ 4.6, Safety Analysis Report, vol. 4; 4.12, Environmental Report, vol. 2; 6.0, Safety Analysis Report, vol. 4; *see* 10 C.F.R. § 20.1101(b); Nuclear Regulatory Guidance Document 4.14 (setting forth the need for discharge and dosage information prior to and during operations of the uranium processing facility). The radiation dose quantities are provided, but are not supported by calculation protocols, formulae, or variables (e.g., occupancy factors, seasonal variations, diffusion coefficients). This additional information must be provided in order to verify the information in the Application.

DISCUSSION: NMED Petition at 3-4; LES NMED Petition Response at 15-19; Staff NMED Petition Response at 10; NMED Supplemental Request at 2; Tr. at 204-11.

RULING: Admissible, in that the contention and its supporting bases are sufficient to establish a genuine material dispute adequate to warrant further inquiry.

NMED MC-1 — ECONOMIC VIABILITY

CONTENTION: The Application does not set forth any information regarding the economic viability of the proposed Facility. The economic viability cannot be evaluated without LES providing market projections and a business plan that take into consideration the market need for enriched uranium and a realistic cost of waste disposal. The economic viability of the proposed Facility is of critical importance to the State of New Mexico in light of the fact it is the State that will inherit the Facility and its waste should LES default on decommissioning the Facility or clean-up if its venture proves to be economically unsound.

DISCUSSION: NMED Petition at 3; LES NMED Petition Response at 13-15; Staff NMED Petition Response at 8-10; NMED Supplemental Request at 2; Tr. at 154-55, 160-61, 165-75.

RULING: Inadmissible, in that this contention and its supporting bases fail to establish with specificity any genuine dispute with any aspect of the financial qualifications showing of LES in its application; lack adequate factual or expert opinion support; and constitute a general challenge to the financial assurance obligations relating to decommissioning and disposal imposed by 10 C.F.R. §§ 70.23(a)(5), 70.25, *see Louisiana Energy Services, L.P.* (Claiborne Enrichment

Center), CLI-97-15, 46 NRC 294, 308 (1997), so as to be an impermissible challenge to the Commission's regulations. *See* section II.B.1.a, c above.

b. AGNM Contentions

AGNM TC-i — DISPOSAL SECURITY

CONTENTION: The manner in which the disposal security will be calculated is not at all clear.

DISCUSSION: AGNM Petition at 5-6; AGNM Supplemental Request at 2-3; Staff AGNM Petition Response at 4-8; LES AGNM and NIRS/PC Petition Response at 60-65; AGNM Reply at 14-19; Staff Surreply to AGNM at 6-7; Tr. at 155-56, 161-75; LES Contingency Factor Update at 1-2; AGNM Contingency Factor Update at 1-2.

RULING: Admitted, in that its bases (2) and (4) are sufficient to establish a genuine material dispute adequate to warrant further inquiry, albeit only as they challenge the adequacy of the LES contingency factor. The balance of the contention's bases, including bases (1) and (3), fail to provide sufficient support for the contention in that they lack adequate factual or expert opinion support, fail to raise a material factual or legal dispute, and/or constitute a general challenge to the financial assurance obligations related to decommissioning and disposal imposed by 10 C.F.R. §§ 70.23(a)(5), 70.25, *see Claiborne*, CLI-97-15, 46 NRC at 308, so as to be an impermissible challenge to the Commission's regulations. *See* section II.B.1.a, c, d above.

Because of the similarities that exist, the Board will consolidate this contention with the admitted aspects of contention NIRS/PC EC-5/TC-2. *See infra* p. 68. The Board sets forth the consolidated contention at p. 78 of Appendix A to this Memorandum and Order.

AGNM TC-ii — DISPOSAL COST ESTIMATES

CONTENTION: The bases for LES's cost estimates are suspect and the actual cost of disposing of tails will exceed the \$5.50 per [kilogram uranium (kgU)] estimated by LES.

DISCUSSION: AGNM Petition at 6-7; AGNM Supplemental Request at 3-4; Staff AGNM Petition Response at 8-9; LES AGNM and NIRS/PC Petition Response at 48-52; AGNM Reply at 14-19; Staff Surreply to AGNM at 6-7; AGNM TC-ii Reply at 1-3; Tr. at 88-95, 102-28; LES Contingency Factor Update at 1-2; AGNM Contingency Factor Update at 1-2.

RULING: Admitted, as supported by bases sufficient to establish a genuine material dispute adequate to warrant further inquiry, but limited to challenges to LES cost estimates to the extent they are based on the Urenco contract and the LES cost estimates developed in connection with its Louisiana application. The balance of the contention's bases fail to provide adequate support for the contention in that they fail to establish with specificity any genuine dispute with the SAR, fall outside the scope of this proceeding, and/or lack adequate factual or expert opinion support. *See* section II.B.1.b, c above.

A revised version of this contention incorporating this ruling is set forth at p. 77 of Appendix A to this Memorandum and Order.

AGNM EC-i — FOREIGN OWNERSHIP

CONTENTION: If LES's proposed Uranium Enrichment Facility is not economically viable, the 90% majority owners, which are foreign entities, may simply abandon their investment.

DISCUSSION: AGNM Petition at 2-3; AGNM Supplemental Request at 5; Staff AGNM Petition Response at 9-10; LES AGNM and NIRS/PC Petition Response at 60-65; Tr. at 211-13.

RULING: Inadmissible, in that this contention and its supporting bases lack adequate factual or expert opinion support; and/or impermissibly challenge the Commission's decommissioning regulations. *See* section II.B.1.a, c above.

AGNM EC-ii — ONSITE STORAGE

CONTENTION: The storage of large amounts of depleted uranium tails in steel cylinders, which would remain in outdoor storage on concrete pads for "a few years" poses a distinct environmental risk to New Mexico.

DISCUSSION: AGNM Petition at 3; AGNM Supplemental Request at 5-6; Staff AGNM Petition Response at 10-12; LES AGNM and NIRS/PC Petition Response at 42-44; AGNM Reply at 20-24; Staff Surreply to AGNM at 7-8; Tr. at 135-40, 143-47, 149-50, 153.

RULING: Inadmissible, in that this contention and its supporting bases fail to establish with specificity any genuine dispute with the ER, and/or lack adequate factual or expert opinion support. *See* section II.B.1.c above. Nonetheless, because our ruling includes a determination not to consider information that was first submitted as part of a reply pleading and is purportedly material to the

admission of this contention,⁷ in accord with section II.B.3 above, we refer this ruling to the Commission. *See* 10 C.F.R. § 2.323(f).

AGNM EC-iii — “PLAUSIBLE STRATEGIES” FOR WASTE DISPOSAL

CONTENTION: In its current application LES has identified two “plausible” approaches for waste disposal: (1) a plan under which other private investors would construct a “deconversion” plant to change the depleted UF₆ into U₃O₈, whereupon the U₃O₈ would be buried in an exhausted uranium mine, LES Application, 4.13-7 to -8, and (2) a plan under which, pursuant to Sec. 3113 of the U.S. Enrichment Corporation (USEC) Privatization Act, LES would require the Department of Energy (DOE) to accept for conversion and to dispose of the depleted UF₆ as low-level radioactive waste at a price determined by DOE. LES Application, 4.13-7 to -8. Further, NRC’s scheduling order dated February 6, 2004 states that a plan to transfer depleted tails to DOE for disposal tails pursuant to Sec. 3113 of the USEC Privatization Act constitutes a “plausible strategy” for dispositioning such waste. 69 Fed. Reg. at 5877.

DISCUSSION: AGNM Petition at 4-5; AGNM Supplemental Request at 6-7; Staff AGNM Petition Response at 12-13; LES AGNM and NIRS/PC Petition Response at 45-47; AGNM Reply at 6-14; Staff Surreply to AGNM at 5-6; Tr. at 34-42, 49-75, 77-80, 84-87.

RULING: Inadmissible, in that this contention as it contests the acceptability of a proposed disposal strategy recognized by the Commission in its January 30, 2004 hearing opportunity notice as one that is “plausible,” *see* CLI-04-3, 59 NRC at 22, represents an impermissible challenge to the Commission’s regulations or rulemaking-associated generic determinations, fails to raise a material factual or legal dispute, and/or falls outside the scope of this proceeding. *See* section II.B.1.a, b, d above. Nonetheless, because our ruling includes a determination not to consider information that was first submitted as part of a reply pleading and is purportedly material to the admission of this contention,⁸ in accord with section II.B.3 above we refer this ruling to the Commission. *See* 10 C.F.R. § 2.323(f).

AGNM EC-iv — SECURITY FOR DISPOSAL COSTS

CONTENTION: Security for disposal costs must be provided.

⁷In this regard, the AGNM submitted information regarding the purported failure of the ER to discuss the impact of (1) the facility on the sand dune lizard, a state-listed threatened species, *see* AGNM Reply at 21; and (2) the indefinite storage of depleted UF₆ on the environment and the public health and safety, *see id.* at 22-24.

⁸In this regard, the AGNM submitted information regarding the application of the Commission’s “waste confidence” decisions to depleted uranium tails. *See* AGNM Reply at 6-14.

DISCUSSION: AGNM Petition at 5; AGNM Supplemental Request at 8; Staff AGNM Petition Response at 13-14; LES AGNM and NIRS/PC Petition Response at 60-65; AGNM Reply at 14-19; Staff Surreply to AGNM at 6-7; Tr. at 155-56, 161-75; LES Contingency Factor Update at 1-2; AGNM Contingency Factor Update at 1-2.

RULING: Inadmissible, in that this contention and its supporting bases lack adequate factual or expert opinion support; fail properly to challenge the LES ER; and/or impermissibly challenge the Commission's decommissioning regulations. *See* section II.B.1.a, c, e above.

AGNM EC-v — NEED FOR ENRICHMENT SERVICES

CONTENTION: LES has not adequately demonstrated the need for its enrichment services for the purposes of the Environmental Impact Statement.

DISCUSSION: AGNM Petition at 8; AGNM Supplemental Request at 8; Staff AGNM Petition Response at 14; LES AGNM and NIRS/PC Petition Response at 80-92; Tr. at 176-77.

RULING: This contention was withdrawn by the AGNM. *See* Tr. at 176-77.

AGNM MC-i — DEFINITION OF "PLAUSIBLE STRATEGY"

CONTENTION: The State requests the opportunity to explore the definition of a "plausible strategy" for disposal of LES waste.

DISCUSSION: AGNM Petition at 3; AGNM Supplemental Request at 9; Staff AGNM Petition Response at 15; LES AGNM and NIRS/PC Petition Response at 44-45; AGNM Reply at 6-14; Staff Surreply to AGNM at 5-6; Tr. at 34-42, 49-75, 77-80, 84-87.

RULING: Inadmissible, in that this contention, as it contests the acceptability of a proposed disposal strategy recognized by the Commission in its January 30, 2004 hearing opportunity notice as one that is "plausible," *see* CLI-04-3, 59 NRC at 22, represents an impermissible challenge to the Commission's regulations or rulemaking-associated generic determinations; fails to raise a material factual or legal dispute; and/or falls outside the scope of this proceeding. *See* section II.B.1.a, b, d above. Nonetheless, because our ruling includes a determination not to consider information that was first submitted as part of a reply pleading and is purportedly material to the admission of this contention,⁹ in accord with section II.B.3 above we refer this ruling to the Commission. *See* 10 C.F.R. § 2.323(f).

⁹In this regard, the AGNM submitted information regarding the application of the Commission's "waste confidence" decisions to depleted uranium tails. *See* AGNM Reply at 6-14.

AGNM MC-ii — FINANCIAL QUALIFICATION

CONTENTION: Financial qualification of LES must include contractual commitments that will pay for decommissioning and waste disposal, which requires the NRC to determine the actual costs of waste disposal and how it could be adequately financed.

DISCUSSION: AGNM Petition at 7-8; AGNM Supplemental Request at 9-10; Staff AGNM Petition Response at 15-17; LES AGNM and NIRS/PC Petition Response at 65-67; Tr. at 155-56, 161-75.

RULING: Inadmissible, in that this contention, as it contests the acceptability of the financial qualifications funding commitment recognized by the Commission in its January 30, 2004 hearing opportunity notice as one that will “satisfy the requirements of Part 70,” CLI-04-3, 59 NRC at 23, represents an impermissible challenge to the Commission’s financial qualifications regulatory scheme; lacks adequate factual or expert opinion support; fails to raise a material factual or legal dispute; and/or falls outside the scope of this proceeding as it contests NRC staff post-licensing verification activities. *See* section II.B.1.a, b, c, d above.

c. NIRS/PC Contentions

NIRS/PC EC-1 — IMPACTS UPON GROUND AND SURFACE WATER

CONTENTION: Petitioners contend that the Environmental Report (“ER”) contained in the application does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project on ground and surface water, contrary to the requirements of 10 C.F.R. 51.45.¹⁰

DISCUSSION: NIRS/PC Petition at 19-23; LES AGNM and NIRS/PC Petition Response at 7-15; Staff NIRS/PC Petition Response at 8-9; NIRS/PC Reply at 3-5; NIRS/PC Supplemental Request at 1; Tr. at 254-62.

RULING: Admitted, as supported by bases sufficient to raise genuine issues of material fact adequate to warrant further inquiry.

NIRS/PC EC-2 — IMPACT UPON WATER SUPPLIES

CONTENTION: Petitioners contend that the ER contained in the application does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project upon water supplies in the area of the project, contrary to 10 C.F.R. 51.45.

¹⁰ As originally set forth by NIRS/PC, this contention had several additional paragraphs that were described as “background.” NIRS/PC Petition at 19-20. Because these paragraphs are clearly part of the basis for this contention, we are not including them as part of the body of the contention.

To introduce a new industrial facility with significant water needs in an area with a projected water shortage runs counter to the federal responsibility to act “as a trustee of the environment for succeeding generations,” according to the National Environmental Policy Act (NEPA) § 101(b)(1) and 55 U.S.C. § 4331(b)(1). To present a full statement of the costs and benefits of the proposed facility the ER should set forth the impacts of the NEF on groundwater supplies.

DISCUSSION: NIRS/PC Petition at 24; LES AGNM and NIRS/PC Petition Response at 16-17; Staff NIRS/PC Petition Response at 9-10; NIRS/PC Reply at 5-6; NIRS/PC Supplemental Request at 1-2; Tr. at 262-69.

RULING: Admitted, as supported by bases sufficient to raise genuine issues of material fact adequate to warrant further inquiry.

NIRS/PC EC-3/TC-1 — DEPLETED URANIUM HEXAFLUORIDE STORAGE AND DISPOSAL

CONTENTION: Petitioners contend that LES does not have [a] sound, reliable, or plausible strategy for disposal of the large amounts of radioactive and hazardous Depleted Uranium Hexafluoride (“DUF₆”) waste that the operation of the plant would produce. *See* NRC Order, 69 Fed. Reg. 5873, 5877 (Feb. 6, 2004).¹¹

DISCUSSION: NIRS/PC Petition at 25-31; LES AGNM and NIRS/PC Petition Response at 17-37; Staff NIRS/PC Petition Response at 10-13; NIRS/PC Reply at 6-10; NIRS/PC Supplemental Request at 2; Tr. at 42-75, 80-87.

RULING: Admitted, as it is supported by Bases B, C, and D, which are sufficient to establish a genuine material dispute adequate to warrant further inquiry. Basis A is insufficient to support the contention’s admission in that it fails to establish with specificity any genuine material dispute with the SAR or the ER, and/or lacks adequate factual or expert opinion support. *See* section II.B.1.c, d above.

A revised version of this contention incorporating this ruling is set forth at p. CR7 of Appendix A to this Memorandum and Order. Further, because our ruling admitting this contention raises a novel legal or policy question regarding the status of depleted uranium hexafluoride waste as low-level waste, this ruling is referred to the Commission. *See* 10 C.F.R. § 2.323(f).

NIRS/PC EC-4 — IMPACTS OF WASTE STORAGE AND DISPOSAL

CONTENTION: Petitioners contend that the LES ER lacks adequate information to make an informed licensing judgment, contrary to the requirements of 10

¹¹ As originally set forth by NIRS/PC, this contention had several additional paragraphs that were described as “background.” NIRS/PC Petition at 25. Because these paragraphs are clearly part of the basis for this contention, we are not including them as part of the body of the contention.

C.F.R. Part 51. The ER fails to discuss the impacts of construction and operation of deconversion and disposal facilities that are required in conjunction with the proposed enrichment plant.

DISCUSSION: NIRS/PC Petition at 31-32; LES AGNM and NIRS/PC Petition Response at 37-42; Staff NIRS/PC Petition Response at 13; NIRS/PC Reply at 10-12; NIRS/PC Supplemental Request at 2; Tr. at 242-54.

RULING: Admitted, as it is supported by Basis A to the extent that basis challenges the ER as failing to evaluate the environmental effects of the construction and operation of a deconversion facility, which is sufficient to establish a genuine material dispute adequate to warrant further inquiry. Basis B is insufficient to support the admission of this contention as it raises issues unrelated to the application so as to fall outside the scope of this proceeding. *See* section II.B.1.b above.

A revised version of this contention incorporating this ruling is set forth at p. 78 of Appendix A to this Memorandum and Order.

NIRS/PC EC-5/TC-2 — DECOMMISSIONING COSTS

CONTENTION: LES has presented estimates of the costs of decommissioning and funding plan as required by 42 U.S.C. 2243 and 10 C.F.R. 30.35, 40.36, and 70.25 to be included in a license application. *See* SAR 10.0 through 10.3; ER 4.13.3. Petitioners contest the sufficiency of such presentations.

DISCUSSION: NIRS/PC Petition at 32-34; LES AGNM and NIRS/PC Petition Response at 52-60; Staff NIRS/PC Petition Response at 13-14; NIRS/PC Reply at 13-14; NIRS/PC Supplemental Request at 2; Tr. at 157-59, 161-75, LES Contingency Factor Update at 1-2.

RULING: Admitted, as to its Basis B as sufficient to establish a genuine material dispute adequate to warrant further inquiry to the extent it challenges the sufficiency of LES cost estimates as being based on a contingency factor that is too low, a low estimate of the cost of capital, and an incorrect assumption the costs are for low-level waste only.¹² The balance of Basis B and Basis A are insufficient to support the admission of this contention as lacking adequate factual or expert opinion support. *See* section II.B.1.c above.

A revised version of this contention incorporating this ruling and reflecting the consolidation of this contention with the admitted aspects of contention AGNM TC-i, *see supra* p. 62, is set forth at p. 78 of Appendix A to this Memorandum and Order.

¹² A portion of this contention may be subject to further litigation on contention NIRS/PC EC-3/TC-1, as it challenges the potential for categorizing depleted uranium as low-level waste.

NIRS/PC EC-6/TC-3 — COSTS OF MANAGEMENT AND DISPOSAL OF DEPLETED UF₆

CONTENTION: Petitioners contend that LES's application seriously underestimates the costs and the feasibility of managing and disposing of the depleted UF₆ ("DUF₆") produced in the planned enrichment facility.

DISCUSSION: NIRS/PC Petition at 34-38; LES AGNM and NIRS/PC Petition Response at 68-80; Staff NIRS/PC Petition Response at 14-15; NIRS/PC Reply at 14-18; NIRS/PC Supplemental Request at 2-3; Tr. at 95-114, 118-28.

RULING: Admitted, as supported by bases sufficient to establish a genuine material dispute adequate to warrant further inquiry.¹³

A revised version of this contention incorporating this ruling is set forth at pp. 78-80 of Appendix A to this Memorandum and Order.

NIRS/PC EC-7/TC-4 — NEED FOR THE FACILITY

CONTENTION: Petitioners contend that the Environmental Report ("ER") does not adequately describe or weigh the environmental, social, and economic impacts and costs of operating the National Enrichment Facility ("NEF") (*See* ER 1.1.1 et seq.).¹⁴

DISCUSSION: NIRS/PC Petition at 38-43; LES AGNM and NIRS/PC Petition Response at 80-92; Staff NIRS/PC Petition Response at 15-17; NIRS/PC Reply at 18-21; NIRS/PC Supplemental Request at 3; Tr. at 177-203.

RULING: Admitted, as supported by Bases A, B, and F that are sufficient to establish a genuine material dispute adequate to warrant further inquiry, except to the extent that Basis F suggests that the Applicant is under an obligation to present a "business plan." Bases D, E, and G, are insufficient to support the admission of this contention in that they fail to establish with specificity any genuine material dispute and/or fall outside the scope of this proceeding in that the Applicant is under no obligation to present either a "business case" or to demonstrate the profitability of the proposed facility. *See* section II.B.1.b, d above. Basis C was withdrawn. *See* NIRS/PC Supplement at 3.

Because this contention by its terms relates only to the LES ER, it is admitted only as an environmental contention. A revised version of this contention

¹³ A portion of this contention may be subject to further litigation on contention NIRS/PC EC-3/TC-1, as it challenges the potential for categorizing depleted uranium as low-level waste.

¹⁴ As originally set forth in by NIRS/PC, this contention had an additional paragraph that clearly was part of the basis. *See* NIRS/PC Petition at 39. Accordingly, we are not including it as part of the body of the contention.

incorporating this ruling is set forth at p. 80 of Appendix A to this Memorandum and Order.

NIRS/PC EC-8/TC-5 — IMPACT ON NATIONAL SECURITY AND NONPROLIFERATION EFFORTS

CONTENTION: Petitioners contend that the operation of the proposed LES facility would pose an unnecessary and unwarranted challenge to national security and to global nuclear non-proliferation efforts.

The LES license application does not even address these critical issues to the security, health, and safety of the United States and the entire world. These issues should be addressed under Need for the facility, in both the ER and the EIS, and in all sections relating to the handling of classified information.

DISCUSSION: NIRS/PC Petition at 43-48; LES AGNM and NIRS/PC Petition Response at 92-102; Staff NIRS/PC Petition Response at 17-18; NIRS/PC Reply at 21-25; NIRS/PC Supplemental Request at 3-4; Tr. at 213-40.

RULING: Inadmissible, to the extent that this contention and its supporting bases fail to specify any genuine dispute, including failing to satisfy the criterion regarding the appropriate circumstances under which management character issues may be litigated by showing “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); impermissibly challenge the Commission’s regulations; lack materiality; lack adequate factual or expert opinion support; and fail properly to challenge the LES application, in particular its security provisions. *See* section II.B.1.a, b, c, d, e above.

NIRS/PC EC-9/TC-6 — NATURAL GAS-RELATED ACCIDENT RISKS

CONTENTION: Petitioners contend that the Environmental Report (“ER”) does not contain a complete or adequate assessment of the potential environmental impacts of accidents involving natural gas transmission facilities. Further, there has been no Integrated Safety Analysis (“ISA”) based on module-specific data. 10 C.F.R. 51.45 has not been satisfied.¹⁵

DISCUSSION: NIRS/PC Petition at 48-51; LES AGNM and NIRS/PC Petition Response at 102-10; Staff NIRS/PC Petition Response at 18-19; NIRS/PC Reply at 25-27; NIRS/PC Supplemental Request at 4; Tr. at 269-77.

¹⁵ As originally set forth by NIRS/PC, this contention had several additional paragraphs that were described as “background.” NIRS/PC Petition at 48. Because these paragraphs are clearly part of the basis for this contention, we are not including them as part of the body of the contention.

RULING: Admitted, as supported by Basis A which is sufficient to establish a genuine material dispute adequate to warrant further inquiry with respect to the alleged inadequacy of the SAR because it does not contain an ISA based on module-specific data. Bases B, C, and D were withdrawn by NIRS/PC. *See* Tr. at 269-70, 272.

With the withdrawal of Bases B, C, and D, this contention is essentially limited to SAR-related concerns and is admitted as a technical contention. A revised version of this contention incorporating this scope is set forth at p. 71 of Appendix A to this Memorandum and Order.

III. PROCEDURAL/ADMINISTRATIVE MATTERS

As indicated above, each of the three Petitioners — NMED, the AGNM, and NIRS/PC — are admitted as parties to this proceeding as they each have established standing and have set forth at least one admissible contention. Following below is procedural guidance for further litigating the above-admitted contentions.

A. Lead Parties

Pursuant to 10 C.F.R. § 2.319, the presiding officer possesses the authority to control the prehearing and hearing process by consolidating parties and/or designating a lead party to represent interests held in common by multiple groups, in order to eliminate duplicative or cumulative evidence and arguments. In the instant proceeding, there is one admissible NMED contention that has been adopted by the AGNM and several other admissible contentions that have been consolidated because of their similar subject matter. This being the case, we believe the prudent approach is to designate “lead” parties for the litigation of each of these contentions.

A party designated as the “lead” has the primary responsibility for the litigation of a contention. These litigation responsibilities of the lead party include, absent other instruction from the Board, the conduct of all discovery related to the contention; filing and responding to any dispositive or other motions related to the contention; submitting any required prehearing briefs regarding the contention; preparing prefiled direct testimony, conducting any redirect examination, providing any surrebuttal testimony in connection with the contention; and preparing posthearing proposed findings of fact and conclusions of law regarding the contention. The lead party is responsible for consulting with the other parties involved (i.e., any party adopting the contention or filing

a contention that has been consolidated) regarding the activities related to the litigation of the contention.¹⁶

If a contention admitted in this proceeding has not been consolidated with any other, the party who proffered that contention is the lead party. For that NMED contention adopted by the AGNM, NMED will serve as the lead party.¹⁷ Further, for those contentions that have been consolidated, we suggest the following lead party designation:

NIRS/PC EC-5/TC-2 - AGNM TC-i — DECOMMISSIONING COSTS: NIRS/PC

Should any designated lead party and the others involved agree that a party other than the one we have suggested serve as the lead party for a contention, they should seek Board approval for the change of the designation.

B. Discovery

Per our discussion at the end of the June 2004 prehearing conference (Tr. at 279-84), and as Commission rules require, as soon as practicable after issuance of this Memorandum and Order admitting parties and issues, the parties are to meet to discuss their particular claims and defenses and the possibility of settlement or resolution of any part of the proceeding, develop a plan for discovery, and make arrangements for the required disclosures under 10 C.F.R. § 2.704.¹⁸ *See* 10 C.F.R.

¹⁶The Board believes that this communication between the lead party and the other involved parties will serve to protect the interests and concerns of all the parties regarding the contention. Should such consultation fail to yield a resolution to a dispute, those parties involved may request Board intervention. All such requests must be in writing, on the record, and be presented in such a timely fashion that will allow the Board to resolve the matter without requiring the extension of any existing schedules.

¹⁷Section 2.309(f)(3) provides that if a petitioner “seeks to adopt the contention of another sponsoring [petitioner], the [petitioner] who seeks to adopt the contention must either agree that the sponsoring [petitioner] shall act as the representative with respect to that contention, or jointly designate with the sponsoring [petitioner] a representative who shall have the authority to act for the [petitioners] with respect to that contention.” In this instance, in adopting this NMED contention the AGNM did not specifically agree that NMED shall act as the representative for this contention. *See* NMED/AGNM Joint Supplement to Petitions at 2. Nonetheless, we will assume this is the case, unless within 10 days of the entry of this Order those two Petitioners advise the Board they have agreed to some other arrangement.

¹⁸Pursuant to 10 C.F.R. § 2.704(a), and consistent with the Commission’s January 2004 order, *see* CLI-04-3, 59 NRC at 16, all lead parties, except the Staff, are to make available within forty-five (45) days of the issuance of this Memorandum and Order (1) the name and, if known, the address and telephone number of those individuals likely to possess discoverable information that is relevant

(Continued)

§ 2.705(f). The discovery plan, which is to be submitted to the presiding officer within ten (10) days of the meeting, must indicate the views of the parties and their proposals regarding (1) any changes that may be needed in the timing, form, or requirements for disclosures under section 2.704(a);¹⁹ (2) the subjects on which discovery will be needed, when it should be completed, and whether it should be

to the admitted contentions and their supporting bases; and (2) copies of, or descriptions by category and locations of, all documents, data compilations, and tangible things in the possession, custody, or control of the lead party that are relevant to the admitted contentions and their supporting bases. Where such material is publicly available from a different source, it will suffice to provide the location, title, and page reference to the relevant document, data compilation, or tangible thing.

A party complying with this rule is under a duty to supplement its disclosures within a reasonable time after it learns that the information disclosed is incomplete or incorrect in some material respect, if this additional information has not otherwise been made known during discovery or in writing. *See* 10 C.F.R. § 2.704(e)(1). Additionally, each section 2.704 disclosure must be signed by at least one attorney of record, certifying that to the best of his or her knowledge, after reasonable inquiry, the information is correct and complete at the time of submission. *See* 10 C.F.R. § 2.705(g)(1). Finally, the Board will address the timing for disclosures required under section 2.704(b)-(c) in a later issuance.

¹⁹In this regard, among the items to be discussed and included in the report should be whether (1) the Staff's section 2.336(b) hearing file can be provided electronically via the NRC Web site sooner than 30 days from the date of this issuance; and (2) discovery against the Staff on environmental issues can begin with issuance of the draft environmental impact statement in September 2004 rather than awaiting the final EIS (and Safety Evaluation Report), now scheduled for issuance in mid-June 2005, *see* Tr. at 278.

Relative to the Staff's hearing file, in accord with 10 C.F.R. § 2.336(b), in creating and providing the hearing file for this proceeding, the Staff can utilize one of two options:

1. *Hard copy file.* The hearing file that is submitted to the Licensing Board and the parties in hard copy must contain a chronologically numbered index of each item contained in it and each file item shall be separately tabbed in accordance with the index and be separated from the other file items by a substantial colored sheet of paper that contains the tab(s) for the immediately following item. Additionally, the items shall be housed in hole-punched three-ring binders of no more than 4 inches in thickness.

2. *Electronic file.* For an electronic hearing file, the Staff shall make available to the parties and the Licensing Board a list that contains the ADAMS accession number, date, and title of each item so as to make the item readily retrievable from the agency's Web site, www.nrc.gov, using the ADAMS "Find" function. Additionally, the Staff should create a separate folder in the agency's ADAMS system, which it should label "Louisiana Energy Services — 70-3103-ML Hearing File," and give James Cutchin of ASLBP and the SECY group (Office of the Secretary) viewer rights to that folder. Once created, the Staff should place in that folder copies of the ADAMS files for all the Hearing Docket materials. For documents in ADAMS packages a subfolder should be created into which the package content should be placed. The subfolder should have a title that comports with the title of the package. Thereafter, as part of its notice to the parties and the Licensing Board regarding the availability of the Hearing File materials in ADAMS, the Staff should advise the Licensing Board that this process is complete and the "Hearing File" folder is available for viewing. (As an information

(Continued)

conducted in phases or limited to particular issues; (3) any changes or additions to existing discovery limitations; and (4) any other orders that should be issued by the Presiding Officer under section 2.705(c). *See id.*

The Board will oversee the discovery process through status reports and/or conferences, and expects that each of the parties will comply with the process to the maximum extent possible. Failure to do so may result in appropriate Board sanctions. When a party claims privilege and withholds information otherwise discoverable under the rules, the party shall expressly make the claim and describe the nature of what is not being disclosed to the extent that, without revealing what is sought to be protected, other parties will be able to determine the applicability of the privilege or protection. *See* 10 C.F.R. § 2.705(b)(4). The claim and identification of privileged materials must occur within the time provided for such disclosure of the withheld materials. *See id.* Moreover, any attempt to compel discovery by filing a motion with the Board must be preceded by the moving party either conferring or attempting in good faith to confer with the other party in an effort to resolve the dispute without Board intervention. *See* 10 C.F.R. § 2.705(h)(1).

C. Schedule for Joint Report and Prehearing Conference Call

As indicated in section III.B above, the parties are to conduct a meeting to discuss scheduling for discovery. In this connection, on or before *Thursday, July 29, 2004*, the parties are to file with the Board a report that outlines the resulting discovery schedule. The Board requests also that in the discovery plan the parties provide their views regarding which, if any, of the admitted contentions are

matter for the parties, once this notice is received, the contents of the folder will be copied so as to make its contents available to an ASLBP-created ADAMS folder that will be accessible to ASLBP personnel only and into a folder that will be accessible by the parties from the NRC Web site.)

If the Staff thereafter provides any updates to the hearing file, it should place a copy of those items in the “Louisiana Energy Services — 70-3103-ML Hearing File” ADAMS folder and indicate it has done so in the notification regarding the update that is then sent to the Licensing Board and the parties. Additionally, if at any juncture the Staff anticipates placing any nonpublic documents into the hearing file for the proceeding, it should notify the Licensing Board of that intent prior to placing those documents into the “Louisiana Energy Services — 70-3103-ML Hearing File” and await further instructions regarding those documents from the Licensing Board. (Questions regarding the electronic hearing file creation process should be addressed to James Cutchin at 301-415-7397 or *jmc3@nrc.gov*.)

If the Staff decides to utilize option 2, as part of the discovery report required under this section, it should give notice to the Licensing Board and the parties of that election. If any party objects to this method of providing the hearing file, it shall file a response within 7 days outlining the reasons why access to an electronic hearing file will place an undue burden on that party’s ability to participate in this proceeding.

subject to summary disposition, along with an appropriate filing schedule for such motions. These suggestions should reflect the summary disposition schedule as set forth in 10 C.F.R. § 2.710 and the Commission's January 30 issuance. See CLI-04-3, 59 NRC at 18-20. Additionally, the report should include party estimates regarding exactly when this case, or any substantial portion of this case (e.g., environmental contentions), will be ready to go to hearing and the time necessary to try each of the admitted contentions if they were to go to hearing.²⁰ The report should also indicate the status of any settlement negotiations relative to any of the admitted contentions, and whether a "settlement judge" would be helpful in those discussions. Should the parties disagree as to any of these matters, separate views may be included as part of the report.

Following the receipt of the parties' joint report, the Board will conduct a prehearing conference call to discuss scheduling and other matters. This conference call will be held on *Tuesday, August 3, 2004*, beginning at 1:00 p.m. EDT (11:00 p.m. MDT).²¹ Additional calling instructions will be issued by the Board at a later date. The Board anticipates this prehearing conference call will last no more than 2 hours.

IV. CONCLUSION

For the reasons set forth in sections II.A, B above, we find that Petitioners New Mexico Environment Department, the Attorney General of New Mexico, and Nuclear Information and Resource Service/Public Citizen, previously having been found by the Commission to have standing, have also put forth at least one admissible contention so as to be entitled to party status in this proceeding. The text of their admitted contentions is set forth in Appendix A to this decision. Additionally, because we find they raise novel legal or policy questions, we refer several of our rulings denying and admitting contentions to the Commission for its consideration.

For the foregoing reasons, it is, this 19th day of July 2004, ORDERED that:

1. Relative to the contentions specified in paragraph 2 below, the NMED, AGNM, and NIRS/PC hearing requests are *granted* and these Petitioners are admitted as parties to this proceeding.

²⁰ Additionally, in the report, LES and the Staff should provide their views on how the Board should proceed relative to the "mandatory hearing" findings required of the Board under section II.C-F of the Commission's January 2004 order. See CLI-04-3, 59 NRC at 12-13.

²¹ Any party that is unable to make itself available for this conference as scheduled should contact counsel for the other parties and provide the Board with agreed alternative times on Tuesday, Wednesday, or Thursday of that week.

2. The following Petitioner contentions are admitted for litigation in this proceeding: NMED TC-3/EC-4 (also adopted by the AGNM), AGNM TC-i (as consolidated with contention NIRS/PC EC-5/TC-2), AGNM TC-ii, NIRS/PC EC-1, NIRS/PC EC-2, NIRS/PC EC-3/TC-1 (as supported by Bases B, C, and D), NIRS/PC EC-4 (as supported by Basis A), NIRS/PC EC-5/TC-2 (as consolidated with contention AGNM TC-i), NIRS/PC EC-6/TC-3, NIRS/PC EC-7/TC-4 (as supported by Bases A, B, and F), and NIRS/PC EC-9/TC-6 (as supported by Basis A).

3. The following Petitioner contentions are rejected as inadmissible for litigation in this proceeding:²² NMED TC-1/EC-1, NMED EC-2, NMED MC-1, AGNM EC-i, AGNM EC-ii, AGNM EC-iii, AGNM EC-iv, AGNM MC-i, AGNM MC-ii, and NIRS/PC EC-8/TC-5.

4. In accordance with 10 C.F.R. § 2.323(f), the following Board's contention admission determinations are referred to the Commission: NMED TC-1/EC-1, AGNM EC-ii, AGNM EC-iii, AGNM MC-i, and NIRS/PC EC-3/TC-1.

5. The parties are to make the submissions required by section III above in accordance with the schedule established herein.

6. In accordance with the provisions of 10 C.F.R. § 2.311, as it rules upon intervention petitions, any appeal to the Commission from this Memorandum and Order must be taken within ten (10) days after it is served.

THE ATOMIC SAFETY AND
LICENSING BOARD²³

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Paul B. Abramson
ADMINISTRATIVE JUDGE

Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 19, 2004

²²The following contentions were withdrawn by the respective Petitioners: NMED TC-2/EC-3, AGNM EC-v, NIRS EC-7/TC-4 (Basis C), and NIRS/PC EC-9/TC-6 (Bases B, C, and D).

²³Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant LES; (2) Petitioners NMED, the AGNM, and NIRS/PC; and (3) the Staff.

APPENDIX A: ADMITTED CONTENTIONS

1. NMED TC-3/EC-4 — RADIATION PROTECTION PROGRAM

CONTENTION: The Application does not comply with the requirements of 10 C.F.R. § 20.1101 because it fails to provide sufficient information to demonstrate the establishment of an adequate radiation protection program. Specifically, the Application is deficient in providing the technical bases for monitoring and assessing effluent discharge, and in estimating occupational and public radiation doses. *See e.g.* Application, §§ 4.6, Safety Analysis Report, vol. 4; 4.12, Environmental Report, vol. 2; 6.0, Safety Analysis Report, vol. 4; *see* 10 C.F.R. § 20.1101(b); Nuclear Regulatory Guidance Document 4.14 (setting forth the need for discharge and dosage information prior to and during operations of the uranium processing facility). The radiation dose quantities are provided, but are not supported by calculation protocols, formulae, or variables (e.g., occupancy factors, seasonal variations, diffusion coefficients). This additional information must be provided in order to verify the information in the Application.

2. AGNM TC-ii — DISPOSAL COST ESTIMATES

CONTENTION: The bases for Louisiana Energy Services, L.P.'s (LES) cost estimates are suspect and the actual cost of disposing of tails will exceed the \$5.50 per kilogram uranium (kgU) estimated by LES utilizing information relating to (1) the Urenco contract; and (2) LES cost estimates developed in connection with its Louisiana application.

3. NIRS/PC EC-1 — IMPACTS UPON GROUND AND SURFACE WATER

CONTENTION: Petitioners contend that the Environmental Report contained in the application does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project on ground and surface water, contrary to the requirements of 10 C.F.R. 51.45.

4. NIRS/PC EC-2 — IMPACT UPON WATER SUPPLIES

CONTENTION: Petitioners contend that the Environmental Report (ER) contained in the application does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project upon water supplies in the area of the project, contrary to 10 C.F.R. 51.45.

To introduce a new industrial facility with significant water needs in an area with a projected water shortage runs counter to the federal responsibility to act “as a trustee of the environment for succeeding generations,” according to the National Environmental Policy Act § 101(b)(1) and 55 U.S.C. § 4331(b)(1). To present a full statement of the costs and benefits of the proposed facility the ER should set forth the impacts of the National Enrichment Facility on groundwater supplies.

5. NIRS/PC EC-3/TC-1 — DEPLETED URANIUM HEXAFLUORIDE STORAGE AND DISPOSAL

CONTENTION: Petitioners contend that Louisiana Energy Service, L.P., (LES) does not have a sound, reliable, or plausible strategy for private sector disposal of the large amounts of radioactive and hazardous Depleted Uranium Hexafluoride (“DUF₆”) waste that the operation of the plant would produce in that:

- (A) The statement (LES Environmental Report (ER) 4.13-8) that a ConverDyn partner, General Atomics, “may have access to an exhausted uranium mine . . . where depleted U₃O₈ could be disposed” represents a grossly inadequate certitude for a “plausible strategy” determination, particularly for a radioactive and hazardous substance which has been accumulating in massive quantities in the United States for fifty-seven years without a plausible disposal program.
- (B) Similarly, the statement that “discussions have recently been held with Cogema concerning a private conversion facility” (ER 4.13-8) is without substance.
- (C) The disposition of depleted uranium must be addressed based on the radiological hazards of this material that require that it be disposed of in a deep geological repository.

6. NIRS/PC EC-4 — IMPACTS OF WASTE STORAGE AND DISPOSAL

CONTENTION: Petitioners contend that the Louisiana Energy Services, L.P. Environmental Report (ER) lacks adequate information to make an informed licensing judgment, contrary to the requirements of 10 C.F.R. Part 51. The ER fails to discuss the environmental impacts of construction and lifetime operation of a conversion plant for the Depleted Uranium Hexafluoride (“UF₆”) waste that is required in conjunction with the proposed enrichment plant.

7. NIRS/PC EC-5/TC-2 - AGNM TC-i — DECOMMISSIONING COSTS

CONTENTION: Louisiana Energy Services, L.P., (LES) has presented estimates of the costs of decommissioning and funding plan as required by 42 U.S.C. 2243 and 10 C.F.R. 30.35, 40.36, and 70.25 to be included in a license application. *See* Safety Analysis Report 10.0 through 10.3; ER 4.13.3. Petitioners contest the sufficiency of such presentations as based on (1) a contingency factor that is too low; (2) a low estimate of the cost of capital; and (3) an incorrect assumption that the costs are for low-level waste only.

8. NIRS/PC EC-6/TC-3 — COSTS OF MANAGEMENT AND DISPOSAL OF DEPLETED UF₆

CONTENTION: Petitioners contend that the Louisiana Energy Services, L.P., (LES) application seriously underestimates the costs and the feasibility of managing

and disposing of the Depleted Uranium Hexafluoride (“DUF₆”) produced in the planned enrichment facility in that:

- (A) LES’s reliance on the Lawrence Livermore National Laboratory (LLNL) Report as a basis for LES’s cost estimate for deconversion and disposal is not justified given the report states its cost estimates as medians.
- (B) LLNL cost estimates are based on travel distances of 1000 kilometers or 620 miles (§ 4.1.3, at 37; *id.* 92), but the data presented in the LES application show that travel over 1000 miles would be required to convert the DUF₆ at Paducah, Kentucky or Portsmouth, Ohio, and travel of an additional 1000 miles (Environmental Report (ER) Table 4.13-1) would be required to get the material to a disposal site.
- (C) In LLNL’s projections of the cost of decommissioning, it is assumed that materials such as steel used in the construction could be recycled. (*See* ER 4.13-17). Thus, it is assumed that such material would not constitute waste. However, such an assumption cannot be made.
- (D) Significant revenues are assumed from the sale of calcium difluoride (“CaF₂”) — \$11.02 million per year (ER 4.13-17, Table 4.13-2; LLNL Report at 50). These assumptions are unfounded and cannot be incorporated in the calculation of the cost of decommissioning.
- (E) A problem arises with respect to disposal of CaF₂. It is not known whether the CaF₂ will be contaminated with uranium. Such contamination would prevent the resale of the CaF₂ and would require that such material be disposed of as low-level waste.
- (F) There is an even more significant risk that the magnesium difluoride (“MgF₂”) would also be contaminated. The LLNL report states that MgF₂ generated in decommissioning may be contaminated. (§ 6.3.2, at 119). Such contamination would require that such material be disposed of as radioactive waste. Such disposal would raise the cost of decommissioning by more than \$400 million. (*See* Table 6.17, at 120).
- (G) LES’s “preferred plausible strategy” for the disposition of depleted UF₆ is the possible sale to a “private sector conversion facility” followed by disposal of deconverted U₃O₈ in a “western U.S. exhausted underground uranium mine.” (ER 4.13-8). Such a conversion strategy cannot be accepted as plausible given that no such conversion facility exists nor is it likely to be built to suit LES’s timing and throughput requirements.
- (H) The mine disposal option advanced by LES (ER 4.13-11) cannot be considered plausible given the single mine identified in the application opposes use of its property and storage of the waste in a such mine will not be realistically approvable if DUF₆ is not considered low-level waste.

- (I) The “engineered trench” method of waste disposal proposed by LES is not likely to be acceptable (ER 4.13-11, -19) if DUF_6 is not considered low-level waste.

9. NIRS/PC EC-7/TC-4 — NEED FOR THE FACILITY

CONTENTION: Petitioners contend that the Environmental Report (ER) does not adequately describe or weigh the environmental, social, and economic impacts and costs of operating the National Enrichment Facility (*See* ER 1.1.1 et seq.) in that:

- (A) Louisiana Energy Services, L.P.’s (LES) presentation erroneously assumes that there is a shortage of enrichment capacity.
- (B) LES’s statements of “need” for the LES plant (ER 1.1) depend primarily upon global projections of need rather than projections of need for enrichment services in the U.S.
- (C) LES has referred to supply and demand in the uranium enrichment market (ER 1.1), but it has not shown how LES would effectively enter this market in the face of existing and anticipated competitors and contribute some public benefit.

10. NIRS/PC EC-9/TC-6 — NATURAL GAS-RELATED ACCIDENT RISKS

CONTENTION: Petitioners contend that the Safety Evaluation Report does not contain a complete or adequate assessment of accidents involving natural gas transmission facilities in that there has been no Integrated Safety Analysis based on module-specific data.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Dr. Paul B. Abramson, Chairman
Ann Marshall Young
Dr. Richard F. Cole

In the Matter of

**Docket Nos. 50-336-LR
50-423-LR
(ASLBP No. 04-824-01-LR)**

**DOMINION NUCLEAR CONNECTICUT, INC.
(Millstone Nuclear Power Station,
Units 2 and 3)**

July 28, 2004

In this proceeding concerning the license renewal applications for Units 2 and 3 of Dominion Nuclear Connecticut, Inc.'s Millstone Nuclear Power Station, the Licensing Board denies two motions for stay and denies the petition for leave to intervene and request for hearing filed by Connecticut Coalition Against Millstone.

RULES OF PRACTICE: STAY OF PROCEEDINGS

Pursuant to 10 C.F.R. § 2.342(e), in determining whether to grant or deny a motion for stay, a presiding officer is to consider the following four factors: (1) whether the moving party has made a strong showing that it is likely to prevail on the merits, (2) whether the moving party will be irreparably injured unless a stay is granted, (3) whether the granting of a stay would harm other parties, and (4) where the public interest lies. Although the presiding officer is to consider all four section 2.342 factors in ruling on a stay motion, the first two factors — likelihood of success on the merits and irreparable injury — are generally

regarded as being the two most important, and the moving party has the burden of demonstrating that they weigh in its favor. *See Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985); *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6-8 (1994).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

For a contention to be admissible, it must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case where the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. In addition, the petitioner must demonstrate that the issue raised in the contention is both "within the scope of the proceeding" and "material to the findings the NRC must make to support the action that is involved in the proceeding." *See* 10 C.F.R. § 2.309(f)(1). Failure to comply with any of these requirements is grounds for the dismissal of a contention. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION AND EXPERT OPINION)

A contention must, if it is to be admissible, provide the alleged facts or expert opinions that support the petitioner's position, together with references to specific sources and documents on which it intends to rely to support its position. *See* 10 C.F.R. § 2.309(f)(1)(v). A petitioner has the obligation to provide the analysis and expert opinion showing why its bases support its contentions, and a licensing board may not make factual inferences on the petitioner's behalf. *See Palo Verde*, CLI-91-12, 34 NRC at 155-56. Interpreting the predecessor equivalent sections to our current rules, the Commission held that these requirements "demand that all petitioners provide an explanation of the bases for the contention, a statement of fact or expert opinion upon which they intend to rely, and sufficient information to show a dispute with the applicant on a material issue of law or fact." *See id.* at 155. Moreover, where a contention amounts to mere speculation, it is insufficient to merit further consideration. *See Yankee Atomic*

Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 267 (1996). Furthermore, the supporting information must be specifically identified; a petitioner “may not simply incorporate massive documents by reference as the basis for or as a statement of his contentions.” See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989). Rather, petitioners are expected “to clearly identify the matters on which they intend to rely with reference to a specific point.” See *id.* at 241.

RULES OF PRACTICE: CONTENTIONS (MATERIALITY)

In order to be admissible, the regulations require that all contentions assert an issue of law or fact that is material to the outcome of a licensing proceeding; that is, the subject matter of the contention must impact the grant or denial of a pending license application. See 10 C.F.R. § 2.309(f)(1)(iv). Where a contention alleges a deficiency or error in the application, the deficiency or error must have some independent health and safety significance. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179-80, *aff’d in part*, CLI-98-13, 48 NRC 26 (1998).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE TO LICENSE APPLICATION)

All properly formulated contentions must focus on the license application in question, challenging either specific portions or alleged omissions of the application. See 10 C.F.R. § 2.309(f)(1)(vi). Any contention that fails directly to controvert the application, or mistakenly asserts the application does not address a relevant issue, can be dismissed. See *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)

A petitioner must demonstrate that the issue raised in its contention is within the scope of the proceeding. See 10 C.F.R. § 2.309(f)(1)(iii). A licensing board appropriately looks “to the Commission’s hearing notice to ascertain its subject matter jurisdiction,” i.e. to define the scope of the proceeding, and any contention that falls outside the specified scope of the proceeding must be rejected. See *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785,

790 (1985); *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979). In proceedings concerning the renewal of an operating license, the scope 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 analysis.” See *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE OF COMMISSION RULE)

With limited exception, no rule or regulation of the Commission can be challenged in an adjudicatory proceeding. See 10 C.F.R. § 2.335; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982) (citing *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974)).

FWPCA: NRC AUTHORITY

There is a long-established principle that “[NRC] licensing is in no way dependent upon the existence of a [FWPCA] permit.” See *Peach Bottom*, ALAB-216, 8 AEC at 58; see also *Consumers Power Co.* (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 124 (1979).

LICENSE RENEWAL PROCEEDINGS: SCOPE

It is well settled that emergency planning issues are outside the scope of license renewal proceedings. The Commission has stated that because the agency’s ongoing regulatory process ensures that existing emergency plans are adequate throughout the life of any facility, notwithstanding changing demographics and other site-related factors, “[e]mergency planning . . . is one of the safety issues that need not be re-examined within the context of license renewal.” See *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 9 (2001).

MEMORANDUM AND ORDER (Ruling on Standing and Contentions)

Pending before the Licensing Board are (a) two June 2004 motions for stay and (b) a March 2004 petition and a June 2004 amended petition for leave

to intervene and request for hearing, along with related documents, filed by petitioner Connecticut Coalition Against Millstone (CCAM). These pleadings were submitted in connection with the January 20, 2004 applications of Licensee Dominion Nuclear Connecticut, Inc. (“Dominion”) seeking the renewal of the operating licenses for Units 2 and 3 of its Millstone Nuclear Power Station in Waterford, Connecticut. Both Dominion and the NRC Staff oppose the CCAM stay motions and petition. For the reasons set forth below, we (a) deny both of CCAM’s motions for stay and (b) deny CCAM’s petition for leave to intervene.

I. BACKGROUND

In response to a March 8, 2004 notice of opportunity for hearing,¹ on March 22, 2004, CCAM submitted a petition to intervene and request for hearing in proceedings concerning the applications of Dominion to renew the operating licenses for Millstone Units 2 and 3.² The matter was referred to the Atomic Safety and Licensing Board Panel by the Secretary of the Commission in a March 24, 2004 order,³ which led to the establishment of this Licensing Board on May 19, 2004.⁴

On June 7, both Dominion and the Staff filed answers opposing CCAM’s March 22 petition, arguing that CCAM had not only failed to make any showing regarding its standing to participate in the subject proceedings, but also had not proffered an admissible contention meeting the requirements of 10 C.F.R. § 2.309(f)(1).⁵

On June 8, this Board issued an order directing the participants to set aside the dates of June 29 and 30 for a possible prehearing conference and setting out certain administrative guidelines.⁶ On June 15 and 16, CCAM filed, essentially simultaneously, a motion for leave to file an amended petition, an amended petition together with several supporting affidavits, a motion for leave to file a reply to the Staff and Dominion answers *nunc pro tunc*, and the subject reply

¹ See Dominion Nuclear Connecticut Inc., Millstone Power Station, Units 2 and 3; Notice of Acceptance for Docketing of the Applications and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-65 and NPF-49 for an Additional 20-Year Period, 69 Fed. Reg. 11,897 (Mar. 12, 2004) [hereinafter Hearing Notice].

² See Petition To Intervene and Request for Hearing (Mar. 22, 2004) [hereinafter CCAM Petition].

³ See Commission Order (Mar. 24, 2004) at 1 (unpublished).

⁴ See 69 Fed. Reg. 29,759 (May 25, 2004).

⁵ See Dominion’s Answer to CCAM’s Petition To Intervene and Request for Hearing (June 7, 2004); NRC Staff Answer to Petition To Intervene and Request for Hearing of [CCAM] (June 7, 2004).

⁶ See Licensing Board Order (Initial Prehearing Order) (June 8, 2004) (unpublished).

(which provided certain new bases and arguments to support CCAM's standing and its contentions).⁷

Despite questions regarding the admissibility of CCAM's amended petition and other late-filed documents, which arguably constitute untimely attempts to amend the original petition without any attempt to address the late-filing factors set forth in 10 C.F.R. § 2.309(f)(2), this Board determined to conduct a prehearing conference to address all the issues raised by the various filings in the proceeding. Toward that end, on June 21 this Board issued an order convening a prehearing conference for June 30, 2004.⁸

In the period following that order and prior to beginning the prehearing conference, CCAM: (a) filed on the evening of Sunday June 27, a motion for a stay of this proceeding pending the outcome of CCAM's challenge, filed before the United States Court of Appeals for the Second Circuit on Friday June 25, 2004, to the Commission's non-acceptance of the CCAM February 12, 2004 petition to intervene as premature in the as-yet-not-commenced proceeding to consider the renewal of the licenses at issue in this proceeding;⁹ and (b) delivered to this Board at the outset of the prehearing conference a second motion for a stay based, in this instance, upon CCAM's assertion that a June 28 resolution of the Legislature of the County of Suffolk of the State of New York authorized that body to participate in the instant proceedings (despite the facts that neither CCAM nor its counsel had any connection with, or authorization to speak for, that legislative body).¹⁰

At commencement of the prehearing conference, following brief oral argument on the issues raised by the two stay motions,¹¹ this Board determined that there was no foundation for the grant of, and therefore denied, the stay motions insofar as they related to the conduct of the prehearing conference.¹²

⁷ See [CCAM] Motion for Leave To File Amended Petition To Intervene and Request for Hearing (June 15, 2004); [CCAM] Amended Petition To Intervene and Request for Hearing (June 15, 2004) [hereinafter CCAM Amended Petition]; [CCAM] Motion for Leave To File Reply to Licensee and NRC Staff Answers to Petition, Amended Petition and Declarations of CCAM Members *Nunc Pro Tunc* (June 16, 2004); [CCAM] Reply to Licensee and NRC Staff Answers to Petition (June 16, 2004) [hereinafter CCAM Reply].

⁸ See Licensing Board Order (Initial Prehearing Conference Schedule) (June 21, 2004) (unpublished).

⁹ See [CCAM] Motion for Stay of Proceedings (June 27, 2004) [hereinafter June 27 Stay Motion].

¹⁰ See [CCAM] Second Motion for Stay of Proceedings (June 30, 2004) [hereinafter June 30 Stay Motion].

¹¹ See Tr. at 10-26.

¹² See *id.* at 26.

II. DISCUSSION

A. CCAM's Stay Motions

1. *The June 27 Stay Motion*

CCAM in its first motion for stay relies largely on its pending petition before the U.S. Court of Appeals for the Second Circuit regarding, *inter alia*, CCAM's challenge to the Commission's initial March 10, 2004 nonacceptance of the CCAM February 12 petition to intervene.¹³ CCAM, however, (a) has failed to indicate any irreparable injury that might come to CCAM as a result of the carrying out of the instant proceedings on the schedule required by our regulations;¹⁴ (b) has not provided any written or oral argument to suggest that CCAM has a reasonable likelihood of success on the merits in its pending adjudication before the Second Circuit; and (c) has not addressed specifically or in any significant way any of the other bases that must be established to support the grant of a stay.¹⁵ Therefore, the CCAM June 27, 2004 motion for a stay of these proceedings is denied.

2. *The June 30 Stay Motion*

In its second motion for stay, CCAM relies on a resolution CCAM states was passed by the Suffolk County, New York Legislature regarding some form of participation in this proceeding, according to CCAM.¹⁶ Not only, however, has CCAM failed to indicate, as with the prior stay motion, any irreparable injury that might flow to CCAM as a result of continuation of these proceedings in their normal course, but it has also demonstrated no relationship whatsoever between either CCAM or its counsel and the Suffolk County Legislature,¹⁷ whose actions

¹³ See June 27 Stay Motion at 1-7.

¹⁴ See *id.* at 7-8; see also Tr. at 10-11, 25-26.

¹⁵ Pursuant to 10 C.F.R. § 2.342(e), in determining whether to grant or deny a motion for stay, a presiding officer is to consider the following four factors: (1) whether the moving party has made a strong showing that it is likely to prevail on the merits, (2) whether the moving party will be irreparably injured unless a stay is granted, (3) whether the granting of a stay would harm other parties, and (4) where the public interest lies. Although the presiding officer is to consider all four section 2.342 factors in ruling on a stay motion, the first two factors — likelihood of success on the merits and irreparable injury — are generally regarded as being the two most important, and the moving party has the burden of demonstrating that they weigh in its favor. See *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985); *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6-8 (1994).

¹⁶ See June 30 Stay Motion at 1-4.

¹⁷ See Tr. at 23.

it cites as a foundation for the requested stay.¹⁸ On these grounds, the CCAM June 30, 2004 motion for a stay of these proceedings is denied.

B. CCAM's Contentions

1. Contention Admissibility Standards

a. The Rules of Practice

Section 2.309(f)(1) of the Commission's Rules of Practice specify that, for a contention to be admissible, it must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case where the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.¹⁹ In addition, the petitioner must demonstrate that the issue raised in the contention is both "within the scope of the proceeding" and "material to the findings the NRC must make to support the action that is involved in the proceeding."²⁰ Failure to comply with any of these requirements is grounds for the dismissal of a contention.²¹

b. Interpretation

The application of these requirements, which were in effect either as part of 10 C.F.R. § 2.714 of the Rules of Practice in effect prior to adoption of the current rules, or as discussed in case law prior to the current rules, has been further developed by NRC case law, as is summarized below:

(1) NEED FOR ADEQUATE FACTUAL INFORMATION OR EXPERT OPINION

A contention must, if it is to be admissible, provide the alleged facts or expert opinions that support the petitioner's position, together with references to specific

¹⁸ See *id.* at 12-13; June 30 Stay Motion at 1-4.

¹⁹ See 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), and (vi).

²⁰ See *id.* § 2.309(f)(1)(iii), (iv).

²¹ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

sources and documents on which it intends to rely to support its position.²² A petitioner has the obligation to provide the analysis and expert opinion showing why its bases support its contentions, and the Board may not make factual inferences on the petitioner's behalf.²³ Interpreting the predecessor equivalent sections to our current rules, the Commission held that these requirements "demand that all petitioners provide an explanation of the bases for the contention, a statement of fact or expert opinion upon which they intend to rely, and sufficient information to show a dispute with the applicant on a material issue of law or fact."²⁴ Moreover, where a contention amounts to mere speculation, it is insufficient to merit further consideration.²⁵ Furthermore, the supporting information must be specifically identified; a petitioner "may not simply incorporate massive documents by reference as the basis for or as a statement of his contentions."²⁶ Rather, petitioners are expected "to clearly identify the matters on which they intend to rely with reference to a specific point."²⁷

(2) MATERIALITY; ALLEGED DEFICIENCIES AND ERRORS

In order to be admissible, the regulations require that all contentions assert an issue of law or fact that is material to the outcome of a licensing proceeding; that is, the subject matter of the contention must impact the grant or denial of a pending license application.²⁸ Where a contention alleges a deficiency or error in the application, the deficiency or error must have some independent health and safety significance.²⁹

(3) IMPROPER CHALLENGES TO APPLICATION

All properly formulated contentions must focus on the license application in question, challenging either specific portions or alleged omissions of the application.³⁰ Any contention that fails directly to controvert the application,

²² See 10 C.F.R. § 2.309(f)(1)(v).

²³ See *Palo Verde*, CLI-91-12, 34 NRC at 155-56.

²⁴ See *id.* at 155.

²⁵ See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 267 (1996).

²⁶ See *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989).

²⁷ See *id.* at 241.

²⁸ See 10 C.F.R. § 2.309(f)(1)(iv).

²⁹ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179-80, *aff'd in part*, CLI-98-13, 48 NRC 26 (1998).

³⁰ See 10 C.F.R. § 2.309(f)(1)(vi).

or mistakenly asserts the application does not address a relevant issue, can be dismissed.³¹

(4) CHALLENGES OUTSIDE SCOPE OF PROCEEDING

A petitioner must demonstrate that the issue raised in its contention is within the scope of the proceeding.³² A licensing board appropriately looks “to the Commission’s hearing notice to ascertain its subject matter jurisdiction,” i.e., to define the scope of the proceeding,³³ and any contention that falls outside the specified scope of the proceeding must be rejected.³⁴ In proceedings concerning the renewal of an operating license, the scope 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 analysis.”³⁵

(5) CHALLENGES TO STATUTORY REQUIREMENTS/REGULATIONS

With limited exception, no rule or regulation of the Commission can be challenged in an adjudicatory proceeding.³⁶

2. *Proposed Contentions*

a. *CCAM Contention I*

The operations of Millstone Units 2 and 3 have caused death, disease, biological and genetic harm and human suffering on a vast scale.

As the basis for Contention I, CCAM asserts, without identifying any sources or supporting authority, that (a) the “routine and unplanned releases of radionuclides and toxic chemicals into the air, soil and water have caused death, disease,

³¹ See *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

³² See 10 C.F.R. § 2.309(f)(1)(iii).

³³ See *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985).

³⁴ See *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

³⁵ See *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000).

³⁶ See 10 C.F.R. § 2.335; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982) (citing *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974)).

biological and genetic harm and human suffering on a vast scale,”³⁷ and (b) “cancer clusters have been identified in many areas close to Millstone” since Units 2 and 3 became operational and that the cancers “are scientifically and medically linked to the routine and unplanned emissions of Millstone.”³⁸

Even taking into consideration certain later-provided, nonspecific references, including a “tumor registry” that is not identified further, this contention fails because it fails to set forth the specific factual or legal basis required by 10 C.F.R. § 2.309(f)(1)(v).³⁹ Nor did CCAM counsel give any reasons why CCAM had not provided any reasonably specific sources of information to support the contention.⁴⁰ This is only one of several examples in which CCAM has expressed very serious concerns but provided little or no sources or specificity so as to warrant admission of a contention. Such lack of care is unjustifiable, notwithstanding counsel representing CCAM on a pro bono basis.⁴¹ If there is information to support the allegations, at least some reasonably specific basis or source is necessary — and should not be difficult to provide or describe specifically, if it exists. Certainly, mere references to “the public domain” do not suffice.⁴² Nor are the problems with CCAM’s petition mere “niceties of pleading,” as discussed in *South Texas*.⁴³ What has been provided as a basis for Contention I consists essentially of bare assertions, and this is insufficient to support admission of a contention under either the new or the old contention rules.

³⁷ See CCAM Petition at 2; CCAM Amended Petition at 2.

³⁸ See CCAM Petition at 3; CCAM Amended Petition at 3.

³⁹ See section II.B.1.b(1) above; see also Tr. at 41-49, 169-72. CCAM has not provided any specific factual basis or expert opinion to support this assertion. In affidavits submitted with CCAM’s amended petition, declarants Geralyn Winslow, William Honan, and Clarence Reynolds — none of whom indicate having any basis for their knowledge or any expert knowledge of any kind — merely state that they are “familiar with the high rate of cancer and other diseases within the Millstone host community and [they] believe the toxic and radiological emissions from Millstone play a key role in this phenomenon, which will continue and worsen if the present application is granted.” See Declaration of Geralyn Winslow (June 14, 2004), ¶ 15; Declaration of William H. Honan (June 14, 2004), ¶ 14; Declaration of Clarence O. Reynolds (June 14, 2004), ¶ 19 [hereinafter Reynolds Decl.]. In support of this contention, CCAM also submitted the declaration of Michael Steinberg, an investigative journalist and author of the book *Millstone and Me*. See Declaration of Michael Steinberg (June 29, 2004), ¶¶ 4-7. Notwithstanding Mr. Steinberg’s studies into the relationship between low-level radiation and human health, neither he nor CCAM has provided sufficient information to establish any expertise on his part in this area.

⁴⁰ See Tr. at 41-47.

⁴¹ See *id.* at 52.

⁴² See *id.* at 43.

⁴³ See *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979).

Finally, notwithstanding a poorly articulated and misapprehended reference in its reply to the provisions of 10 C.F.R. § 54.4(a)(1)(ii),⁴⁴ CCAM has not shown how its allegations may be related to the potential detrimental effects of aging.

Based on the preceding analysis, we conclude that this contention is inadmissible because it fails to comply with the requirements of 10 C.F.R. § 2.309(f)(1)(v).⁴⁵ If CCAM can support the concerns it has expressed, it should bring them to the attention of the Commission under 10 C.F.R. § 2.206.

b. CCAM Contention II

Millstone Units 2 and 3 are terrorist targets of choice.

In its second contention, CCAM asserts, again without offering any specific supporting documentation, that the Millstone facility has been identified by the Office of Homeland Security as a primary terrorist target and that “[n]either Millstone Unit 2 nor Unit 3 was constructed to withstand, nor would it, the force of a terrorist attack, which is credible.”⁴⁶

The Commission has expressly determined that “contentions related to terrorism are beyond the scope of the NRC Staff’s safety review under the Atomic Energy Act and [a license renewal] proceeding.”⁴⁷ Upon questioning by the Board during the oral argument, counsel for the Petitioner was unable to offer either any controlling precedent contradictory to the Commission’s *McGuire* ruling or any factual basis to distinguish *McGuire* from the instant proceeding.⁴⁸ And, again, CCAM’s reliance⁴⁹ on the provisions of 10 C.F.R. § 54.4(a)(1)(ii) with respect to this contention is both insufficiently articulated and plainly misplaced. We conclude, therefore, that this contention is inadmissible because it fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii).⁵⁰

c. CCAM Contention III

Millstone Units 1 and 2 operations require the uninterrupted flow through intake and discharge structures of cooling water, which conduct requires a valid National

⁴⁴ See CCAM Reply at 3.

⁴⁵ See section II.B.1.b(1) above.

⁴⁶ See CCAM Petition at 4; CCAM Amended Petition at 4.

⁴⁷ See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358, 363 (2002).

⁴⁸ See Tr. at 63-64, 69-72.

⁴⁹ See CCAM Reply at 4-5.

⁵⁰ See section II.B.1.b(4) above.

Pollution Discharge Elimination System permit and the facility lacks such a valid permit.

In Contention III, CCAM states that Dominion currently lacks a valid National Pollution Discharge Elimination System (NPDES) permit and that “[w]ithout the lawful ability to cool the reactors and prevent core meltdown, the applicant cannot safe[l]y operate the facility.”⁵¹ Relying entirely on the declaration of Mr. Reynolds, CCAM contends that “given past practices involving criminal misconduct at Millstone, it is doubtful that the applicant will be able to obtain a lawful NPDES permit.”⁵²

This contention raises an issue solely within the purview of the Connecticut State Department of Environmental Protection (DEP), which administers the Federal Water Pollution Control Act (FWPCA or “Clean Water Act”) within the jurisdiction of the State of Connecticut. While 10 C.F.R. § 51.45(d) requires an applicant seeking a license renewal to “list all Federal permits, licenses, approvals, and other entitlements which must be obtained in connection with the proposed action,”⁵³ it does not impose a requirement that the applicant actually possess such permits at the time of application.⁵⁴ Therefore, even if the CCAM allegation that Dominion does not have a “valid” DEP permit were accurate (and the Licensee has presented record testimony of the DEP to the effect that the current permit *is* valid), that would not be relevant for this proceeding. In short, CCAM asks to litigate before this Board the State of Connecticut’s DEP permitting process, a matter outside the scope of this proceeding and outside the reach of the jurisdiction of this Board.⁵⁵ This contention is, therefore, inadmissible.

⁵¹ See CCAM Petition at 5-6; CCAM Amended Petition at 5-6.

⁵² See CCAM Amended Petition at 5; see also CCAM Reply at 5 (citing Reynolds Decl. ¶ 11).

⁵³ 10 C.F.R. § 51.45(d) (emphasis added).

⁵⁴ On this point, there is a long-established principle that “[NRC] licensing is in no way dependent upon the existence of a [FWPCA] permit.” See *Peach Bottom*, ALAB-216, 8 AEC at 58; see also *Consumers Power Co.* (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 124 (1979). In *Palisades*, the licensing board dismissed a contention that claimed the FWPCA would be violated by the discharge of polluted effluents without a valid FWPCA permit. In addition to noting that radioactive effluents discharged by a nuclear plant were not “pollutants” covered by the FWPCA, the *Palisades* Board determined that the NRC no longer had authority over matters concerning FWPCA discharge permits, which resided with the Environmental Protection Agency and the states. See *Palisades*, LBP-79-20, 10 NRC at 124.

⁵⁵ Indeed, the NRC has been barred by statute from making substantive determinations regarding compliance with the Clean Water Act. See section 511(c)(2) of the FWPCA (33 U.S.C. § 1371(c)(2)).

d. CCAM Contention IV

The operations of Millstone Units 2 and 3 have caused irreversible harm to the environment.

Contention IV alleges that the “operations of Millstone Units 2 and 3 have caused devastating losses to the indigenous Niantic winter flounder population” and that “[c]ontinued operations will increase the severity of the environmental damage.”⁵⁶

The only even arguably specific information supplied by CCAM in support of this contention relates to an observed decline in the indigenous winter flounder population.⁵⁷ However, Petitioner fails to identify any specific portion of either the Unit 2 or Unit 3 application with which it takes issue,⁵⁸ and fails to provide any expert opinion or reference to substantiate the general allegation that the two units at issue in this proceeding have somehow played a material role in the flounder population decline. Instead, Petitioner has stated that it intends to rely upon information it asserts is to be found in unspecified “[r]ecords and documents maintained by the Connecticut Department of Environmental Protection and other state, federal and local agencies”⁵⁹ — but not even one specific document is identified.⁶⁰ Of equal import is the fact that CCAM makes no dispute over the Licensee’s compliance with 10 C.F.R. § 51.53(c)(3)(ii)(B), which requires an applicant to either provide a copy of its Clean Water Act § 3.16(b) determination or its Clean Water Act § 316(a) variance or, if it cannot, to address entrainment and impingement. Upon inspection of the applications, we see that Dominion did, in fact, provide the section 316(b) materials in its environmental report, and did address entrainment and impingement in section 4.2 of the environmental report.⁶¹ These facts are not disputed by CCAM with any specificity whatsoever, nor is any specific reference to a section of the applications provided, as required under 10 C.F.R. § 2.309(f)(1)(vi).⁶² Therefore, because with respect to this contention CCAM has failed to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi), this contention is inadmissible.

⁵⁶ See CCAM Petition at 7; CCAM Amended Petition at 7.

⁵⁷ See CCAM Reply at 7 (referring to documented declines of the Niantic winter flounder species over decades in official annual environmental reports filed with the DEP by Dominion and Millstone’s predecessor owner, Northeast Utilities).

⁵⁸ See Tr. at 112.

⁵⁹ See CCAM Reply at 8.

⁶⁰ See section II.B.1.b(1) above.

⁶¹ See Applicant’s Environmental Report — Operating License Renewal Stage, Millstone Power Station Units 2 and 3, Dominion Nuclear Connecticut (Jan. 2004) at E-4-6 to E-4-8; *id.* at Appendix B.

⁶² See section II.B.1.b(3) above.

e. CCAM Contention V

Millstone Units 2 and 3 suffer technical and operational defects which preclude safe operation.

In support of its fifth contention, CCAM asserts that both Units 2 and 3 “have suffered excessive occasions of unplanned emergency shutdowns” and that “[s]ystem malfunctions and failures recur without adequate correction.”⁶³ As a result, according to the Petitioner, “[b]oth units suffer from premature aging.”⁶⁴

CCAM fails here to cite a single specific deficiency, alleging, instead, “excessive occasions of unplanned emergency shutdowns.” Although its late-filed reply refers to the declaration of Clarence Reynolds as support for the proposition that Millstone Unit 2 suffers from weak areas in the reactor vessel head,⁶⁵ CCAM does not seek to qualify Mr. Reynolds as an expert, nor are any source materials cited. Stating simply that “Dominion has been permitted by the NRC to operate with the unsafe condition until the next scheduled refueling outage,”⁶⁶ CCAM does not assert any aging-related problem.⁶⁷

CCAM has contended that the applications are deficient because they fail to incorporate the effects of the allegedly excessive number of emergency shutdowns upon the relevant systems,⁶⁸ but during the oral argument it became apparent that Dominion’s methodology incorporated the historical data regarding those (and other transient events) when developing the fatigue (and other aging-related) analysis of the components required to be examined in the aging analysis,⁶⁹ and this approach has not been specifically challenged. For example, all of that information is contained in section 4.3 of each application,⁷⁰ as to which Petitioner has raised not a single objection. Therefore, the Petitioner’s assertion that the applications are deficient is simply based upon a failure to read or perform any meaningful analysis of the applications.⁷¹ In addition, Petitioner failed to cite

⁶³ See CCAM Petition at 8; CCAM Amended Petition at 9.

⁶⁴ See CCAM Petition at 8; CCAM Amended Petition at 9.

⁶⁵ See CCAM Reply at 12.

⁶⁶ See Reynolds Decl. ¶ 12.

⁶⁷ During oral argument, Dominion noted that as part of its “aging management program,” it has already considered the stress corrosion cracking issues with the Unit 2 reactor vessel head and that the reactor vessel head is scheduled to be replaced with an entirely new one at the time of the next refueling. See Tr. at 134-35.

⁶⁸ See CCAM Reply at 13.

⁶⁹ See Tr. at 151-54, 157-65.

⁷⁰ See Millstone Power Station Unit 2, Application for Renewed Operating License, Technical and Administrative Information (Jan. 20, 2004) at 4-14 to 4-22; Millstone Power Station Unit 3, Application for Renewed Operating License, Technical and Administrative Information (Jan. 20, 2004) at 4-12 to 4-23.

⁷¹ See Tr. at 146-47.

any particular section of either application or any specific system, structure, or component as being deficient.⁷² Finally, CCAM counsel’s argument that certain plant modifications that are examined for possible implementation should be *required* for implementation⁷³ fails as an impermissible challenge to Commission rules and regulations.⁷⁴

To the extent that this contention can be construed as one relating to the effects of aging upon the plant’s structures, systems, and components, it is inadmissible, as it fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(v) and (vi) to provide specificity, and to the extent that it could be construed as a contention of omission, it fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi) relating to identification of each failure and the supporting reasons, including an apparent misapprehension of the content of the applications by CCAM. In addition, to the extent that this contention raises issues regarding historical defects, it is inadmissible because, by failing to present any expert testimony or documentary references indicating a link between historical defects and projected aging-related issues for critical structures, systems, and components that are not adequately considered by the Licensee in its aging management program (as described in the applications), the contention is outside the scope of our proceeding. Finally, this contention fails to provide sufficient specificity regarding any alleged error or defect, and fails to provide sufficient supporting expert opinion, facts, or documents.⁷⁵

f. CCAM Contention VI

Connecticut and Long Island cannot be evacuated.

Contention VI asserts that “[i]n the event of a serious nuclear accident at Millstone 1 and/or 2, which is credible, parts or all of Connecticut and Long Island will be required to be evacuated and these areas cannot as a factual matter be evacuated.”⁷⁶

CCAM has offered no source or authority of any kind to support its claim that parts of Connecticut and Long Island “cannot as a factual matter be evacuated.” Moreover, it is well settled that emergency planning issues are outside the scope of this proceeding. The Commission has stated that because the agency’s ongoing regulatory process ensures that existing emergency plans are adequate throughout the life of any facility, notwithstanding changing demographics and other site-

⁷² See *id.* at 165.

⁷³ See *id.* at 168-69.

⁷⁴ See section II.B.1.b(5) above.

⁷⁵ See 10 C.F.R. § 2.309(f)(1)(v) and (vi).

⁷⁶ See CCAM Petition at 9; CCAM Amended Petition at 10.

related factors, “[e]mergency planning . . . is one of the safety issues that need not be re-examined within the context of license renewal.”⁷⁷ Therefore, this contention is inadmissible because it is outside the scope of this proceeding as established by a Commission ruling by which this Board is bound.⁷⁸

Even if we were not so bound, this contention would have to be found to fall short of the contention admissibility standards in that it fails to provide sufficiently specific facts and/or expert opinion supporting the contention to demonstrate that a genuine dispute exists on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi).⁷⁹

III. CONCLUSION

For the reasons set forth above, we deny CCAM’s June 27 and June 30 stay motions. In addition, we find that none of CCAM’s six proffered contentions satisfies the requirements of 10 C.F.R. § 2.309(f)(1) so as to be admissible for litigation. Accordingly, pursuant to 10 C.F.R. § 2.309(a), CCAM’s petition for leave to intervene and request for hearing is denied, and this proceeding is terminated.

Pursuant to 10 C.F.R. § 2.311(b), this ruling may be appealed by filing a notice of appeal and accompanying supporting brief within ten (10) days of service of this Memorandum and Order.

⁷⁷ See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 9 (2001).

⁷⁸ See section II.B.1.b(5) above.

⁷⁹ Because CCAM has failed to proffer any admissible contentions, we need not determine whether it has demonstrated standing to intervene in this proceeding. See 10 C.F.R. § 2.309(a).

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD⁸⁰

Dr. Paul B. Abramson, Chairman
ADMINISTRATIVE JUDGE

Ann Marshall Young
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 28, 2004

⁸⁰Copies of this Memorandum and Order were sent this date by internet e-mail transmission to counsel for (1) Licensee Dominion Nuclear Connecticut, Inc.; (2) Petitioner CCAM; and (3) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Dr. Paul B. Abramson
G. Paul Bollwerk, III

In the Matter of

Docket No. 30-07710-CO
(ASLBP No. 04-827-02-CO)
(Confirmatory Order
Modifying License)

STATE OF ALASKA DEPARTMENT OF
TRANSPORTATION AND PUBLIC
FACILITIES

July 29, 2004

In this enforcement proceeding, a majority of the Licensing Board grants the request of Robert F. Farmer for a hearing filed in connection with a Confirmatory Order issued by the NRC Staff to Licensee State of Alaska Department of Transportation and Public Facilities.

RULES OF PRACTICE: INTERVENTION

To intervene in a proceeding, in addition to establishing standing, a petitioner must also set forth at least one admissible contention. *See* 10 C.F.R. § 2.309(a).

RULES OF PRACTICE: STANDING

Pursuant to 10 C.F.R. § 2.309(d), in ruling on a request for hearing, a licensing board is to determine whether the petitioner has an interest affected by the proceeding by considering (1) the nature of the petitioner's right under the

Atomic Energy Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner's interest. Under Commission case law applying judicial concepts of standing, to establish the requisite interest to intervene in a proceeding, a petitioner "must allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision." *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

RULES OF PRACTICE: STANDING (ORGANIZATION)

An organization that wishes to intervene in a proceeding may do so either in its own right by demonstrating injury to its organizational interests or in a representational capacity by demonstrating harm to the interests of its members. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 n.10 (1994). An organization may establish standing in a representational capacity if it can show that (1) at least one of its members would fulfill the standing requirements, and (2) the member has authorized the organization to represent his or her interests. *See GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000).

RULES OF PRACTICE: STANDING TO INTERVENE (ENFORCEMENT ACTIONS)

In enforcement proceedings, Commission jurisprudence requires a licensing board to consider as part of its standing inquiry whether the petitioner's concerns are beyond the scope of this proceeding. *See Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56 n.14 (2004)

RULES OF PRACTICE: STANDING TO INTERVENE (CONSTRUCTION OF PETITION)

While the petitioner bears the burden of demonstrating standing, the Commission, following the well-established federal court practice for determining whether a petitioner has standing, has directed licensing boards to "construe the petition in favor of the petitioner." *See Georgia Tech*, CLI-95-12, 42 NRC at 115 (citing *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995)).

RULES OF PRACTICE: STANDING

Although the Commission customarily follows judicial concepts of standing, it is not bound to do so given that it is not an Article III court. *See Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 n.2 (1998), *petition for review denied, Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999). Federal courts have recognized that because agencies are neither constrained by Article III nor governed by judicially created standing doctrines, “[t]he criteria for establishing ‘administrative standing’ therefore may permissibly be less demanding than the criteria for ‘judicial standing.’” *See Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 74 (D.C. Cir. 1999) (citing *Pittsburgh & W. Va. Ry. v. United States*, 281 U.S. 479, 486 (1930); *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249, 255 (1930)).

Because the NRC is not bound by judicial concepts of standing, judicial notions or interpretations of redressability do not strictly control a licensing board’s assessment of redressability in an administrative proceeding.

RULES OF PRACTICE: STANDING TO INTERVENE (ENFORCEMENT PROCEEDING)

Under *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983), a petitioner may not request additional measures beyond those set out in a confirmatory order or litigate matters that go beyond the scope of the enforcement proceeding as defined by the Commission in the confirmatory order. On the other hand, a petitioner may challenge the Staff’s assessment and analysis of the facts underlying the issuance of the confirmatory order. As recognized by the Commission, concerns relative to the question of whether the facts set forth in an order are true and whether the remedy chosen is supported by those facts would fall within the scope of an enforcement proceeding. *See Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441 (1980); *Maine Yankee*, CLI-04-5, 59 NRC at 58-59.

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY)

Pursuant to Part 2 of the Commission’s Rules of Practice, a request for hearing must set forth with particularity the contentions sought to be raised. Furthermore, for each contention, the hearing request must: (1) provide a specific statement of the issue of law or fact to be raised or controverted; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised in the contention is within the scope of the proceeding; (4) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the

alleged facts or expert opinion that support the petitioner's position and on which the petitioner intends to rely at hearing, including references to specific sources and documents that will be relied upon to support its position on the issue; and (6) provide sufficient information to show that a genuine dispute on a material issue of law or fact exists with the applicant, which consists of either (a) references to specific portions of the application (including the applicant's environmental and safety reports) that are disputed and the reasons supporting the dispute, or (b) identification of each instance where the application purportedly fails to contain information on a relevant matter as required by law and the reasons supporting the allegation. *See* 10 C.F.R. § 2.309(f)(1)(i)-(vi).

MEMORANDUM AND ORDER **(Ruling on Request for Hearing)**

Before us is the request for hearing filed by Petitioners Robert F. Farmer and the Alaska Forum for Environmental Responsibility (AFER) on a Confirmatory Order issued by the NRC Staff to Licensee State of Alaska Department of Transportation and Public Facilities (ADOT & PF).¹ Both the Licensee and the Staff oppose the Petitioners' hearing request.² For the reasons set forth below, a majority of the Licensing Board finds that Petitioner Farmer has established standing to intervene in this proceeding and has submitted at least one admissible contention. Accordingly, we grant his request for hearing.

I. BACKGROUND

This proceeding concerns a Notice of Violation (NOV) (EA-03-126) and Confirmatory Order Modifying License (Effective Immediately) that were issued simultaneously to ADOT & PF by the Staff on March 15, 2004.³ The NOV

¹ *See* Request for Hearing (April 9, 2004) [hereinafter Hearing Request]. ADOT & PF is the holder of a 10 C.F.R. Part 30 license, which authorizes it to possess and use certain licensed material in portable gauging devices. *See* 69 Fed. Reg. 13,594, 13,594 (Mar. 23, 2004).

² *See* ADOT & PF's Answer to Request for Hearing by Robert F. Farmer and the Alaska Forum for Environmental Responsibility (May 7, 2004) at 2 [hereinafter ADOT & PF Answer]; ADOT & PF's Supplemental Answer to Request for Hearing by Robert F. Farmer and the Alaska Forum for Environmental Responsibility (May 10, 2004) at 2-3 [hereinafter ADOT & PF Supplemental Answer]; NRC Staff's Answer to Request for Hearing by Robert F. Farmer and the Alaska Forum for Environmental Responsibility (May 4, 2004) at 1 [hereinafter Staff Answer].

³ *See* Notice of Violation (EA-03-126) (Mar. 15, 2004) [hereinafter NOV]; 69 Fed. Reg. 13,594 (Mar. 23, 2004). Also on that same date, in a separate enforcement proceeding also involving ADOT & PF, the Staff issued a Notice of Violation and Proposed Imposition of Civil Penalties in connection with EA-03-190.

memorializes the Staff's conclusion that between 1999 and 2002, the Licensee discriminated against one of its employees in violation of 10 C.F.R. § 30.7(a).⁴ Specifically, the Staff identified fifteen instances in which ADOT & PF had retaliated against Petitioner Farmer, who during that time had been employed as the Statewide Radiation Safety Officer (SRSO), for raising safety concerns regarding radiation exposures to other ADOT & PF employees.⁵ The Staff found that these actions rose to a Severity Level II violation,⁶ which according to the Commission's Enforcement Policy, are "of very significant regulatory concern" and generally involve "actual or high potential consequences on public health and safety."⁷ Even though finding a Severity Level II violation, the Staff proposed no monetary penalty. Rather, the NOV directs ADOT & PF to submit a written statement or explanation to the Staff providing (1) the reason for the violation, or if contested, the basis for disputing the violation or severity level, (2) the corrective steps that have been taken and the results achieved, (3) the corrective steps that will be taken to avoid further violations, and (4) the date when full compliance will be achieved.⁸

Contemporaneous with the issuance of the NOV, the Staff issued an immediately effective Confirmatory Order modifying ADOT & PF's license. The Confirmatory Order first stated the NRC conclusion that ADOT & PF violated 10 C.F.R. § 30.7 by discriminating against Mr. Farmer for engaging in protected activity as documented in the NOV.⁹ It then required ADOT & PF to submit an independent review of its internal policies and procedures.¹⁰ Next, the Confirmatory Order directed ADOT & PF to develop a short-term plan to train its managers and supervisors on establishing a Safety Conscious Work Environment (SCWE) and a long-term plan for maintaining such an environment.¹¹ Also included in the Confirmatory Order was a notice of opportunity for hearing for persons (other than the Licensee) adversely affected by the order. As noted in the Confirmatory Order, "the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained."¹²

⁴ See NOV at 1. Section 30.7(a) of 10 C.F.R. prohibits licensees from discriminating against an employee for engaging in certain types of protected activities.

⁵ See NOV at 1.

⁶ See *id.*

⁷ See NUREG-1600, "General Statement of Policy and Procedure for NRC Enforcement Actions" (May 1, 2000) at 11-12 [hereinafter NUREG-1600]. A Severity Level I designation is given to the most significant violations, while a Severity Level IV designation is assigned to the least significant violations. See NUREG-1600 at 11.

⁸ See NOV at 1.

⁹ See 69 Fed. Reg. at 13,594.

¹⁰ See *id.* at 13,595.

¹¹ See *id.*

¹² *Id.* at 13,596.

In response to the Confirmatory Order, Petitioners Farmer and AFER filed a request for hearing on April 9, 2004.¹³ By memorandum, the hearing request was referred by the Secretary of the Commission to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel on April 21, 2004.¹⁴ Thereafter, on April 27, 2004, this Licensing Board was established to preside over this proceeding.¹⁵

In its answer opposing the Petitioners' hearing request, the Staff asserts that the Board should deny the hearing request because the Petitioners (1) seek a remedy outside the scope of the proceeding, (2) lack standing, and (3) have not offered a valid contention.¹⁶ For its part, ADOT & PF does little more in its brief answer and supplement thereto than to assert an Eleventh Amendment-based objection to the NRC's jurisdiction in this matter, deny any discriminatory actions, and refer the Board to arguments made by the Staff.¹⁷ The Petitioners filed a reply to the answers of ADOT & PF and the Staff on May 21, 2004.¹⁸ Thereafter, the Board directed the participants to answer several questions clarifying their positions because the signatories to the Confirmatory Order, ADOT & PF and the Staff, took contradictory positions in their answers opposing the hearing request with respect to whether the Confirmatory Order settled the contemporaneously issued NOV.¹⁹ Specifically ADOT & PF indicated that the Confirmatory Order settled the NOV, while the Staff indicated it did not.²⁰

II. STANDING

Pursuant to 10 C.F.R. § 2.309(d), in ruling on a request for hearing, a licensing board is to determine whether the petitioner has an interest affected by the

¹³ Petitioners' hearing request was timely filed after receiving a 5-day extension of the 20-day period for filing a request for hearing from the Director of the NRC Office of Enforcement. *See* Staff Answer at 3 n.8.

¹⁴ *See* Memorandum from Annette L. Vietti-Cook, Secretary, to G. Paul Bollwerk, III, Chief Administrative Judge (Apr. 21, 2004).

¹⁵ *See* 69 Fed. Reg. 24,198 (May 3, 2004).

¹⁶ *See* Staff Answer at 3-16.

¹⁷ *See* ADOT & PF Answer at 1-2; ADOT & PF Supplemental Answer at 1-3.

¹⁸ *See* Petitioners' Reply to the Answers of the NRC Staff and Licensee Opposing Petitioners' Request for Hearing (May 21, 2004) [hereinafter Petitioners' Reply].

¹⁹ *See* Licensing Board Order (June 9, 2004) (unpublished) [hereinafter June 9 Board Order]; Petitioners' Reply to the ASLB's June 9, 2004 Order (June 15, 2004) [hereinafter Petitioners' Response to Board Questions]; NRC Staff's Response to Board's Order Dated June 9, 2004 (June 16, 2004) [hereinafter Staff Response to Board Questions]; ADOT & PF's Answers to Questions by the Atomic Safety and Energy Licensing Board (June 16, 2004) [hereinafter ADOT & PF Response to Board Questions].

²⁰ *See* ADOT & PF Answer at 1; Staff Answer at 13.

proceeding by considering (1) the nature of the petitioner’s right under the Atomic Energy Act to be made a party to the proceeding; (2) the nature and extent of the petitioner’s property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on the petitioner’s interest. Under Commission case law applying judicial concepts of standing, to establish the requisite interest to intervene in a proceeding, a petitioner “must allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision.”²¹ An organization that wishes to intervene in a proceeding may do so either in its own right by demonstrating injury to its organizational interests or in a representational capacity by demonstrating harm to the interests of its members.²² Additionally, in enforcement proceedings such as this one, Commission jurisprudence requires us to consider as part of our standing inquiry whether the petitioner’s concerns are beyond the scope of this proceeding.²³ And while the petitioner bears the burden of demonstrating standing, the Commission, following the well-established federal court practice for determining whether a petitioner has standing, has directed us to “construe the petition in favor of the petitioner.”²⁴

A. AFER’s Standing

According to the hearing request, AFER is “a non-profit organization of the State of Alaska dedicated to holding industry and government accountable to the laws designed to safeguard the environment, provide a safe and retaliation-free workplace, and achieve a sustainable economy in Alaska.”²⁵ Its members include Alaska residents who live and work in the vicinity of where nuclear gauges are used during the summer road construction season and where such gauges are stored.²⁶ The Staff opposes AFER’s standing, asserting that AFER has failed to

²¹ *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

²² *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 n.10 (1994).

²³ *See Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56 n.14 (2004) (“a person whose interest cannot be affected by the issues before the Commission in the proceeding lacks an essential element of standing”).

²⁴ *See Georgia Tech*, CLI-95-12, 42 NRC at 115 (citing *Kelley v. Selin*, 42 F. 3d 1501, 1508 (6th Cir. 1995)). In *Kelley*, the court observed, “[i]n order to determine whether the petitioners have standing, we ‘accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party.’” 42 F.3d at 1507-08 (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979)).

²⁵ Hearing Request at 6.

²⁶ *See id.* at 7.

show, *inter alia*, that it has a cognizable interest either as an organization or as a representative of an affected member.²⁷

As noted above, an organization may intervene in a proceeding in one of two ways. First, an organization may have standing to intervene in its own right by demonstrating harm to its organizational interests. AFER claims to have “an interest in being free of the risks imposed by the Licensee’s failure to comply with the terms and conditions of its license.”²⁸ Because this interest is concerned with the risks associated with exposures to radiation, which is the subject of a separate enforcement proceeding (EA-03-190), rather than with the Confirmatory Order here, which concerns violations of the employee protection rule, 10 C.F.R. § 30.7, and employee training for the establishment and maintenance of a SCWE, AFER has not demonstrated that it has an organizational interest sufficient to establish its standing in this proceeding.

An organization may also establish standing in a representational capacity if it can show that (1) at least one of its members would fulfill the standing requirements, and (2) the member has authorized the organization to represent his or her interests.²⁹ Here, aside from identifying Mr. Stan Stephens as being its president and a resident of the State of Alaska,³⁰ AFER has not attempted to show that any one of its members would fulfill the standing requirements. Accordingly, AFER has also failed to demonstrate standing to intervene in a representational capacity.

B. Mr. Farmer’s Standing

In his request for hearing, Mr. Farmer asserts that he became a target of discrimination and retaliation for ADOT & PF management as a result of his raising safety-related concerns about radiation exposure to members of the public.³¹ Mr. Farmer argues that his continuing injury (in the form of ongoing discrimination that prevents him from properly performing his job without retaliation) stems from the Confirmatory Order,³² which he claims is based upon a factually erroneous premise and neither addresses his interests nor protects the public health and

²⁷ See Staff Answer at 12. In its supplemental answer, ADOT & PF declares, without any application of the relevant legal principles to the record, that “[n]either of the Petitioners have shown they have any standing to make their claims.” ADOT & PF Supplemental Answer at 2.

²⁸ See Hearing Request at 7.

²⁹ See *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000).

³⁰ See Hearing Request at 6.

³¹ *Id.* at 6, 8.

³² See *id.* at 8.

safety.³³ According to the hearing request, a rescission of the Confirmatory Order, which Mr. Farmer asserts is not supported by the facts, would likely redress this injury.³⁴

As indicated above, during the course of an investigation conducted by the NRC, the Staff found that numerous adverse employment actions taken against Mr. Farmer during a 3-year period between 1999 and 2002 (while he was employed by ADOT & PF as the SRSO) constituted discrimination and retaliation in violation of 10 C.F.R. § 30.7(a).³⁵ Specific instances of retaliation identified by the Staff include: a 3-month extension of Mr. Farmer's probationary period; unacceptable ratings in three performance appraisals; a denial of a merit increase; two verbal admonitions from Mr. Farmer's supervisor; direction by Mr. Farmer's supervisor (a) to cease performance of radiation safety duties, (b) to sign a letter to the NRC stating that his report indicating a radiation exposure beyond NRC limits was in error, (c) to limit radiation safety duties to 8% of his time, and (d) to turn over confidential correspondence between Mr. Farmer and the NRC; a Letter of Expectation; a Letter of Instruction; a Letter of Reprimand; and denial of Mr. Farmer's requests for radiation safety officer-related training.³⁶ In January 2004, ADOT & PF management permanently removed Mr. Farmer from his position as the SRSO and placed him in a different position within the department.³⁷ Without question, Mr. Farmer has adequately demonstrated a concrete, particularized, and continuing injury that falls within the zone of interests protected by the Atomic Energy Act (AEA).³⁸ And the fact that Mr. Farmer might have other venues in which to pursue other types of redress for his injury is irrelevant with respect to whether he has established an injury in fact here.

Mr. Farmer's injury also can be fairly traced to the issuance of the Confirmatory Order. As indicated above, the Confirmatory Order agreed upon by the Staff and ADOT & PF is directed at correcting deficiencies in the Licensee's SCWE.³⁹ In considering which enforcement actions to take against ADOT & PF, the Staff refrained from imposing a civil penalty on the Licensee or taking any action against ADOT & PF management and elected instead to focus its enforcement

³³ *See id.*

³⁴ *Id.*

³⁵ *See* NOV at 1.

³⁶ *See id.*

³⁷ *See* Hearing Request at 2.

³⁸ Although the Staff challenges Mr. Farmer's standing because, in its view, Mr. Farmer has failed to demonstrate "causation" and "redressability," it does not attempt to argue that Mr. Farmer has not met the "injury" element of the standing test. *See* Staff Answer at 10-11.

³⁹ *See* 69 Fed. Reg. at 13,594-95.

efforts on ‘‘improving knowledge and awareness of [NRC] requirements.’’⁴⁰ According to the NRC’s Director of the Office of Enforcement, this was because the Staff during its investigation

did not develop evidence that managers acted deliberately with respect to NRC’s requirements governing discrimination against those who engage in protected activity. To the contrary, it was apparent to [the Staff] that ADOT & PF management lacked an awareness, and an appreciation, of NRC’s requirements in this area.⁴¹

In short, the Staff found that the fifteen discriminatory and retaliatory actions of ADOT & PF management against Mr. Farmer were not deliberate but rather the result of ‘‘ignorance of the law.’’ This is the lynchpin fact underlying the Staff’s Confirmatory Order and the Staff’s critical justification for not imposing any civil penalty or taking action against ADOT & PF management, in spite of finding the actions a Severity Level II violation. In his request for hearing, Mr. Farmer vigorously asserts that the Staff’s factual premise is incorrect and that the actions of ADOT & PF management, who continue to occupy positions of authority over him, were deliberate.⁴² Thus, if Mr. Farmer’s assertion that the Confirmatory Order does nothing to address his interest in working in a retaliation-free environment because the order is based on a flawed factual premise is to be believed, his injury can be fairly traced to the Confirmatory Order. And, at this initial stage of the proceeding, Mr. Farmer’s claims that the key factual underpinnings of the Confirmatory Order are erroneous must be accepted, because we must view his petition in the light most favorable to him.⁴³ Indeed, in light of the NOV that sets forth the Staff’s findings regarding ADOT & PF’s discriminatory and retaliatory conduct against Mr. Farmer, his claims have substantial facial validity.

With regard to the third element of the standing analysis, Mr. Farmer contends that his injury ‘‘will likely be redressed by a favorable decision to rescind the agreed-upon Confirmatory Order.’’⁴⁴ Mr. Farmer further argues that if the Confirmatory Order is not sustained, the NOV ‘‘will have to be issued by the Staff, responded to by the Licensee, and a more appropriate form of corrective

⁴⁰ See Hearing Request, Exh. 3, Letter from Frank J. Congel, Director, NRC Office of Enforcement, to Billie P. Garde, Counsel for Petitioners (Apr. 5, 2004) at 1; see also Letter enclosing NOV and Confirmatory Order from Frank J. Congel to Michael Barton, Commissioner, ADOT & PF (Mar. 15, 2004) at 2 [hereinafter NOV Cover Letter].

⁴¹ See Hearing Request, Exh. 3 at 1.

⁴² See Hearing Request at 1, 2, 10, 12.

⁴³ See *Georgia Tech*, CLI-95-12, 42 NRC at 115.

⁴⁴ See Hearing Request at 8.

action developed that will provide accountability with the terms and conditions of the License.’’⁴⁵ More specifically, Mr. Farmer avers,

 failing to sustain the deal reached between the NRC Staff and the Licensee will require the NRC Staff to address the senior manager retaliation in violation of 10 CFR § 30.7 and apply the Enforcement Policy to the facts, as confirmed by the NRC investigation, and left unaddressed by the Order. Thus postured, the NRC Staff would have to utilize the Enforcement Policy, NUREG-1600, to determine the correct penalty necessary to protect the public health and safety given the serious violations of 10 CFR § 30.7 demonstrated by the facts of this case.⁴⁶

The Staff, however, disputes Mr. Farmer’s assessment of what ADOT & PF and Staff actions will follow in the event the Confirmatory Order is not sustained.⁴⁷ In response to questions posed by the Board to all participants seeking clarification of the effect of the Confirmatory Order on the outstanding NOV,⁴⁸ the Staff asserts that the issuance of the Confirmatory Order does not settle the NOV, ‘‘as the licensee is required to respond *separately* to the NOV, which is an independent Staff issuance. . . . Regardless of the position ADOT & PF takes in response to the NOV, ADOT & PF’s obligation to comply with the *Order*, and the Staff’s enforcement of the *Order*, are unaffected.’’⁴⁹

We need not decide whether, under the regulations, the Confirmatory Order resolves the underlying NOV. For even if we accept the Staff position — that (1) the NOV and Confirmatory Order are two separate and distinct enforcement actions; and (2) the Confirmatory Order does not fully settle the NOV because ADOT & PF is required to respond to the NOV — as a *practical matter*, the Confirmatory Order does in fact settle the NOV, in that it forecloses the possibility of any future Staff enforcement action based on the NOV. Notwithstanding the Staff assertion that the Confirmatory Order and NOV are completely independent enforcement actions, the Staff has nonetheless inextricably linked the two actions. Indeed, in the letter enclosing the NOV written by the NRC Director of the Office of Enforcement to the ADOT & PF Commissioner, the Staff assured ADOT & PF that following the issuance of, and compliance with, the Confirmatory Order, no further enforcement action would be taken relative to the NOV:

⁴⁵ See *id.* at 13.

⁴⁶ See Petitioners’ Reply at 2.

⁴⁷ See Staff Answer at 13 (‘‘the Licensee is obligated to respond to the NOV regardless of whether an order is issued.’’).

⁴⁸ See June 9 Board Order at 1-4.

⁴⁹ See Staff Response to Board Questions at 5-6 (footnotes omitted) (emphasis in original). Although ADOT & PF takes the position that its consent to the Confirmatory Order settles the NOV, it apparently understands that it must still respond the NOV. See ADOT & PF Response to Board Questions at 1-4.

In view of the Confirmatory Order, consent by the Licensee thereto as evidenced by the signed “Consent and Hearing Waiver Form” . . . dated March 4, 2004, and subject to the satisfactory completion of the conditions of the Confirmatory Order by the Licensee, *the NRC will not pursue further enforcement action for the enclosed Notice of Violation.*⁵⁰

In light of this Staff pronouncement, it can fairly be said that the Confirmatory Order, for all intents and purposes, not only renders ADOT & PF’s responses to the NOV, whatever they may turn out to be, entirely irrelevant but also settles the NOV enforcement action.⁵¹ It follows, therefore, that if the Confirmatory Order were not sustained, then the NOV would, as Mr. Farmer asserts, “revert to the posture in which the Licensee must respond to the Violations in a manner appropriate to remedy the findings.”⁵² In this posture, ADOT & PF would then be required to either (1) admit that the violation occurred and provide the measures it has taken or will take to remedy the violation; or (2) deny that the violation occurred and contest the Staff’s findings.⁵³ And here, we must assume that ADOT & PF, as it has steadfastly maintained throughout this proceeding and as it repeated most recently in its June 16 response to the Board’s questions, will deny that its management discriminated against Mr. Farmer.⁵⁴ While it may be true that the Confirmatory Order does not relieve ADOT & PF of its obligation to respond to the NOV, the key difference of not having the Confirmatory Order in place is that ADOT & PF’s anticipated denial of any violation occurrence will then induce subsequent Staff enforcement action in accordance with the Commission’s Enforcement Policy.

The Staff also sees the possibility of an improved SCWE and an end to the continuing discrimination against Mr. Farmer, by way of a rescission of the Confirmatory Order, as “speculative” and not demonstrative of redressability.⁵⁵ But the Staff’s argument overlooks the fact that the test for redressability is that the asserted injury is “*likely* to be redressed by a favorable decision” (i.e.,

⁵⁰ See NOV Cover Letter at 2 (emphasis added).

⁵¹ Even if the NOV and Confirmatory Order are considered separate and distinct enforcement actions, there is no reason to believe in light of the Enforcement Director’s letter that the substance of ADOT & PF’s writing will have any bearing upon the Staff’s response to that writing. As a practical matter and whether or not ADOT & PF denies or admits the alleged violations, all ADOT & PF need do in its written response to satisfy the NOV requirement is simply regurgitate the content of the Confirmatory Order.

⁵² See Hearing Request at 9.

⁵³ See NOV at 1.

⁵⁴ ADOT & PF Response to Board Questions at 3; *see also* ADOT & PF Answer at 1; NOV Cover Letter at 1; 69 Fed. Reg. at 13,594, 13,595.

⁵⁵ See Staff Answer at 11.

failing to sustain the Confirmatory Order).⁵⁶ If the Confirmatory Order is not sustained, Mr. Farmer correctly asserts that the NOV remains outstanding in the circumstances presented. Because ADOT & PF has given every indication to this point that it will deny that any discriminatory or retaliatory conduct took place, the Staff, as Mr. Farmer contends, will have to determine the appropriate penalty to protect the public health and safety in light of the serious Severity Level II violation it found to have occurred. Contrary to the Staff's argument, this chain of events is not speculative, but rather dictated by the Commission's enforcement policies and procedures. We will not assume, as the Staff apparently would have it, that the Staff will not do its job. Indeed, as we must assume in determining the admissibility of contentions challenging certain applicant or licensee conduct that the applicant or licensee will obey the agency's regulations,⁵⁷ here we must assume that the Staff will perform its enforcement responsibilities in accordance with its procedures and agency policy and regulations.

And while we recognize that the redress this Board is able to provide here may not be of the type federal courts are able to offer,⁵⁸ it does not follow that Mr. Farmer has no standing to intervene in this proceeding. To the contrary, as the Commission has observed,

Although the Commission customarily follows judicial concepts of standing, we are not bound to do so given that we are not an Article III court. Our principle concern is to ensure that parties participating in our adjudicatory proceedings have interests that are cognizable under the AEA.⁵⁹

Further in this regard, federal courts have recognized that because agencies are neither constrained by Article III nor governed by judicially created standing doctrines, "[t]he criteria for establishing 'administrative standing' therefore may permissibly be less demanding than the criteria for 'judicial standing.'"⁶⁰ As these cases acknowledge, because the NRC is not bound by judicial concepts of

⁵⁶ See *Georgia Tech*, CLI-95-12, 42 NRC at 115 (emphasis added).

⁵⁷ See, e.g., *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 29 (2003); *Oyster Creek*, CLI-00-6, 51 NRC at 207; *Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 400 (1995); *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), ALAB-207, 7 AEC 957, 958 (1974).

⁵⁸ In this regard, it should be recognized that licensing boards are not empowered to grant much direct affirmatory relief to any party. For example, in licensing proceedings a board cannot grant an applicant a license but can only authorize the NRC Staff to grant the license.

⁵⁹ See *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 n.2 (1998), *petition for review denied*, *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999).

⁶⁰ See *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 74 (D.C. Cir. 1999) (citing *Pittsburgh & W. Va. Ry. v. United States*, 281 U.S. 479, 486 (1930); *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249, 255 (1930)).

standing, judicial notions or interpretations of redressability do not strictly control our assessment of redressability in this administrative proceeding. Although the question of whether Mr. Farmer has a cognizable interest under the AEA is further explored below, we find that, for our purposes as an administrative tribunal, Mr. Farmer has alleged “a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision.”⁶¹

Our standing inquiry does not end there, however. As previously noted, we must also consider as part of our standing determination whether the issues Mr. Farmer seeks to raise fall within the scope of the proceeding. The controlling case on this point is *Bellotti v. NRC*, in which the court of appeals held that the authority under section 189a of the AEA to define the scope of a proceeding resides with the Commission.⁶² In *Bellotti*, the Commission had issued an enforcement order to licensee Boston Edison Company amending its license for the Pilgrim nuclear power plant to require development of a plan for reappraisal and improvement of management functions and imposed a \$550,000 civil penalty on the utility.⁶³ In that proceeding, as in the matter before us, the order issued to the licensee limited the scope of the proceeding to the issue of whether the order should be sustained.⁶⁴ Massachusetts Attorney General Francis X. Bellotti petitioned to intervene in the proceeding, but the court determined that the Attorney General sought to litigate issues that would impermissibly expand the scope of the proceeding beyond the very narrow scope that had been defined by the Commission in the order.⁶⁵ In response to concerns expressed by the dissenting opinion that its decision would effectively end all public participation with respect to nuclear licensing issues, a majority of the court pointed out that

The Commission’s power to define the scope of a proceeding will lead to the denial of intervention only when the Commission amends a license to require additional or better safety measures. Then, one who, like petitioner Bellotti, wishes to litigate the need for still more safety measures, perhaps including the closing of the facility, will be remitted to section 2.206’s petition procedures.⁶⁶

⁶¹ See *Georgia Tech*, CLI-95-12, 42 NRC at 115.

⁶² *Bellotti v. NRC*, 725 F.2d 1380, 1381 (D.C. Cir. 1983). Although the *Bellotti* court framed the issue before it as one concerning the Commission’s authority under the AEA to define the scope of a proceeding, the Commission in *Maine Yankee* linked the issue of scope to that of standing and observed, “[t]hus, a person whose interest cannot be affected by the issues before the Commission in the proceeding lacks an essential element of standing.” CLI-04-5, 59 NRC at 56 n.14.

⁶³ *Bellotti*, 725 F.2d at 1381.

⁶⁴ See *id.* at 1382 n.2.

⁶⁵ *Id.* at 1382.

⁶⁶ *Id.* at 1383.

The principles of *Bellotti* were most recently applied by the Commission in its *Maine Yankee* decision.⁶⁷ At issue in *Maine Yankee* was a safeguards and security programs-related order that had been issued by the Commission to all 10 C.F.R. Part 50 licensees, including Maine Yankee Atomic Power Company. The State of Maine requested a hearing and sought a determination on whether the order should be sustained in light of the burden placed on the State to provide the resources it claimed were mandated by the order.⁶⁸ In affirming the Licensing Board's decision to deny the State's hearing request, the Commission found that like Attorney General Bellotti, the State of Maine did not "genuinely oppose" the order issued to the licensee.⁶⁹ As noted by the Licensing Board,

Maine has indicated it opposes the order unless the order is modified to (1) define the time period during which the [interim compensatory measures] are necessary; (2) set forth what resources will be required from State and local law enforcement to implement the measures; and (3) delineate the funding mechanism that will ensure State resources are available to implement those measures.⁷⁰

In addition, the Commission provided guidance in the form of three questions that it deemed fundamental to the determination of whether a petitioner, under *Bellotti*, has standing in an enforcement proceeding: (1) would the petitioner be better off if the order were vacated, (2) would the petitioner's concerns be alleviated if the order were vacated, and (3) does the petitioner in reality seek additional measures beyond those set out in the disputed order?⁷¹

In the instant proceeding, under *Bellotti* and *Maine Yankee*, one of the contentions Mr. Farmer seeks to litigate falls within the scope of the proceeding. We begin our discussion by addressing the three questions posed by the Commission in *Maine Yankee*. In answer to the first and second questions, Mr. Farmer asserts that if the Confirmatory Order were vacated, he would be "better off" and his concerns about the retaliatory treatment he is being subjected to would be alleviated, in that the Staff and Licensee would have to address the behaviors of the responsible supervisors who continue to work in positions having significant authority and influence over him.⁷² With respect to the third question, Mr. Farmer insists that he does not seek additional measures beyond those set out in the

⁶⁷ *Maine Yankee*, CLI-04-5, 59 NRC 52.

⁶⁸ *See id.* at 54-55.

⁶⁹ *Id.* at 57.

⁷⁰ *See id.* at 55 (quoting *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), LBP-03-26, 58 NRC 396, 401 (2003)).

⁷¹ *Id.* at 60.

⁷² *See* Petitioners' Reply at 8.

Confirmatory Order at issue.⁷³ Rather, he seeks a rescission of the order so that the normal enforcement process, which he contends will result in ADOT & PF either accepting accountability for the conduct of its management and taking appropriate actions to remedy the violation, or challenging the violation and leading to a hearing on the NOV, can proceed.⁷⁴

In its answer opposing the hearing request, the Staff focuses its challenge on the third question posed by the Commission in *Maine Yankee* and argues that although Mr. Farmer requests that the Confirmatory Order not be sustained, “*in reality* the relief [he] seek[s] is the imposition of additional measures beyond those of the Order.”⁷⁵ To support its argument, the Staff directs the Board’s attention to pages 16 and 17 of the intervention petition and avers that “[b]y proffering measures to correct the ‘specific weaknesses in the Order,’ Petitioners’ pleading, in effect, constitutes a request for additional or substitute enforcement.”⁷⁶

The Staff’s argument, however, paints with too broad a brush. By identifying several areas in which the Confirmatory Order falls short of protecting the public health and safety in its argument that its proffered contentions meet the requirements of 10 C.F.R. § 2.309(f),⁷⁷ there no doubt is an implication in the hearing request that if the original Confirmatory Order had addressed these concerns, or if it were modified to do so, Mr. Farmer might not contest its issuance. Thus, like the petitioners in *Bellotti* and *Maine Yankee*, there is a strong implication that Mr. Farmer’s first contention, in essence, requests additional measures. Consequently, the matters he seeks to litigate in connection with Contention 1 go beyond the scope of this enforcement proceeding as it was defined by the Commission in the Confirmatory Order, and that contention is inadmissible for that reason. Unlike the petitioners in *Bellotti* and *Maine Yankee*, however, Mr. Farmer properly challenges the Staff’s assessment and analysis of the facts underlying the issuance of the Confirmatory Order in his second

⁷³ See *id.* at 9.

⁷⁴ See *id.*

⁷⁵ Staff Answer at 5 (emphasis in original).

⁷⁶ See *id.* at 6. It should be noted that the pages the Staff relies upon to make its argument are not those portions of the hearing request addressing Mr. Farmer’s standing but rather are in Part IV of the petition in which Mr. Farmer sets forth his proffered contentions. The Staff has not informed us how, with respect to Mr. Farmer’s standing, it squares its argument with the Commission’s direction that in determining standing the hearing request is to be construed in the light most favorable to the petitioner. See *Georgia Tech*, CLI-95-12, 42 NRC at 115.

⁷⁷ In Contention 1, Mr. Farmer asserts that the Confirmatory Order should not be sustained because “the Order does not address the illegal retaliatory actions and behaviors of Licensee managers, the failure of the managers to address employee concerns about safety and compliance, the consequences of those behaviors on the remainder of the workforce, and the impact of Licensee management on the freedom of employees to raise concerns without fear of reprisals.” See Hearing Request at 10; see also *id.* at 16-17 (identifying additional specific weaknesses in the Confirmatory Order).

contention.⁷⁸ As recognized by the Commission in its *Marble Hill* and *Maine Yankee* decisions, concerns relative to the question of whether the facts set forth in an order are true and whether the remedy chosen is supported by those facts would fall within the scope of an enforcement proceeding.⁷⁹ Accordingly, as to those matters Mr. Farmer has raised with respect to the supporting factual basis of the Confirmatory Order, Mr. Farmer has demonstrated standing to intervene by establishing the requisite interest in this proceeding.⁸⁰

⁷⁸ See Hearing Request at 10. Cf. *Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 46 (1982), *aff'd*, *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983); *Maine Yankee*, LBP-03-26, 58 NRC at 401, *aff'd*, CLI-04-5, 59 NRC 52 (2004).

⁷⁹ *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441 (1980); *Maine Yankee*, CLI-04-5, 59 NRC at 58-59.

⁸⁰ As previously noted (*see p. 103 supra*), the Confirmatory Order incorporated the NOV that set out the retaliatory actions against Mr. Farmer by ADOT & PF. Mr. Farmer directly alleges that the Staff's conclusions (that the public health and safety is protected by the Confirmatory Order) as well as other underlying facts relied upon by the Staff to support its conclusion (i.e., ADOT & PF managers did not act deliberately in retaliating against Mr. Farmer) cannot reasonably be derived from the facts set out in the NOV. Thus, because the order is not supported by the facts, according to Mr. Farmer it necessarily cannot protect the public health and safety. See Hearing Request at 1, 2, 7; *id.*, Exh. 3 at 1. Mr. Farmer, in effect, asserts that the Staff's factual findings and conclusions that ADOT & PF retaliated against Mr. Farmer for engaging in protected activity yet ADOT & PF managers did not act deliberately is contradictory and flawed because retaliation (which by its very nature is intentional), against one engaged in protected activity cannot be found, under any circumstances, to be unintentional. Relying upon *Bellotti*, the dissent, however, would preclude any challenge to clearly erroneous Staff factual determinations and conclusions as well as any remedy based thereon, even where the true facts provide no underpinning for the Staff's position. Neither *Bellotti* nor the Commission's recent decision in *Maine Yankee* requires such a result, where, taken to its logical conclusion, a Staff order could rest on no foundation whatsoever or be completely contrary to the facts of the situation. We disagree with the fundamental premise of the dissent that the "root" holding of *Bellotti* is the concept that the Commission's power to define scope can result in a contest of an order only when the order amends a license to require weaker safety measures. Rather, we read that part of *Bellotti* as dicta, and, at most, an observation of the majority in its response to the dissent's criticism that no one can get a hearing but the applicant. The root holding of *Bellotti* is simply that the Commission has the right to define the scope of the proceeding, a right that enters into the "standing" decision because section 189a of the Atomic Energy Act requires a hearing for any person "affected" by a proceeding, and we cannot determine whether or not a person is "affected" without knowing the "scope" of the proceeding. Once the Commission has set out the "scope," which in the instant case is "whether the Order should be sustained," we must determine whether the Petitioner would be negatively "affected" by it should the order be sustained.

Indeed, in discussing *Bellotti* in *Maine Yankee*, the Commission noted that "[a]s in the instant case, the order in [*Belotti*] limited the scope of the proceeding to the issue whether, on the basis of matters set forth in the order, the order should be sustained." CLI-04-5, 59 NRC at 56. Then, in describing its own holding in the underlying administrative proceeding, the Commission stated: "Noting its authority to limit issues in enforcement proceedings to whether the facts as stated in the order are true and whether the remedy selected is supported by those facts, the Commission denied the petition."

(Continued)

While it appears that petitioners seeking to intervene in enforcement proceedings for the purpose of challenging confirmatory orders have been found to have standing on very rare occasions, if ever,⁸¹ if Mr. Farmer — who clearly has (1) alleged an injury-in-fact within the zone of interests of the AEA that is fairly traceable to the Confirmatory Order and likely to be redressed by a rescission of the Confirmatory Order; and (2) sought to challenge the factual basis of the Confirmatory Order, as permitted by *Marble Hill* and *Maine Yankee* — does not have standing to oppose the order, we, frankly, cannot envision the circumstances under which any petitioner (other than the licensee or applicant) would ever be found to have such standing. If that is the case and only the applicants or licensees have standing to oppose the orders to which they are subject, it is disingenuous, at best, for the Director of the Office of Enforcement, acting for the Commission, to continue to issue notices of opportunity for hearing in enforcement and confirmatory order proceedings stating that “[a]ny person adversely affected by this Confirmatory Order, other than the Licensee, may request a hearing.”⁸² Further, to continue the current practice is not only misleading but a waste of scarce resources by all concerned.

III. CONTENTIONS

To intervene in a proceeding, in addition to establishing standing, a petitioner must also set forth at least one admissible contention.⁸³ Pursuant to the newly

Id. Late in its *Maine Yankee* decision, the Commission devoted the better part of four paragraphs to discussing why the asserted factual matters that the State sought to litigate were, in the circumstances, unavailing — a totally unnecessary exercise if, as the dissent would have it, *Bellotti* precludes any and all challenges to an order based upon inconsistency with the underlying facts. *Id.* at 58-59. Contrary to the position of the dissent, *Maine Yankee* clearly recognizes that an order may be challenged based upon a failure to be reasonably based upon the asserted underlying facts. To hold otherwise in a Confirmatory Order proceeding involving alleged retaliation in the circumstances presented by the instant case would make a mockery not only of the Commission notice of opportunity for hearing but of the underlying enforcement process.

⁸¹ Indeed, we were unable to identify a single instance in which a third party who opposed a confirmatory order was permitted to intervene in a proceeding. On the other hand, the Commission has in a number of instances permitted the intervention by petitioners who *support* an enforcement order. See, e.g., *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 69 & n.6, 71 (1994). In *Sequoyah Fuels*, for instance, the Commission affirmed the Licensing Board’s reasoning that “once a hearing is requested by the target of the enforcement order, a petitioner who supports the order may be ‘adversely affected’ by the proceeding, because a possible outcome of the proceeding is that the order will not be sustained.” *Id.* at 68. By parallel reasoning, it should follow that a petitioner in Mr. Farmer’s circumstance who *opposes* the order may similarly be adversely affected by the proceeding, because a possible outcome of the proceeding is that the order *will* be sustained.

⁸² See 69 Fed. Reg. at 13,596.

⁸³ See 10 C.F.R. § 2.309(a).

revised Part 2 of the Commission's Rules of Practice, a request for hearing must set forth with particularity the contentions sought to be raised.⁸⁴ Furthermore, for each contention, the hearing request must: (1) provide a specific statement of the issue of law or fact to be raised or controverted; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised in the contention is within the scope of the proceeding; (4) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinion that support the petitioner's position and on which the petitioner intends to rely at hearing, including references to specific sources and documents that will be relied upon to support its position on the issue; and (6) provide sufficient information to show that a genuine dispute on a material issue of law or fact exists with the applicant, which consists of either (a) references to specific portions of the application (including the applicant's environmental and safety reports) that are disputed and the reasons supporting the dispute, or (b) identification of each instance where the application purportedly fails to contain information on a relevant matter as required by law and the reasons supporting the allegation.⁸⁵

A. Contention 1

Mr. Farmer's first contention avers:

The agreed upon Confirmatory Order should not be sustained since, even if fully implemented, it does not provide reasonable assurance to the Commission that the health and safety of the public will be protected, in that the Order does not address the illegal retaliatory actions and behaviors of Licensee managers, the failure of the managers to address employee concerns about safety and compliance, the consequences of those behaviors on the remainder of the workforce, and the impact of Licensee management on the freedom of employees to raise concerns without fear of reprisals.⁸⁶

As discussed above, because Contention 1 seeks to litigate issues that fall outside the scope of the proceeding, it is inadmissible.

B. Contention 2

In Contention 2, Mr. Farmer asserts:

⁸⁴ *Id.* § 2.309(f)(1).

⁸⁵ *See id.* § 2.309(f)(1)(i)-(vi).

⁸⁶ *See* Hearing Request at 10.

The agreed upon Confirmatory Order should not be sustained since it is not based upon an accurate assessment and analysis of all the facts available to the Commission, or on a correct interpretation and application of the legal requirements of 10 C.F.R. 30.7 and/or the May 14, 1996 Policy Statement, *Freedom of Employees in the Nuclear Industry to Raise Safety Concerns*, 61 FR 24336.⁸⁷

In support of his second contention, Mr. Farmer argues that despite the body of evidence gathered by the Staff substantiating his claims of a 3-year-long pattern of retaliation and of a failure on the part of ADOT & PF management to address the safety concerns he raised, the Staff failed to take appropriate action to ensure adequate protection of the public health and safety.⁸⁸ As noted above, the sole explanation provided by the Staff for its decision to issue the Confirmatory Order, in lieu of other actions against ADOT & PF, was because the Staff had found no evidence of deliberate retaliatory conduct toward Mr. Farmer.⁸⁹ Rather, according to the Staff, the numerous adverse actions taken against Mr. Farmer were based on a lack of understanding of NRC regulations in this area.⁹⁰ Given the Staff's finding in the NOV that "in each instance listed in the Notice of Violation the adverse action was taken, at least in part, for discriminatory reasons and that some of the adverse actions were taken immediately after [Mr. Farmer] engaged in protected activities,"⁹¹ Mr. Farmer has provided an adequate basis in support of his contention that the facts do not support the Staff's issuance of the Confirmatory Order. As previously discussed, Mr. Farmer's challenge of the Staff's assessment and analysis of the facts underlying the issuance of the Confirmatory Order falls squarely within the scope of this proceeding. In this regard, Mr. Farmer has also demonstrated that the factual issues raised in Contention 2 are clearly material to the finding made by the Staff that there was no deliberate or willful discrimination on the part of ADOT & PF management in issuing the Confirmatory Order. In addition to the NOV, Confirmatory Order, and NRC Office of Investigations report, Mr. Farmer has identified over twenty specific documents on which he intends to rely to support his position.⁹² Furthermore, Mr. Farmer has provided sufficient information to demonstrate that a genuine dispute on a material fact (i.e., whether ADOT & PF management deliberately discriminated and retaliated against Mr. Farmer) exists with ADOT & PF. Accordingly, having satisfied each of the admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1), Contention 2 is admitted for litigation in this proceeding.

⁸⁷ *See id.*

⁸⁸ *See id.* at 12.

⁸⁹ *See id.*, Exh. 3 at 1.

⁹⁰ *See id.*

⁹¹ *See* NOV Cover Letter at 2.

⁹² *See* Hearing Request, Exh. 5, Documents Forming the Basis of Petitioners' Request for Hearing.

IV. CONCLUSION

We find that Petitioner Farmer has established standing to intervene in this proceeding. Petitioner AFER, however, has not demonstrated its standing. Further, we find that one of the proffered contentions — Contention 2 — satisfies the requirements of 10 C.F.R. § 2.309(f) so as to be admitted for litigation in this proceeding. Accordingly, pursuant to 10 C.F.R. § 2.309(a), we grant the hearing request of Petitioner Farmer and admit him as a party to this proceeding.

Pursuant to 10 C.F.R. § 2.311(b) and to the degree this ruling denies its hearing request, AFER may appeal this ruling by filing a notice of appeal and accompanying supporting brief within ten (10) days of service of this Order. Pursuant to 10 C.F.R. § 2.311(c), ADOT & PF and the NRC Staff may appeal this ruling by filing a notice of appeal and accompanying supporting brief within ten (10) days of service of this Order.

Pursuant to 10 C.F.R. § 2.310(b), this proceeding “on enforcement matters” shall be conducted in accordance with the procedures of 10 C.F.R. Part 2, Subparts C and G. If all parties, however, now agree that this proceeding should be conducted pursuant to Part 2, Subpart L, or alternatively, Subpart N, then it may proceed under one or the other of those subparts. The NRC Staff shall determine whether all parties consent to the conduct of the proceeding pursuant to one or the other of those subparts and notify us of such agreement within fifteen (15) days of service of this Order and then file a joint consent of all parties within twenty (20) days of service of this Order.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD⁹³

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 29, 2004

⁹³ Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Licensee ADOT & PF, (2) Petitioners Farmer and AFER, and (3) the Staff.

Separate Views of Bollwerk, J., dissenting in part:

Although I have no quarrel with my colleagues' rulings on the lack of standing of organizational petitioner Alaska Forum for Environmental Responsibility (AFER) and the inadmissibility of the first contention proffered by AFER and individual petitioner Robert F. Farmer, I find that I cannot agree with their determinations regarding Mr. Farmer's standing and the admissibility of the Petitioners' second contention. I briefly set forth my reasons below.

Relative to its ruling on standing and contention admissibility,¹ it seems that a central precept of the majority's holding that Mr. Farmer's claim has the legal wherewithal to go forward for a hearing is its statement in the context of its standing ruling that

[i]f the Confirmatory Order is not sustained, . . . the [Notice of Violation (NOV)] remains outstanding . . . [and] [b]ecause [the Alaska Department of Transportation and Public Facilities (ADOT & PF)] has given every indication to this point that it will deny that any discriminatory or retaliatory conduct took place, the Staff . . . will have to determine the appropriate penalty to protect the public health and safety in light of the serious Severity Level II violation it found to have occurred.

60 NRC at 111; *see also id.* at 118 ("Mr. Farmer has provided an adequate basis in support of his contention that the facts do not support the Staff's issuance of the Confirmatory Order"). What this reflects, in my estimation, is a Board approach to adjudicatory review of agency-initiated orders that is inconsistent with the basic precepts of the holding in *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983), as it governs the scope of adjudicatory proceedings regarding such orders.

At its roots, *Bellotti* holds that the Commission's power to define the scope of a proceeding will result in the denial of an intervention petition seeking to contest an NRC Staff enforcement order "only when the Commission amends a license to require additional or better safety measures." 725 F.2d at 1383. In this instance, under the terms of the Staff's confirmatory order, to address identified problems with Licensee ADOT & PF discriminating against Mr. Farmer for raising safety concerns, ADOT & PF is now subject to additional planning and training requirements intended to ensure that responsible Licensee personnel comply with the agency's 10 C.F.R. § 30.7 employee protection standards. *See*

¹From my perspective, one of the analytical conundrums facing a presiding officer dealing with an agency-initiated order modifying a license is a "chicken or the egg" question: should a petitioner who runs afoul of the "whether the order should be sustained" scope of the proceeding be denied party status because it lacks standing or an admissible contention? Whatever may be the case, I find no basis for an attempt in the circumstances of this proceeding (*see* 60 NRC at 111-12) to move the analysis of standing principles beyond the "judicial precepts of standing" that have long been the hallmark of NRC adjudications under Atomic Energy Act (AEA) § 189a, 42 U.S.C. § 2239(a).

69 Fed. Reg. 13,594, 13,595 (Mar. 23, 2004). Because these new requirements, which are not challenged by Mr. Farmer as detrimental to the public health and safety, clearly are “additional or better safety measures,” consistent with *Bellotti* his hearing petition contesting the Staff’s order should be dismissed.

The majority in its opinion, however, seeks to distinguish this case from *Bellotti* by asserting that Mr. Farmer’s concern is of a different type to the degree he claims that the facts set forth by the Staff do not support issuance of the confirmatory order (as opposed to asserting that the order need provide for something else in the way of safety measures). In my view, this is but a variation on the theme, rejected by the *Bellotti* court,² that “something else is required” which precludes the order from being sustained.

As was noted above, the apparent basis upon which the majority finds Mr. Farmer has standing and/or a litigable issue statement by way of his second contention is his assertion that, with a proper validation and assessment of the facts, which he can obtain only if the order is not sustained, the NRC Staff would have to do something additional or different relative to the measures imposed under its current order. Yet, there is nothing about that order which, if entered under facts more in the nature of what Mr. Farmer apparently believes can be established, would make it improper or insufficient.³ The order requires “additional or better safety measures” that relate to the subject matter of Mr.

² As is the case here, the *Bellotti* court’s ruling was a divided one, with the majority and dissenting opinions written by two jurists — Judge Robert Bork and Judge J. Skelly Wright — who were considered among the preeminent legal intellects of that era. The two opinions reflect a spirited debate over the nature of public participation rights under AEA § 189a, and the discretion afforded the Commission to delineate those rights in the context of a proceeding regarding an enforcement order. Each presented strong arguments for the validity of his position and, indeed, to the extent the majority’s holding in *Bellotti* rested upon the availability of the 10 C.F.R. § 2.206 process as an alternate avenue of relief for petitioners, that rationale may have been undercut by subsequent judicial decisions — relying upon the Supreme Court’s decision in *Heckler v. Chaney*, 470 U.S. 821 (1985) — holding that the scope of judicial review of the agency’s section 2.206 determinations is extremely limited. See *Massachusetts Public Interest Research Group, Inc. v. NRC*, 852 F.2d 9, 19 (1st Cir. 1988). Be that as it may, the Commission precedent affirmed by the court in *Bellotti* continues to control relative to the scope of adjudicatory proceedings regarding agency-initiated enforcement orders and so must be followed here.

³ In this regard, the current NRC enforcement manual states in section VI, Disposition of Violations, under subsection D that orders may “be issued in lieu of, or in addition to, civil penalties, as appropriate for Severity Level I, II, and III violations.” Likewise, under the section VII heading Exercise of Discretion, subsection A.2 states that the agency “may, where necessary or desirable, issue orders in conjunction with or in lieu of civil penalties to achieve or formalize corrective actions and to deter further recurrence of serious violations.” Unlike the civil penalty provisions of these sections, which go into great detail outlining the amounts of the various severity level base penalties and mitigation factors that apply in setting a penalty, there is no further guidance as to the scope of any order that may be issued. As the manual reflects, this is a matter left to the exercise of the agency’s (i.e., the Staff’s) discretion.

Farmer's concerns about employee protection,⁴ which under the holding in *Bellotti* seemingly ends further adjudicatory inquiry regarding the order's sufficiency.⁵

Ultimately, what *Bellotti* reflects is that, whenever the Staff chooses to use its authority to address an enforcement situation by issuing an order, any adjudicatory proceeding convened in response to a intervenor challenge to that order is to assure that the staff — to take a well-known adage somewhat out of context — “do no harm.” In this instance, Mr. Farmer has not provided any basis for concluding that a further inquiry is necessary as to whether the Staff's order affirmatively will harm the employee protection situation at ADOT & PT. Rather, as his contention clearly reflects, in his estimation the order as entered fails adequately to address the problem he believes exists relative to ADOT & PT's approach to employee protection matters. As *Bellotti* makes clear, however, this is not a complaint/request for relief within the scope of this proceeding and, as such, fails to afford him party status.

In the enforcement arena, given the breadth of possibilities that are open to the Staff in framing an order addressing identified health and safety problems associated with an agency licensee's activities, there also resides with the Staff an obligation to ensure that in issuing such a directive it crafts measures that will directly and promptly address the problem identified. Under *Bellotti*, however, whether the Staff carries out this responsibility to the degree a petitioner believes is warranted is not a matter within the ambit of a Licensing Board. It may well be that, depending on the responses ADOT & PT provides to the outstanding Notice of Violation, further Staff enforcement action would be justified in this instance. See NRC Staff's Response to Board's Order Dated June 9, 2004 (June 16,

⁴ Although the majority seems to suggest that if the current controversy as framed by Mr. Farmer is not litigable under *Bellotti* than nothing ever will be, see 60 NRC at 116 & n.81, it is not apparent this is the case. For instance, a Staff order that imposed measures bearing no conceivable relationship to the circumstances identified as the genesis for the order likely would be one challengeable consistent with *Bellotti*. So too, a challenge to an order based on the premise that its terms, if carried out, would be affirmatively contrary to the public health and safety (as opposed to being deficient because it does not impose other or additional measures) would be one that seemingly would fall within the scope of a proceeding as envisioned under *Bellotti*.

⁵ In this regard, in support of its holding, see 60 NRC at 114-16, the majority relies upon the Commission ruling in the *Marble Hill* proceeding declaring that enforcement proceeding challenges are to be limited to “whether the facts as stated in an order are true and whether the remedy selected is supported by those facts.” *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441 (1980). From my perspective, however, given that it is not clear how a Board ruling that fails to sustain the Staff's order in this instance (and so returns the situation to the status quo ante) advances protection of the public health and safety, unless license suspension or termination are not considered measures “to make a facility's operation safer” within the meaning of *Bellotti*, 723 F.2d at 1383, it is not apparent what relief could be granted Petitioner Farmer that would be within the scope of this proceeding as it is defined by that case.

2004) at 5-7. But that is not a matter that can be litigated, even indirectly, in this proceeding.⁶

Thus, for the foregoing reasons I also would dismiss the AFER/Farmer petition for failing to establish the Petitioners' standing and/or proffer an admissible contention.

⁶In this regard, assuming the Staff takes an appeal from the majority's determination and the Commission affirms the majority's decision, the Commission nonetheless may wish to consider providing guidance as to exactly what the Board should adjudicate relative to Mr. Farmer's concerns, including the scope of the Board's authority, if any, to craft another (perhaps interim) remedy if it finds the current Staff order cannot be sustained.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
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)

August 17, 2004

RULES OF PRACTICE: CONTENTIONS (PLEADING)

The NRC strictly limits the contentions that may be raised in licensing adjudications so that individual licensing adjudications are limited to deciding “genuine, substantive safety and environmental issues placed in contention by qualified intervenors.” *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999), quoting H.R. Rep. No. 97-177, at 151 (1981).

RULES OF PRACTICE: CONTENTIONS (PLEADING)

The subject of a contention must be appropriate for adjudication in an individual licensing proceeding. No contention is admitted for adjudication if it attacks applicable statutory requirements or Commission regulations, if it raises issues that are not applicable to the facility in question, or if it raises a question that is not concrete or litigable. See *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). See also *Oconee*, CLI-99-11, 49 NRC at 334 (contention attacking generic NRC regulations or policies is not admissible).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE OF COMMISSION RULE)

Requiring the substance and presentation of contentions to be concrete and specific to the license application helps ensure that individual license applicants are not put into the position of defending the policies and decisions of the Commission itself.

RULES OF PRACTICE: CONTENTIONS (PLEADING)

Requiring the substance and presentation of contentions to be concrete and specific precludes an intervenor from making general allegations, with the hope of generating through discovery sufficient facts to show there is a genuine dispute. *See Oconee*, CLI-99-11, 49 NRC at 335.

RULES OF PRACTICE: CONTENTIONS (PLEADING)

NEPA: CHALLENGE TO ENVIRONMENTAL REPORT

A petitioner must file NEPA contentions on the applicant's environmental report so that environmental issues are raised as soon as possible in the proceeding. This requirement gives the Staff the opportunity to request additional information from the applicant and work to resolve any deficiencies as the Staff develops its own Environmental Impact Statement (EIS). If the EIS addresses the concerns alleged in the contention, the original contention becomes moot and the intervenor must raise a new contention if it claims the EIS discussion is still inaccurate or incomplete. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373 (2002).

RULES OF PRACTICE: CONTENTIONS (PLEADING)

NEPA: NEED FOR ENVIRONMENTAL REVIEW

The fact that our safety regulations do not require a measure does not necessarily mean there will be no environmental consequences that must be discussed in an environmental impact statement.

RULES OF PRACTICE: CONTENTIONS (PLEADING)

NEPA: NEED FOR ENVIRONMENTAL REVIEW

In order to attack the factual determinations underpinning a regulation in a NEPA context, a petitioner must present specific, fact-based claims to the

contrary, not mere allegations. “[O]ur contention rule is strict by design. It . . . insists upon some reasonably specific factual or legal basis for a petitioner’s allegations.” *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003) (internal quotation marks omitted).

RULES OF PRACTICE: CONTENTIONS (PLEADING)

NEPA: NEED FOR ENVIRONMENTAL REVIEW

To show a genuine material dispute, a contention would have to postulate a plausible scenario wherein quality assurance measures fail and a mechanism giving rise to environmental consequences needing discussion in the ER. Simply pointing out that the applicant does not control quality assurance measures at another licensee’s facility does not raise a genuine material dispute.

RULES OF PRACTICE: CONTENTIONS (PLEADING)

While we do not expect a petitioner to prove its contention at the pleading stage, we do require that it show a genuine dispute warranting a hearing.

RULES OF PRACTICE: CONTENTIONS (PLEADING)

NEPA: SUFFICIENCY OF CONTENTIONS

A contention that did no more than point out that *if* there was a need to open a canister or remove its contents, the applicant could not do so at its storage facility did not raise a litigable contention. The Board could properly conclude that the contention lacked factual support and expert opinion to back it, and failed to show that there existed a genuine issue of material fact. The petitioner failed to allege, with expert and technical backing, how a canister could become so contaminated that it would be harmful to workers at the applicant’s site or be too dangerous to ship through interstate commerce, given the shippers’ quality assurance procedures.

RULES OF PRACTICE: APPELLATE REVIEW (NEW ARGUMENTS NOT CONSIDERED)

Ordinarily, the Commission will not consider on appeal either new arguments or new evidence supporting the contention, which the Board never had the opportunity to consider. *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-00-8, 51 NRC 227, 243 (2000); *Yankee Atomic*

Electric Co. (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 260 & n.19 (1996).

NEPA: COST-BENEFIT ANALYSIS

On review, we ask not whether every assumption contained in the FEIS was the best or whether it will turn out true, but “whether the economic assumptions of the FEIS were so distorted as to impair fair consideration of those environmental effects.” *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998), citing *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 466 (4th Cir. 1996), and *South Louisiana Environmental Council, Inc. v. Sand*, 629 F.2d 1005, 1011 (5th Cir. 1980).

NEPA: COST-BENEFIT ANALYSIS

The use of misleading economic assumptions in an EIS could thwart NEPA’s twin goals to inform the agency decisionmaker and the public-at-large. Overstated benefits could persuade an agency to approve a project despite significant adverse environmental impacts, while the EIS would also misinform the public. *See, e.g., Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996).

MEMORANDUM AND ORDER

Today we again consider issues arising out of the proposal of Private Fuel Storage, L.L.C. to build a spent fuel storage facility on Goshute tribal land in Utah. The State of Utah opposes the facility and is before us to argue in favor of admitting for hearing certain contentions that the Licensing Board rejected.

By a February 5, 2004 order,¹ we granted review under 10 C.F.R. § 2.786 of the Board’s decision not to admit for adjudication three of Utah’s proposed contentions relating to two issues. Both issues concern proposed contentions under the National Environmental Policy Act (NEPA).² One arises out of Utah’s claim that PFS’s environmental report (ER) failed to address consequences of not having a “hot cell” or means to enable it to open a canister. The other calls into question the accuracy of the NRC Staff’s “cost-benefit analysis” of the proposed project. The disputed contentions are known as “Utah U,” “Utah CC,” and “Utah SS.”

¹ CLI-04-4, 59 NRC 31 (2004).

² 42 U.S.C. § 4321 *et seq.*

On close analysis of the proposed contentions and all the evidence submitted to support them, we conclude that the Board was correct in refusing to admit them for further consideration. Therefore, we affirm the Board's decisions.

I. DISCUSSION

A. Legal Standards Concerning Admissibility of Contentions and NEPA Considerations

The NRC strictly limits the contentions that may be raised in licensing adjudications so that individual licensing adjudications are limited to deciding “genuine, substantive safety and environmental issues placed in contention by qualified intervenors.”³ To begin with, the subject of the contention must be appropriate for adjudication in an individual licensing proceeding. No contention is admitted for adjudication if it attacks applicable statutory requirements or Commission regulations, if it raises issues that are not applicable to the facility in question, or it raises a question that is not concrete or litigable.⁴ In addition, a party wanting to raise a contention in an adjudicatory hearing must meet strict pleading standards by providing:

- (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 . . . 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

³ *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999), quoting H.R. Rep. No. 97-177, at 151 (1981).

⁴ See *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974). See also *Oconee*, CLI-99-11, 49 NRC at 334 (contention attacking generic NRC regulations or policies is not admissible).

supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.⁵

Requiring the substance and presentation of contentions to be concrete and specific to the license application helps ensure that individual license applicants are not put into the position of defending the policies and decisions of the Commission itself. It also precludes an intervenor from making general allegations, with the hope of generating through discovery sufficient facts to show there is a genuine dispute.⁶

Our contention pleading rule requires a petitioner to file NEPA contentions on the applicant's ER so that environmental issues are raised as soon as possible in the proceeding. The requirement that a petitioner raise NEPA contentions in response to the ER gives the Staff the opportunity to request additional information from the applicant and work to resolve any deficiencies as the Staff develops its own Environmental Impact Statement (EIS). If the EIS addresses the concerns alleged in the contention, the original contention becomes moot and the intervenor must raise a new contention if it claims the EIS discussion is still inaccurate or incomplete.⁷

Here, Utah's Contention U, basis 2, and Utah's Contention CC claimed deficiencies in PFS's ER. The Board rejected these contentions in its original ruling on contentions in 1998. Utah Contention SS attacked the cost-benefit analysis in the Staff's FEIS. The Board declined to admit Utah SS, deciding that the FEIS contained sufficient information to satisfy NEPA's requirements.⁸

B. Utah U, Basis 2 (Inability To Inspect and Repair Canisters)

According to Utah Contention U, PFS's ER violated NRC regulations⁹ and NEPA by failing to include a full discussion of the environmental impacts of the PFS facility. As bases for this claim, Utah U listed various impacts allegedly not considered. Basis 2 argued that the ER did not discuss impacts associated with PFS's purported inability to inspect and repair the contents of spent fuel canisters, or to detect and remove contamination from canisters.¹⁰

⁵ 10 C.F.R. § 2.714(b)(2) (as in effect prior to February 13, 2004). Rules of procedures for proceedings initiated prior to February 13 are not affected by our recent revisions to 10 C.F.R. Part 2.

⁶ See *Oconee*, CLI-99-11, 49 NRC at 335.

⁷ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373 (2002).

⁸ Tr. 9210-17 (May 17, 2002).

⁹ 10 C.F.R. § 51.45(c).

¹⁰ See State of Utah's Contentions on the Construction and Operating License Application by Private Fuel Storage, L.L.C. for an Independent Spent Fuel Storage Facility (Nov. 23, 1997), at 142.

In ruling on this contention, the Board incorporated by reference the arguments made by the parties in their pleadings and during a January 29, 1998, prehearing conference.¹¹ The Board rejected basis 2 (and other bases as well) because it “fail[ed] to establish with specificity any genuine dispute; impermissibly challenge[d] the Commission’s regulations or rulemaking-associated generic determinations, including those involving canister inspection and repair and transportation sabotage; lack[ed] adequate factual or expert opinion support; and/or fail[ed] properly to challenge the PFS application.”¹²

The Commission accepted review because the Board’s description did not make it entirely clear which bases failed to meet which criterion or criteria for admissibility. But if our review shows that basis 2 was deficient in any of the respects listed by the Board, we can conclude that the Board correctly rejected it.¹³ In addition, if the issues raised by basis 2 were resolved by the Staff’s Final Environmental Impact Statement (FEIS), then they are now moot.¹⁴

Utah U, basis 2, pointed to another contention, Contention Utah J, and argued that the ER ought to have discussed the lack of a means to repair defective or leaking canisters:

The ER fails to consider the safety risks and costs raised by PFS’s failure to provide adequate means for inspecting and repairing the contents of spent fuel canisters, or for detecting and removing contamination on the canisters. These include risks to workers posed by handling or inspecting casks with contaminated or defective contents, during receipt of casks, storage of casks, or in preparing them for shipment to a repository. They also include health risks and increased costs during the decommissioning process. *See* Contention J (Inadequate Inspection and Maintenance of Safety Components, Including Canisters and Cladding), whose basis is adopted and incorporated herein by reference.¹⁵

Contention Utah J, in turn, alleged that “[t]he design of the proposed ISFSI fails to satisfy 10 C.F.R. §§ 72.122(f) and 72.128(a), and poses undue risk to the public health and safety, because it lacks a hot cell or other facility for opening casks and inspecting the condition of spent fuel.”¹⁶

In the same decision that we accepted Utah’s NEPA issue for review, we rejected Utah’s safety argument (Contention Utah J) that PFS must have a “hot

¹¹ LBP-98-7, 47 NRC 142, 199 (1998).

¹² *Id.* *See generally* 10 C.F.R. § 2.714(b) (setting out standard for admissible contentions).

¹³ *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

¹⁴ *McGuire & Catawba*, CLI-02-28, 56 NRC at 382.

¹⁵ *See* Utah’s Contentions at 142.

¹⁶ *Id.* at 63.

cell” that would allow it to open canisters for inspection or repair.¹⁷ We found that Utah’s approach would exceed the requirements of our regulations and therefore amounted to an impermissible collateral attack on the regulations.¹⁸ We noted, however, that the fact that our safety regulations do not require a measure does not necessarily mean there will be no environmental consequences that must be discussed in an environmental impact statement.

The portions of Contention Utah J’s bases that would possibly relate to NEPA (and Contention U, basis 2) are its allegations that “[a] hot cell is needed to protect workers and the public against undue risks caused by the handling of spent fuel.”¹⁹ Contention J also said that the hot cell was needed because fuel could be improperly loaded into a canister, and gave two examples where this allegedly had happened.²⁰

Utah U, basis 2, can be broken down into three allegations. First, according to Utah U, PFS’s ER should address the consequences of not being able to open the canisters in order to inspect and repair their contents (that is, the fuel rods), which in turn would require a “hot cell” (a facility capable of transferring fuel out of a canister).²¹ Second, Utah U says that the ER should discuss the consequences of PFS’s inability to detect and remove contamination that may be on the outside of a canister as a result of the fuel loading process. Finally, Utah U would have the ER consider the risks to workers of handling *casks* with defective contents, which would include a defective canister as well as damaged fuel rods.

PFS plans to completely seal spent fuel inside a canister that is never opened from the time it leaves the power plant until it is deposited into a permanent repository, although that canister is transferred into different casks for loading, shipping, and storage. During typical fuel loading operations at the power plant of origin, the canister is placed inside a transfer cask and both are lowered into the spent fuel pool.²² While the fuel is being loaded, contaminated water is kept out of the space between the canister and the transfer cask either by sealing the space at the top or by forcing clean water into the cask from the bottom so that

¹⁷ CLI-04-4, 59 NRC at 39.

¹⁸ *Id.*

¹⁹ Utah’s Contentions at 63.

²⁰ *Id.* at 67.

²¹ The NRC Staff and PFS both mischaracterize this aspect of basis 2. They argue that Utah U wanted a discussion of the environmental consequences of having a hot cell. See “Applicant’s Response to State of Utah’s Brief on Commission Review of Contentions Utah U Basis 2 and Utah CC and Utah SS” (Mar. 18, 2004), at 6-7; “NRC Staff’s Brief in Response to ‘State of Utah’s Brief on the Commission’s Review of Contentions Utah U Basis 2, Utah CC and Utah SS’” (Mar. 18, 2004), at 14-15. Although Utah argued that the regulations should be interpreted to require a “hot cell” as a means to allow such inspection and repair, basis 2 clearly demanded a discussion of the environmental consequences of *not* having a hot cell.

²² See SAR, Ch. 5, at 5.1-2 to -3.

it overflows the top.²³ This helps prevent the outside of the canister from being contaminated. After loading, the lid of the canister is placed on top and the transfer cask and canister are removed from the pool.²⁴ The canister lid and a redundant “closure lid” are welded to the canister, which is then drained, dried, and filled with helium. The drain and fill ports are then welded shut, sealing the canister.²⁵ The sealed canister is then loaded from the transfer cask into a shipping cask and the shipping cask closure is bolted in place.²⁶ Finally, the canister and shipping cask are then loaded onto the shipment vehicle for rail shipment to the PFS facility.²⁷

At the PFS facility, the canister is transferred from the shipping cask into a transfer cask, and from a transfer cask to a storage cask, inside a canister transfer building.²⁸ The canister transfer building’s reinforced-concrete walls are designed to withstand tornado-driven missiles and “provide substantial shielding from gamma and neutron radiation.”²⁹ During the transfer, temporary shielding is used to ensure that doses to workers are as low as reasonably achievable (ALARA).³⁰ The storage cask is then moved to the outside storage pad.

According to PFS, this “start clean/stay clean” plan makes opening a canister both unnecessary and undesirable.

With this background in mind we turn to Utah’s specific grievances.

1. Utah Failed To Support Alleged Need To Inspect Fuel

Utah U, basis 2, included an allegation that the ER failed to address the consequences of not being able to open and inspect, and repair, the contents of the canisters. Utah argued that the fuel rods could become damaged or degraded — for example, by improper loading.

NRC regulations do not require that canisters stored in an ISFSI be opened so that their contents may be inspected or repaired. In setting the requirements for inspections at ISFSIs, the Commission concluded that such an inspection

²³ *Id.*; see also SAR at 8.1-16 to -17.

²⁴ SAR at 5.1-2 to -3.

²⁵ *Id.*

²⁶ *Id.* at 5.1-3.

²⁷ *Id.*

²⁸ See *id.* at 5.1-4 to -5.

²⁹ *Id.* at 7.1-7.

³⁰ *Id.*

would be unnecessary.³¹ The Commission determined at that time that once the fuel is loaded and sealed into the canister, the canister would adequately contain any radionuclides, and the fuel cladding was no longer a structure important to safety.³² In effect, the Commission has generically determined that not inspecting the contents of the canisters, even if those contents were damaged or degraded, would have no environmental consequences. Similarly, the Commission has determined that it is unnecessary to inspect a double-seal welded canister for leaks and corrosion developing from the inside.³³ Utah did not present any factual support with its contention purporting to show that the agency's generic determinations were faulty, or that opening the canister to inspect the condition of the fuel rods would be at all beneficial.

Utah, in short, has not adequately alleged — that is, with factual or expert support³⁴ — that the ER, and later the FEIS, unreasonably failed to discuss the “consequences” of not opening the canisters to inspect the fuel. The Commission has already determined generically that there will be no significant environmental consequences, even if the fuel inside the canister were damaged.³⁵ In order to attack the factual determinations underpinning a regulation in a NEPA context, Utah would have to present specific, fact-based claims to the contrary, not mere allegations. “[O]ur contention rule is strict by design. It . . . insists upon some reasonably specific factual or legal basis for a petitioner’s allegations.”³⁶ The Board could therefore properly conclude that this allegation lacked factual and expert support.

³¹ See CLI-04-4, 59 NRC at 39 (the fuel cladding is no longer a structure or system important to safety once sealed in a canister). See also Proposed Rule: “Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High Level Radioactive Waste,” 51 Fed. Reg. 19,106 (1986). “[F]or storage of spent fuel the cladding need not be maintained if additional confinement is provided . . . the canister could act as a replacement for the cladding.” *Id.* at 19,108.

³² *Id.*

³³ 59 Fed. Reg. 65,898, 65,901.

³⁴ See 10 C.F.R. § 2.714(b).

³⁵ See Proposed Rule: “Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High Level Radioactive Waste,” 51 Fed. Reg. 19,106, 19,108 (May 27, 1986). See also NUREG-1092, “Environmental Assessment for 10 C.F.R. Part 72 ‘Licensing Requirements for the Independent Storage of Spent Fuel and High-Level Radioactive Waste’ ” (1984), at II-27 to II-30 (Rule change from one requiring maintenance of cladding to one allowing alternate design that otherwise confines fuel in case of cladding degradation “protect[s] the public and limit[s] the impact that an ISFSI constructed to these criteria would have on the site ecology to a level commensurate with existing ISFSI design requirements.” *Id.* at II-27.).

³⁶ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003) (internal quotation marks omitted).

2. *The ER Did Not Overlook Surface Contamination on Canisters*

Utah's petition also argued that the ER should discuss the consequences of PFS's inability to detect and remove contamination on the outside of a canister, which Utah again argued cannot be done without a "hot cell."

Although the steps described above are designed to prevent it, the outside of a canister could become contaminated by spent fuel pool water during the loading process. Although the nuclear plant operator loading the canister is supposed to detect and remove contamination, Utah points out that PFS has no control over whether it does so.

But, as PFS's response to contentions pointed out, PFS's ER and its safety analysis report contained calculations of doses to offsite individuals and to workers should contamination be released from the surface of the canister.³⁷ The ER referenced the results from the SAR of the entire range of postulated accidents, and concluded that the potential radiological impact from accidents, including the release of surface contamination from a canister, was negligible.

According to the SAR, even if the entire surface of the canister were contaminated to the level of $1\text{E-}4 \mu\text{Ci}/\text{cm}^2$, and some event were to release all the contamination into the atmosphere at once, the estimated dose to an individual located at the boundary of the facility would be a committed effective dose equivalent of $4.4 \text{E-}3$ millirem (mrem) and a committed dose equivalent to the lungs of $2.6 \text{E-}2$ mrem³⁸ — well below regulatory limits.³⁹ The SAR also calculated doses to a hypothetical worker. The SAR further pointed out that these calculations should be considered very conservative for the reasons: (1) processes at the facility loading the fuel should keep the canister from becoming contaminated, and any detected contamination should be removed as part of the loading process; (2) PFS will test accessible canister surfaces (the lid and side several inches below the top) for removable contamination and return any canisters showing excessive levels to their place of origin; and (3) assumptions that the entire surface area would be contaminated to the posited level and that 100% could be released are also conservative.⁴⁰

PFS concluded on the basis of its calculations that there would be no significant environmental consequences from the release of surface contamination even in a worst-case scenario. Therefore, PFS's analysis showed that there would be no significant environmental consequences to not having a hot cell in which to remove surface contamination from canisters.

³⁷ See Applicant's Answer to Petitioners' Contentions at 287 (Dec. 24, 1997), Applicant's ER § 5.1 and SAR at 8.1-16 to -18.

³⁸ SAR at 8.1-18.

³⁹ See 10 C.F.R. § 72.106.

⁴⁰ SAR at 8.1-18.

We do not have to reevaluate in our decision today whether PFS's calculations were correct. The assertion in Utah U, basis 2, that the ER did not even consider the "safety risks and costs" associated with potential releases of surface contamination from the canister is simply inaccurate. The analyses were in the ER and SAR, but Utah's contention did not address them. Therefore, the Board properly concluded that this portion of Utah Contention U, basis 2, failed to attack the application.

We should add that the FEIS also addressed the potential release of contamination from the outside of the canister.⁴¹ In its section discussing estimated doses to workers from off-normal operations and accidents, the FEIS found that PFS's analysis in its SAR was conservative and found that the radiological consequences of an accident releasing surface contamination is negligible.⁴²

The FEIS therefore did address the safety costs and risks of not having a means of decontaminating the outside of a canister — it simply found that these risks were small. If Utah disputed the FEIS's calculations concerning the potential for release of contamination from the surface of the canister, the time to raise that contention would be after the release of the FEIS, at the latest.⁴³

3. The ER Did Not Fail To Address Contamination from a Defective Canister

Finally, Utah's Contention U, read broadly, embraced potential environmental harm from defective or defectively sealed canisters.⁴⁴

a. Damage Enroute or at the Site Is Not a Credible Scenario

Although the general language of Utah U, basis 2, could embrace a situation where a canister becomes damaged after leaving the power plant that loaded it, we need not consider that situation further. A defective canister would have to either leave the nuclear power plant that way or become damaged enroute or at the

⁴¹ See FEIS at 4-44 to -53.

⁴² See *id.* at 4-51.

⁴³ See *McGuire & Catawba*, CLI-02-28, 56 NRC at 382. In this case, because Utah did not raise any flaws in the calculations in the ER, it may well have been too late to file a contention attacking essentially the same calculations in the FEIS. See *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 251 (1993), *petition for review and motion for directed certification denied*, CLI-94-2, 39 NRC 91 (1994). But we do not need to resolve that question here.

⁴⁴ As Utah put it, "casks with defective contents." Logically, the "defective contents" of casks would embrace defective canisters or defective fuel rods, but we have already considered defective fuel rods.

PFS site. But the Commission has determined generically that accidental canister breach is not a credible scenario.⁴⁵ The PFS SAR shows that canister stresses from potential handling accidents would be bounded by the canister drop accident analyzed in the HI-STORM FSAR.⁴⁶ The SAR, ER, and later, FEIS, all examined potential accidents that could occur in transit or onsite and concluded that breach of the canister was not credible.⁴⁷ Utah raised an admissible issue concerning the seismic design of the storage casks PFS plans to use at its facility, but the Board held hearings and concluded that “anticipated earthquake phenomena will not impair their capability to perform their intended functions.”⁴⁸ Utah has not put forth any previously unconsidered accident scenario that could result in a canister becoming damaged and beginning to leak. Therefore, insofar as Utah’s contention U attempted to raise the issue of contamination released from a canister or cask damaged onsite or in transit the Board could properly find that the contention lacked factual support and failed to properly challenge the application.

b. Utah Did Not Show How a Defective Canister Could Harm the Environment at PFS’s Facility

Utah also raised in its contentions the specter that a defective canister, improperly constructed or improperly sealed, could be loaded and shipped to PFS.⁴⁹

⁴⁵ See 60 Fed. Reg. 32,430, 32,438 (1995) (“Furthermore, the NRC has conducted Safety Evaluations on many different storage systems. Those studies included evaluations of the effects of corrosion, handling accidents such as cask drops and tipovers, explosions, fires, floods, earthquakes, and severe weather conditions. As documented in each of those Safety Evaluation Reports, NRC was not able to identify any design basis accident that would result in failure of a confinement boundary.”).

⁴⁶ PFS SAR § 8.1.4. See Final Safety Analysis for the Holtec International Storage and Transfer Operation Reinforced Module Cask System (HI-STORM 100 Cask System), Docket No. 72-1014, ML020670717.

⁴⁷ See, e.g., SAR § 8.2; ER at 5.1-2 to -6; FEIS at 4-49 to -53.

⁴⁸ LBP-03-8, 57 NRC 293, 544, *review denied*, CLI-03-8, 58 NRC 11 (2003).

⁴⁹ Utah Contentions at 68. In support of this, it gave an example of an instance where fuel allegedly was loaded into a “defective cask” at a nuclear plant and the mistake not discovered for 2 years. Although Utah claimed in its contentions that fuel was loaded into a defective cask at a nuclear plant, the inspection report it cites, Docket No. 72-1007/92-01, does not describe an incident where fuel was loaded into a defective cask. The cited inspection report found incidents of nonconformance with the quality assurance program at a dry storage cask manufacturing plant. The inspection “found that the implementation of [Pacific Sierra Nuclear Associates’] Quality Assurance program was satisfactory, in general.” *Id.* Thus, Utah did not support its claim that fuel was loaded into a “defective cask” at any nuclear power plant.

Utah also suggested that a cask had been improperly loaded at a power plant in 1981, when a worker had incorrectly filled a cask with water rather than helium. *Id.* Utah says that the same error is “possible with the Transtor cask because the drain and vent ports look alike.” Apart from the

(Continued)

Utah's contention encompasses the safety risks and costs of this type of incident. Utah claims that it would be unsafe to ship a defective canister back to its place of origin, as PFS proposes to do.

PFS countered Utah's contention by pointing out that it planned to ship back any cask that showed an unacceptable level of contamination on arrival at the PFS site.⁵⁰ Because of PFS's plan to return casks to their point of origin upon receipt if they show unacceptable contamination, and because no credible scenario would breach a canister assuming it arrives intact, the only possible problem would arise if a canister arrived at PFS's door in a condition of such extreme contamination that it could not be returned through interstate commerce.

PFS argues that Utah did not show there is a genuine dispute about environmental consequences of defective canisters. First, PFS maintains that the quality assurance procedures at the nuclear power plant shipping the fuel would make it highly improbable that a seriously contaminated canister or cask would arrive at PFS's door. PFS argues that Utah must present a reasonable scenario where these quality assurance measures are defeated, making it necessary for PFS to deal with a dangerously contaminated cask or canister onsite. Second, PFS argues that Utah did not support its allegation that PFS's plan to return any canister found to be contaminated would be dangerous. The shipping cask itself, according to PFS, will act as sufficient containment for the return trip.⁵¹ Moreover, PFS points out that the NRC-approved quality assurance programs at the nuclear reactors that will be generating and packing the fuel would minimize the possibility that any defective canister will arrive at PFS's door.⁵²

We agree with PFS. Utah's proposed Contention U, basis 2, did not address these quality assurance measures, or explain why they are inadequate, except to point out that PFS does not control those measures and cannot therefore offer assurances that they will be carried out. Although PFS does not control the quality assurance measures at the shippers' facilities, and should not merely assume that the shipper could not make a mistake, it is still up to Utah to frame a contention plausibly showing that mistakes at a shipper's site will cause environmental consequences at PFS's site. Other than its bald assertion that shipping such a canister back through interstate commerce "is not safe," Utah offers no factual or expert support for its attack on PFS's plan. PFS's loading, shipping, and storage procedures show that the canister is never to be without a protective transfer, shipping, or storage cask at any point in time. To show a genuine material

other reasons for the insufficiency of Utah's contention, we do not find that Utah provides sufficient factual or expert support to show a material issue by the bare statements about an alleged incident, two decades ago, involving a different facility, different plan, and different cask.

⁵⁰ See PFS Answer to Contentions at 143-45. See also PFS SAR at 7.2-11.

⁵¹ See PFS Brief at 10.

⁵² See *id.*; see also PFS Answer to Contentions at 143-45.

dispute, Utah's contention would have to give the Board reason to believe that contamination from a defective canister could find its way outside of the cask.⁵³

While we do not expect a petitioner to prove its contention at the pleading stage, we do require that it show a genuine dispute warranting a hearing. Here, the bases of Utah's contention did no more than point out that *if* somehow there was a need to open a canister or remove its contents, PFS could not do so at its storage facility. This was not enough to suggest that there were undiscussed NEPA "consequences" to the storage facility; nor was it enough to raise a litigable contention in the proceedings below. We find that the Board could properly conclude that the contention lacked factual support and expert opinion to back it, and failed to show that there existed a genuine issue of material fact. Utah failed to allege, with expert and technical backing, how a canister could become so contaminated that it would be harmful to workers at the PFS site or be too dangerous to ship through interstate commerce, given the shippers' quality assurance procedures.

We also find that the FEIS took a sufficiently hard look at whether there could be any adverse environmental consequences to PFS's inability to repair a defective or defectively sealed canister. In the FEIS, the Staff eventually agreed that the HI-STAR 100 transportation cask would prevent package leaks beyond allowable levels during transportation, and that PFS's plan offers assurance that there will be no significant environmental consequences.⁵⁴ Because of the various precautions taken to ensure that no defective or defectively sealed canister will be shipped to PFS, it is highly unlikely that any such canister would ever arrive at the PFS site. It is even less likely that any canister in a condition too dangerous to be shipped back sealed in a shipping cask would ever arrive at the PFS facility. Further litigation on the point will not add significantly to what we know already. NEPA is, after all, governed by a "rule of reason," which frees the agency from pursuing unnecessary or fruitless inquiries.⁵⁵

4. Matters Raised for the First Time on Appeal

Utah raised a number of factors not raised before the Board when Utah U, basis 2, was presented. Among them are the supposed difficulty in fitting lids on

⁵³ Additionally, Utah's assertion that shipping the canister back inside the approved transportation casks is not safe can be seen as an impermissible attack on NRC regulations and rulemaking-related generic determinations that the transportation cask is sufficient to prevent the leakage of any radioactive material. See Final Rule: "Packaging of Radioactive Material for Transport," 31 Fed. Reg. 9,941 (July 22, 1966).

⁵⁴ See FEIS at 2-19, 2-22.

⁵⁵ See *Department of Transportation v. Public Citizen*, 124 S. Ct. 2204 (June 7, 2004), 2004 WL 1237361.

the HI-STORM cask and “problems with the performance of certain Certificate of Compliance (CoC) holders . . . in packaging and transporting radioactive material.”⁵⁶ Ordinarily, the Commission will not consider on appeal either new arguments or new evidence supporting the contention, which the Board never had the opportunity to consider.⁵⁷ None of Utah’s new arguments are sufficiently compelling to warrant breaking with that ordinary practice.

C. Contentions Utah CC and SS (Cost-Benefit Analysis)

In Contentions CC and SS, Utah challenged cost-benefit analyses performed on this project. We accepted review of the admissibility of CC and SS “[b]ecause NEPA cost-benefit questions have proved troublesome in the past, as for example in the *Claiborne* case,⁵⁸ because the record would benefit from a written decision on these issues, and because the context of the question here is unusual.”⁵⁹

1. Utah CC

Utah CC challenged the cost-benefit analysis in the ER as failing to “balance the costs and benefits of the project, or to quantify factors that are amenable to quantification,” including the costs of various alleged adverse environmental impacts, the benefits of “alternatives that could reduce or mitigate accidents, environmental contamination, and decommissioning costs,” and failing to quantify costs related to decontamination and decommissioning. Among the costs Utah said could be quantified were the costs of visual impacts, in terms of reduced tourist dollars; the costs of accidents, in terms of health care costs to individuals; and the costs of emergency response.

The Board found Utah CC inadmissible for failure to establish a genuine dispute, failure to provide adequate factual support, and failure to properly challenge the PFS application.⁶⁰ We agree with the Board that Utah did not back its charge that various costs were capable of quantification with facts and expert opinion showing how to do so. This was a sufficient basis for the Board to conclude that the state had not shown with specificity that a material dispute existed.

⁵⁶ Utah Br. at 7 n.8 (citing 69 Fed. Reg. at 385-86 (Jan. 5, 2004)).

⁵⁷ *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-00-8, 51 NRC 227, 243 (2000); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 260 & n.19 (1996).

⁵⁸ See CLI-98-3, 47 NRC at 87-100. See also, e.g., *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 48-51 (2001).

⁵⁹ CLI-04-4, 59 NRC at 43.

⁶⁰ LBP-98-7, 47 NRC at 204.

At any rate, Utah has not reiterated its arguments with respect to the original bases in Utah CC, and instead has focused its arguments on factors relating to Utah SS.

2. *Utah SS*

Utah offered late-filed Contention SS in response to the FEIS. Contention Utah SS claimed that the FEIS was flawed in three respects: it wrongly assumed that fuel could be stored on the site beyond the 20-year period of the initial license, it found an unrealistic “break-even” point (the point at which the storage costs saved would equal the cost of building and operating the project), and it assumed an unrealistic start-of-operations date. The Board held a 3-hour hearing to consider the parties’ arguments, and ultimately rejected SS in a ruling from the bench.⁶¹ The Board held that the cost-benefit analysis in the FEIS contained enough information to allow the public to draw its own conclusions about the benefits of the project, and that, therefore, there was no relief available to Utah.

a. Assumptions in the FEIS’s Cost-Benefit Analysis

The cost-benefit analysis in Chapter 8 of the FEIS considered benefits and costs from “a societal prospective, as opposed to the perspective of any particular individual or company.”⁶² In other words, the cost-benefit analysis was not an examination of the potential profitability of PFS’s operation. The profitability of the project from PFS’s standpoint is relevant to this licensing proceeding only insofar as it relates to PFS’s financial ability to take care of the facility. (Financial assurance is considered separately in this proceeding.⁶³) Rather than PFS’s profitability, the FEIS’s cost-benefit analysis looked primarily at storage costs saved by PFS’s customers as the principal societal economic benefit. The cost-benefit analysis of Chapter 8 examined economic costs and benefits separately from environmental costs and benefits.

The tangible economic benefits would be realized by the reactors that would avoid at-reactor storage costs. The FEIS showed that the costs avoided varied according to whether the reactors using the PFS facility were operational or shut down, and whether they would store spent fuel in pools or dry casks.⁶⁴

⁶¹ Tr. 9210-17 (May 17, 2002).

⁶² FEIS at 8-1.

⁶³ The Board found that PFS had provided reasonable assurance that it can finance operations and decommissioning in four as-yet unpublished decisions, which are currently under Commission review.

⁶⁴ FEIS at 8-9 through -11.

The FEIS assumed that the PFS facility would receive fuel for 20 years.⁶⁵ A 20-year receipt period was deemed a more conservative assumption than a 40-year receipt period (possible if PFS renews its 20-year license) because the costs per year of operation would be higher.⁶⁶

In its analysis,⁶⁷ the NRC Staff considered a range of different outcomes using three variables: the total throughput⁶⁸ of fuel, the opening date for a permanent repository, and the discount rate.⁶⁹ Reasoning that financial assurance-related license conditions would preclude PFS from operating unless it had contracts for a certain minimum throughput, the Staff calculated net benefits using a “medium throughput” figure and a “maximum throughput” figure.⁷⁰ Assuming PFS would open for business in 2003, the Staff calculated net benefits based on possible dates for the availability of a permanent repository. The Staff selected 2010, which is the earliest possible repository opening date, and 2015, which Staff considered a realistic date.⁷¹ It then took the net benefit estimates and applied a low-end discount rate of 3.8% and high-end discount rate of 7%.⁷²

The Staff determined that throughput was the most critical factor in determining whether the facility would have a net positive benefit:

From an economic prospective, the net benefit of the proposed PFSF is directly proportional to the quantity of SNF shipped to the facility. The scenarios evaluated by the staff indicate the potential for a net positive benefit past the break-even throughput volume of SNF. As the SNF throughput decreases, the economic benefit decreases. The net economic benefits of the proposed PFSF are sensitive to several factors that are inherently uncertain. An analysis of the sensitivity of the benefits to critical cost assumptions indicates the possibility of considerable variation in outcome. Notwithstanding the sensitivity of the benefits to these factors, cases in which the proposed PFSF has a capacity of 10,000 [metric tons of uranium (MTU)] and a throughput of at least 15,500 MTU have a greater likelihood of positive net benefits.⁷³

⁶⁵ *Id.* at 8-1.

⁶⁶ *Id.*

⁶⁷ The Staff’s analysis was based largely on the information submitted by PFS in its ER, which was then supplemented in response to Staff requests for additional information. *See* FEIS at 8-1 to -2.

⁶⁸ “Throughput” is the total amount of fuel that is ever received for storage at the PFS site, and throughput therefore could exceed the amount of fuel that can be stored at one time.

⁶⁹ *Id.* at 8-11.

⁷⁰ *Id.* at 8-2.

⁷¹ *Id.*

⁷² *Id.* at 8-4 through -9.

⁷³ *Id.* at 8-11.

The environmental cost-benefit analysis noted that there would be some “socioeconomic” benefits to the surrounding community due to factors such as tax payments and host payments to Tooele County, and that the negative impacts on the physical environment, including radiation doses to the public, are expected to be slight. There was no attempt to assign a monetary cost to the effects on the physical environment.

b. The 40-year Storage Question

Utah argues that the cost-benefit analysis in the FEIS is biased in favor of the project because it assumes a 40-year storage period for fuel when, in fact, it should only assume storage during the 20-year term of the license for which PFS is applying.

The problem is illustrated by the maximum throughput scenario. An NRC license expires, if not renewed, at the end of its term, but the license is not terminated until the decommissioning is complete. PFS’s license would allow it to receive fuel until the expiration of its license and it would not be required to remove fuel prior to the expiration of its license.⁷⁴ According to PFS, however, it can only handle a certain number of casks per year. At that handling rate, it would take the entire license term of 20 years simply to fill the facility to the maximum allowable capacity.⁷⁵ If PFS’s license were not renewed, and assuming that PFS did not increase its handling capacity, it would take another 20 years to remove the fuel from the site. In practical effect, if PFS received the maximum throughput, some fuel could be stored onsite for up to 40 years even if PFS’s license were not renewed.⁷⁶ The “medium throughput,” estimated at 27,000 MTU, could also result in fuel remaining onsite beyond the license term.⁷⁷

Utah argued that PFS is required to reduce its inventory onsite such that all the fuel would be gone within a “reasonable decommissioning time” of 2 years. Utah’s expert, Michael F. Sheehan, Ph.D., based the 2-year decommissioning period on the response to a public comment in the FEIS, which stated that “under most circumstances,” decommissioning is completed within 24 months of NRC

⁷⁴ The FEIS points this out. See FEIS at G-77.

⁷⁵ Because PFS would not be ready to start receiving fuel the day its license begins, at the stated handling capacity, it could not receive 40,000 MTU in 20 years. The FEIS recognizes this and so uses 38,000 as the estimated maximum throughput.

⁷⁶ The FEIS noted that “the storage (**but not receipt**) of SNF at the proposed PFSF after the 20-year license term is a possibility until decommissioning is completed.” FEIS at 8-1 (emphasis in original).

⁷⁷ See *id.* at 8-7.

approval of a decommissioning plan.’’⁷⁸ Such a limit to the decommissioning period would make the maximum and medium estimated throughputs impossible, because PFS could not accept those amounts of fuel before it had to start removing fuel again. This, in turn, would radically affect the cost-benefit analysis by reducing the possible net benefits considerably, according to Utah. (We note that the estimated ‘‘break-even’’ throughputs, however, could be theoretically both received and removed within a 20-year license term plus a 2-year decommissioning time.⁷⁹)

c. Cost-Benefit Analyses Under NEPA

Several factors contributed to the Board’s ultimate decision that Utah was not entitled to relief under Contention Utah SS.⁸⁰ First, the Board stressed that the environmental harms against which NRC would weigh the benefits are slight.⁸¹ The FEIS concluded that the principal environmental impact is that the facility occupies land that could be used for other purposes.⁸² The Board pointed out that this impact will be to privately owned land, and the owners have agreed to it.⁸³ In addition, the Board recognized that, for the PFS facility’s proponents, the ‘‘real benefit of the project’’ is to act as an ‘‘insurance policy’’ in case the opening of the permanent, geologic repository suffers additional delays.⁸⁴ Therefore, the Board reasoned, the economic analysis in the FEIS, which presumes the permanent repository will open by 2015 at the latest, would not be the ‘‘central’’ consideration in the ultimate decision to approve or disapprove the project.⁸⁵

The Board acknowledged that the cost-benefit analysis in the FEIS would have to be reasonably accurate to comply with NEPA’s goal of informing the public. The Board concluded that given the above considerations, the FEIS was ‘‘accurate

⁷⁸ FEIS, Appendix G (Public Comments and Responses), at G-77. Although Utah did not bring it to our attention, our regulations in 10 C.F.R. § 72.54(j) and (k) provide that decommissioning must be completed within 24 months after the Commission approves a decommissioning plan, unless the Commission determines that another schedule is appropriate under the circumstances. Technical infeasibility is grounds for an extension. *See* 10 C.F.R. § 72.54(k)(1).

⁷⁹ *See id.* at 8-10. The FEIS estimated that if a permanent geological repository opened in 2010, the break-even throughput would be 15,500 MTU. If the geological repository opened in 2015, the break-even throughput would be 18,000 MTU.

⁸⁰ Tr. at 9214.

⁸¹ *Id.*

⁸² FEIS at 8-11 through -12.

⁸³ Tr. at 9214.

⁸⁴ *Id.*

⁸⁵ *Id.*

enough to inform the public . . . [and] let the public draw its own conclusions’’ about the costs and benefits of the project.⁸⁶

On review, we ask not whether every assumption contained in the FEIS was the best or whether it will turn out true, but ‘‘whether the economic assumptions of the FEIS were so distorted as to impair fair consideration of those environmental effects.’’⁸⁷ Certainly, in some situations, the use of misleading economic assumptions in an EIS could thwart NEPA’s twin goals to inform the agency decisionmaker and the public-at-large. Overstated benefits could persuade an agency to approve a project despite significant adverse environmental impacts, while the EIS would also misinform the public.⁸⁸

At the heart of this matter is the extent to which NEPA, an environmental statute, asks us to perform economic analyses. ‘‘An agency’s primary duty under NEPA is to take a hard look at environmental impacts. . . . Determination of economic benefits and costs that are tangential to environmental consequences are within a wide area of agency discretion.’’⁸⁹ As PFS and the NRC Staff have emphasized, the issues raised by the State in Utah SS have nothing to do with the project’s environmental effects. The Board observed in ruling on Utah SS that a cost-benefit analysis might not even be required for this project because the environmental harms are slight.⁹⁰ That is, NEPA requires that the environmental harms be weighed against the overall benefits of a project, but where the environmental consequences are relatively insignificant, the benefits do not have to be great to justify allowing the project to go forward. Quibbling over the details of an economic analysis in this situation is, in the Board’s words, ‘‘standing NEPA on its head’’ by asking that the license be rejected not due to environmental costs, but because the economic benefits are not as great as estimated in the FEIS.⁹¹

(1) COST-BENEFIT ANALYSIS WILL NOT SKEW AGENCY DECISION

We agree with the Board that there is no danger here that the NRC will be persuaded by bad information to approve a project that it otherwise would not. The Board was correct that the decision to license this project does not turn on PFS showing great economic benefits to society. The FEIS showed that this

⁸⁶ *Id.*

⁸⁷ *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998), citing *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 466 (4th Cir. 1996), and *South Louisiana Environmental Council, Inc. v. Sand*, 629 F.2d 1005, 1011 (5th Cir. 1980).

⁸⁸ See, e.g., *Hughes River Watershed Conservancy*, 81 F.3d at 446.

⁸⁹ *Claiborne*, CLI-98-3, 47 NRC at 88-89 (internal quotations and citation omitted).

⁹⁰ Tr. at 9213-14.

⁹¹ May 10, 2002 hearing, Tr. at 36.

project will have minimal environmental impacts. It does not take great economic “benefits” to outweigh such minimal impacts. The Board aptly observed that the cost-benefit analysis would not be “central” to the ultimate decision. In comparing the alternatives, the FEIS concluded that a variety of benefits outweigh the minimal costs:

overall benefits of the proposed PSFS outweigh the disadvantages and costs based on a consideration of:

- the need for an alternative to at-reactor SNF storage that provides a consolidated, and for some reactor licensees, economical storage capacity for SNF from U.S. power generating reactors;
- the minimal radiological impacts and risks from transporting, transferring, and storing the proposed quantities of SNF canisters and casks;
- the economic benefits that would accrue to the Skull Valley Band during the life of the project; and
- the absence of significant conflicts with existing resource management plans or land use plans within Skull Valley.⁹²

This statement in the FEIS belies any suggestion that the NRC Staff looked solely at the economic benefits — that is, the industry’s storage costs saved — in determining whether this project should be approved.

The FEIS appropriately gave PFS’s (and its members’) goal of providing an offsite storage alternative great weight. In considering alternatives under NEPA, an agency must “take into account the needs and goals of the parties involved in the application.”⁹³ We see no reason why this consideration would not include the unquantified value of having an “insurance policy” against the late opening of a permanent geological repository. We agree with the Board that there is no reason to assume that the cost-benefit analysis in the FEIS would improperly influence this agency to approve a project that would otherwise be rejected due to environmental concerns.

(2) THE EIS DID NOT MISINFORM THE PUBLIC

The second function of the NEPA cost-benefit analysis is to ensure that the FEIS does not mislead the public as to the economic benefits of the proposed

⁹² FEIS at 9-16.

⁹³ *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991), citing *Louisiana Wildlife Federation v. York*, 751 F.2d 1044, 1048 (5th Cir. 1985) (“Indeed, it would be bizarre if the Corps were to ignore the purpose for which the applicant seeks a permit and substitute a purpose it deems more suitable”).

storage facility. Here the FEIS — combined with our discussion in today’s decision — painted a reasonably accurate picture of the economic aspects of the proposed PFS project. Below, we deal briefly with the concerns Utah raises.

(a) *Waste Confidence Regulations Do Not Govern Analysis*

Utah relies on a regulatory provision found in 10 C.F.R. § 51.97(a) stating that “[u]nless otherwise determined by the Commission, and in accordance with the generic determination in § 51.23(a) and the provisions of § 51.23(b), [an FEIS for an ISFSI] . . . will address environmental impacts of spent fuel storage only for the term of the license . . . applied for.” The cross-referenced rule — section 51.23 — reflects the Commission’s so-called “Waste Confidence” determination. It provides:

(a) The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations. Further the Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century. . . .’

(b) Accordingly, as provided in . . . § 51.97(a), and within the scope of the generic determination in paragraph (a) of this section, *no discussion of any environmental impact of spent fuel storage in reactor facility storage pools or independent spent fuel storage installations (ISFSI) for the period following the term of the . . . initial ISFSI license or amendment for which application is made, is required in any environmental report . . .*

(c) This section does not alter any environmental requirements to consider the environmental impacts of spent fuel storage during the term of . . . a license for an ISFSI . . .⁹⁴

This provision, according to Utah, restricts the EIS from considering any environmental impact of the facility beyond the initial 20-year license term. Utah maintains that NRC may not, therefore, consider any economic benefits that would accrue beyond the 20-year license term.

PFS, on the other hand, argues that there is a difference between an “environmental impact” and a purely economic benefit that is discussed in an EIS. We agree. On the one hand, NEPA compels government agencies to examine a wide range of effects on the human environment, including some (for example, socioeconomic effects) that go beyond effects on the physical environment. In

⁹⁴ 10 C.F.R. § 51.23 (emphasis added).

addition, as we acknowledged in *Claiborne*, NEPA expects that the environmental costs of a project be weighed against its benefits.⁹⁵ But the principle that economic benefits must be weighed against environmental costs simply does not transform those economic benefits into environmental impacts. Thus our Waste Confidence Rule's restrictions on considering "environmental impacts" do not expressly address how we evaluate a project's potential economic benefits.

Nevertheless, Utah is right that it would be misleading to weigh 20 years' environmental impact against 40 years' economic benefit. But we think our Waste Confidence provisions allow us some flexibility, where appropriate, to go beyond a 20-year environmental analysis. In stating "[u]nless otherwise determined by the Commission," section 51.97(a) clearly allows the Commission to determine that in a particular situation the FEIS should address environmental impacts of fuel storage beyond the term of the license sought. Similarly, section 51.23(b) states that "no discussion of any environmental impact . . . is *required*," but it does not expressly prohibit such a discussion. Due to the size of the facility for which PFS seeks a license, and the practical reality of filling up and emptying an ISFSI, this is a unique situation where both the impacts on the physical environment and the potential economic benefits should be considered for the entire period that the fuel could be onsite — that is, longer than the 20-year license term.

This interpretation is consonant with the purpose of our regulations. The waste confidence provisions were designed to limit the scope of the environmental inquiry to exclude looking at long-term effects as if there were no prospect for permanent disposal of waste. Because the Commission determined generically that waste can be stored safely for a period after a reactor shuts down, it promulgated regulations saying that there is no need to do a fresh evaluation of those post-shutdown environmental effects with every new EIS. The regulations were not designed to prevent the NRC from considering the very benefits for which a facility license is sought.

We return to this point below (in subsection (c)) where we explain that a 40-year cost-benefit analysis does not require a change in the FEIS's conclusion because of the nature of the environmental impacts in question. First, though, we address Utah's position that the waste confidence regulations limit the potential benefits that could flow from the proposed project.

(b) There Is No Requirement That Applicant Remove Fuel Within 22 Years

Although we agree with Utah that it would be wrong to consider 20 years' adverse impact to the environment against 40 years' economic benefit, Utah carries its argument a step too far. Utah argues that PFS must start reducing its inventory early so that all fuel would be removed from the facility within 20

⁹⁵ CLI-98-3, 47 NRC at 88.

years plus 2 years (as a “reasonable” decommissioning time).⁹⁶ This, says Utah, substantially reduces the project’s benefit.

Utah is arguing one of two things. We could understand Utah’s argument to say that 10 C.F.R. §§ 51.97(a) and 51.23(a), the NEPA-related “waste confidence” regulations discussed above, include a substantive legal requirement that PFS stop accepting new fuel and start reducing its inventory long before its license has expired. But neither section 51.97(a) nor section 51.23(a) contains anything to suggest that they affect the operation of the licensed facility, nor has Utah cited any other regulation suggesting that PFS would have to stop accepting fuel before its license expires. On the other hand, we could take Utah’s argument to mean that the regulations require us to *assume for the sake of a cost-benefit analysis* that PFS will stop accepting fuel prematurely even though there is no substantive legal requirement that it do so. But rather than enhancing the FEIS’s accuracy, that assumption would yield an estimate of net benefits lower than what the PFS project may in fact realize if it fills its facility to capacity within the initial 20-year licensing period.

Most of Utah’s brief on Utah SS, and on the cost-benefit analysis in its entirety, is founded on the premise that the throughputs have to be limited to what can be moved on and off the site within 22 years. We do not agree that the 20-year initial license term means that PFS must decommission the site within 22 years. Although our regulations provide that normally, decommissioning should be completed within 24 months after the Commission approves the decommissioning plan (*not* within 24 months after the expiration of the license), this requirement is waived where appropriate.⁹⁷ And there is no bar against PFS seeking a license renewal. The expert opinion on which Utah based its contention also presumed that PFS is required to remove all fuel from the site within 22 years. Because we reject that fundamental premise, most of Utah’s claim that the FEIS was skewed falls away.

We conclude that the net economic benefits analysis in the FEIS was not flawed by the assumption that the Licensee could continue to accept fuel for the full term of its license and up to the amount allowed in its license.

(c) No Need To Reevaluate Costs and Benefits in Light of the 40-Year Storage Assumption

The information that PFS spent fuel might continue to be onsite for 40 years should not surprise anyone following this matter, because PFS has always said

⁹⁶ Declaration of Michael F. Sheehan, Ph.D., in Support of State of Utah’s Request for Admission of Late-Filed Contention Utah SS, at 4-5.

⁹⁷ See 10 C.F.R. § 72.54(j), (k). Under certain circumstances, the Commission may also grant a request to delay or postpone initiation of the decommissioning process or approve an alternate schedule for submittal of the final decommissioning plan. See 10 C.F.R. § 72.52(f)(1)-(2).

that it anticipated asking for a license renewal. Our regulations allow for license renewal. The FEIS made it clear that PFS could seek to renew its license for a second term.⁹⁸ Further, the FEIS's assumption that the license would be renewed if sufficient permanent storage were not yet available was reasonable.

The principal environmental impacts of the facility, after construction, are its visibility and the fact that it occupies land. It is evident that should PFS renew its license, these impacts will continue until the fuel is removed. There is no reason to believe that anyone has been misled on that point. Similarly, there is no reason to believe that the NRC Staff failed to realize that if some fuel remains on the site for 40 years, the corresponding environmental impacts would also continue for 40 years. Those impacts, as we have stressed, are expected to be minimal. Therefore, the FEIS adequately described the type of environmental impacts that will flow from this license.

Insofar as the FEIS did not make it clear that impacts and benefits may last up to 40 years in the event that PFS takes in the "maximum throughput," or if PFS renews its license, the record of this adjudication (including the Board's oral decision and our decision today) makes that point clear. Commission decisions relating to a licensing proceeding supplement the FEIS.⁹⁹ Given minimal environmental impacts at stake, we see no reason to alter the FEIS's bottom-line conclusions.

In sum, we agree with the Board that the record of this case is sufficient to inform the public about the supposed benefits of the project and the 20-year/40-year issue, and we reject Utah's argument that the FEIS needs to be amended and recirculated.

(d) Start-of-Operations Date

Utah also charges that the cost-benefit analysis is flawed by a false start-of-operations assumption. The FEIS, released in December 2001, assumed the PFSF could start operations in mid-2003. (This reflects a recalculation from the DEIS's assumption that the PFSF would open for business in 2002.) In SS, Utah argued that if you assume that PFS could get a license by September 2002, it would take 18 months to construct the facility, and then it would take an additional 4 months to (in the words of Utah's expert) "get commercial." This, according to Utah, meant PFS could not begin actually receiving fuel until the summer of 2004.

In support of its contention, Utah provided its own expert's calculations of PFS "throughputs," assuming a September 2004 start of operations and a 2010 and a 2015 opening date for a permanent geological repository. But the calculations

⁹⁸ FEIS at xxxii; *see also* 10 C.F.R. § 72.42(a).

⁹⁹ *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 53 (2001); *Claiborne*, CLI-98-3, 47 NRC at 89.

Utah provided were all flawed by Utah's false underlying premise that PFS must remove fuel within 22 years of the date of its license.¹⁰⁰ Take away that premise, and Utah's expert's tables do not tell us anything about what effect a different start-of-operations date would have on the cost-benefit analysis.

Without expert calculations to inform our decision, we are left with an argument that if a delay in startup shortens the period of time during which PFS has a virtual monopoly on away-from-reactor storage, then the benefits of the project must be reduced by some uncertain amount. The argument seems logical at first blush.

On the other hand, Utah's argument assumes that the opening of a permanent repository (the ending of PFS's monopoly) is a certainty by 2015 at the latest. Utah would have us disregard the so-called "insurance policy" benefit of the project, which is to protect reactor owners in case the repository cannot open by 2015. But like the PFS start-of-operations assumption, the opening dates posited for a geological repository in the FEIS were also only estimates.

Utah would have us send the cost-benefit analysis back to the NRC Staff for recalculation, but that would also require the Staff to reevaluate the estimates for the opening of a geologic repository. It is not evident that there is any point to doing so. First of all, we have no reason to believe that the economic benefits of the project would be reduced below the break-even point even if one assumes that the geologic repository opens in 2010 or 2015. Second, any recalculation would still be subject to great uncertainty due to the variability and inherent unpredictability of a number of key factors. Like the analysis in the FEIS, that analysis would provide but one picture of what the financial costs and benefit of the project might be, given certain scenarios and assumptions. Given the innumerable ways the various assumptions can be adjusted and combined, we do not find that a new analysis would contribute meaningfully to the public's knowledge or to the decision to license this facility.

The NRC Staff, as it must, based its analysis on assumptions that were reasonable at the time.¹⁰¹ The FEIS was clear that it was based on various factors that would affect the outcome one way or the other. The FEIS clearly stated that its predicted dates were only estimates. The Staff cannot be expected to constantly rework their analyses as the adjudication over the accuracy of the FEIS progresses. The FEIS was not misleading to the public because any member of the public could look at it and see that the Applicant has not been able to start operations by 2004, as originally hoped. But a short delay in PFS's opening date does not mean that the benefits or costs of the project will change dramatically.

¹⁰⁰ See State of Utah's Request for Admission of Late-Filed Contention Utah SS, Exhibit 1 (Feb. 11, 2002). The tables show the amount of fuel PFS would have left onsite after 22 years if it accepted either the "medium throughput" of 27,000 MTU or the "maximum throughput" of 38,000 MTU, assuming it could start shipping fuel off the site and to a permanent repository in either 2010 or 2015.

¹⁰¹ *Inland Empire Public Lands Council v. U.S. Forest Service*, 88 F.3d 754, 761 (9th Cir. 1996).

(e) *Congressional Preference Is Not a Cost-Benefit Analysis Factor*

Utah claimed at oral argument before the Board and on review that a congressional preference for at-reactor storage, as expressed in the Nuclear Waste Policy Act, should work its way into the cost-benefit analysis. But this factor was not listed as a basis in Utah SS or CC, and we did not accept review of it. In sum, the issue is not before us.

Nevertheless, it is not clear how this congressional preference, if it exists,¹⁰² would affect the cost-benefit analysis even if we were to include it. Congress's alleged preference is neither an economic, nor an environmental, cost or benefit of the proposed licensing action. Indeed, because Congress must weigh competing interests of economic stimulus, public safety, and environmental protection, its preferences are not necessarily the most environmentally benign, nor are they always the most economically beneficial.

At any rate, it is far too late in this adjudication to confront a new argument that the FEIS's cost-benefit analysis should have factored in Congress's supposed preference that spent nuclear fuel be stored at the site of the generating reactor.

(f) *Need for Dry Storage*

We reject for similar reasons Utah's argument that the cost-benefit analysis should include new information that dry storage is not urgently needed. This information, according to Utah, belies a comment in the FEIS that some reactors might have to shut down for lack of fuel storage space. In support of this argument, the state offers statements from an NRC employee that more fuel can be stored in pools than previously believed, and comments from an industry spokesman that dry cask storage may not even be necessary.¹⁰³ We reject this argument for two reasons. First, it is impermissibly new. We do not consider fresh arguments on appeal when there was opportunity to make them earlier; it is far too late in this litigation to explore the accuracy and relevance of the Staff and industry statements.¹⁰⁴ Second, the threat that a reactor might have to shut down for lack of storage space was given little or no weight in the FEIS. It is mentioned in a single sentence in a section in the FEIS entitled "Other Societal Benefits and Costs." This is not enough to warrant a reappraisal of the project's net benefits.

¹⁰²This is doubtful. See *Bullcreek v. NRC*, 359 F.3d 536 (D.C. Cir. 2004).

¹⁰³Utah Br. at 16.

¹⁰⁴See *Hydro Resources, Inc.*, CLI-00-8, 51 NRC at 243; *Yankee Nuclear*, CLI-96-7, 43 NRC at 260.

II. CONCLUSION

Having considered Utah's arguments, we conclude that the FEIS was not deficient in failing to discuss the claimed impacts, and that the Board did not err in failing to admit for hearing (1) Utah U, basis 2; (2) Utah Contention CC; or (3) Utah Contention SS. We therefore affirm the Board's rulings relating to these contentions.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
the 17th day of August 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 50-346-CO

**FIRSTENERGY NUCLEAR OPERATING
COMPANY
(Davis-Besse Nuclear Power Station,
Unit 1)**

August 17, 2004

The Commission affirms the Licensing Board's denial of an intervention petition that challenged a confirmatory order modifying the operating license of FirstEnergy Nuclear Operating Company for the Davis-Besse Nuclear Power Station, Unit 1.

ENFORCEMENT ACTIONS: SCOPE OF PUBLIC PARTICIPATION

RULES OF PRACTICE: INTERVENTION

To obtain a hearing, a petitioner must demonstrate standing and proffer at least one admissible contention. *See* 10 C.F.R. § 2.309(d), (f). For an enforcement order, however, the threshold question, intertwined with both standing and contention admissibility issues, is whether the hearing request is within the scope of the proceeding outlined in the enforcement order itself, i.e., whether the confirmatory order should be sustained.

**ENFORCEMENT ACTIONS: SCOPE OF PUBLIC PARTICIPATION;
AGENCY DISCRETION**

The Commission has the authority to define the scope of the hearing, including narrowly limiting the proceeding. *See Bellotti v. NRC*, 725 F.2d 1380, 1381 (D.C.

Cir. 1983), *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56 (2004); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441-42 (1980).

RULES OF PRACTICE: STANDING TO INTERVENE

Failure to establish injury-in-fact defeats standing of the petitioners. *See Maine Yankee*, CLI-04-5, 59 NRC at 56 n.14.

RULES OF PRACTICE: APPELLATE REVIEW

The appellant bears the responsibility of clearly identifying the asserted errors in the decision on appeal. *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994), *aff'd*, *Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995).

ENFORCEMENT ACTIONS: SCOPE OF PUBLIC PARTICIPATION

Injury alleged as a result of failure to grant more extensive relief is not cognizable in a proceeding on a confirmatory order. *See Bellotti*, 725 F.2d at 1383.

MEMORANDUM AND ORDER

This proceeding arises from a challenge to a confirmatory order modifying the operating license of FirstEnergy Nuclear Operating Company (FENOC) for the Davis-Besse Nuclear Power Station, Unit 1. The Licensing Board denied an intervention petition, and the Petitioners appealed that decision. We affirm the Board's order.

I. BACKGROUND

On March 6, 2002, FENOC discovered that small cracks in a nozzle that penetrates the reactor pressure vessel at the Davis-Besse Nuclear Power Station, Unit 1, had permitted reactor coolant to leak onto the reactor pressure vessel head. Boric acid in the coolant, undetected over time, had created a cavity in the reactor pressure vessel head. The Staff determined the cause of the problem

to be “FENOC’s failure to properly implement its boric acid corrosion control and corrective action programs.”¹ The NRC attached high safety significance to FENOC’s performance deficiency.²

By Confirmatory Action Letter on March 13, 2002,³ the NRC confirmed FENOC’s agreement to seek NRC approval before restarting Davis-Besse.⁴ To this end, FENOC developed a return-to-service plan and, later, an operational improvement plan. Notwithstanding FENOC’s actions and plans, the NRC Staff considered additional measures necessary to improve FENOC’s ability to self-assess plant problems. Thus, on March 8, 2004, the Staff issued the Confirmatory Order at issue in this proceeding and approved the restart of Davis-Besse.⁵ The agreed order modifies the operating license for Davis-Besse to require two additional actions: (1) FENOC must obtain comprehensive independent assessments of Davis-Besse’s operational performance, safety culture, corrective action program implementation, and engineering program effectiveness; and (2) FENOC must conduct a visual examination of the reactor pressure vessel upper head during the next midcycle outage and report the results to the Staff before restart from the outage.⁶

¹ Confirmatory Order Modifying License (Effective Immediately), 69 Fed. Reg. 12,357 (Mar. 16, 2004) (“Confirmatory Order”).

² *Id.*

³ See CAL No. 3-02-01 (Mar. 13, 2002).

⁴ See Letter from J.E. Dyer (NRC) to Howard Bergendahl (FENOC), “NRC Oversight Efforts Regarding the Davis-Besse Nuclear Power Station” (Apr. 29, 2002).

⁵ See 69 Fed. Reg. at 12,357.

⁶ The Confirmatory Order specifically provided:

1. FENOC shall contract with independent organizations to conduct comprehensive assessments of the Davis-Besse operations performance, organizational safety culture, including safety conscious work environment, the corrective action program implementation, and the engineering program effectiveness. . . . These outside independent assessments at Davis-Besse shall be completed before the end of the 4th calendar quarter of 2004 and annually thereafter for 5 years. Within 45 days of completion of the assessments, the Licensee shall submit . . . all assessment results and any action plans necessary to address issues raised by the assessment results.
2. FENOC shall conduct a visual examination of the reactor pressure vessel upper head bare metal surface, including the head-to-penetration interfaces; the reactor pressure vessel lower head bare metal surface, including the head-to-penetration interfaces; and the control rod drive mechanism flanges . . . during the Cycle 14 midcycle outage. The results and evaluation of the inspections will be reported by letter to the Regional Administrator, NRC Region III, prior to restart from the midcycle outage, and any evidence of reactor coolant leakage found during the inspections will be reported by telephone within 24 hours of discovery . . .

69 Fed. Reg. at 12,359.

Pursuant to 10 C.F.R. § 2.202,⁷ the Commission invited any person adversely affected by the Confirmatory Order to request a hearing within 20 days. Michael Keegan, Joanne DiRando, Paul Gunter of the Nuclear Information and Resource Service, and Donna Lueke (collectively, “Petitioners”) requested a hearing. The Licensing Board denied the petition,⁸ and Petitioners appealed. FENOC and the NRC Staff opposed both Petitioners’ hearing request and their appeal. For the reasons stated in LBP-04-11, we affirm the Board’s decision.

II. DISCUSSION

The Confirmatory Order provided that persons adversely affected by it could request a hearing within 20 days.⁹ Significantly, the Confirmatory Order set the boundaries for the hearing: “If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.”¹⁰ The order dealt with improving FENOC’s ability to recognize and evaluate its own problems. Nevertheless, the Petitioners’ hearing request asked the NRC to hold an evidentiary hearing on fire-protection issues; to suspend FENOC’s operating license and halt the restart of Davis-Besse because of the NRC’s alleged “regulatory indifference”; and to require FENOC to satisfy all licensing criteria before allowing commercial generation of electricity at Davis-Besse. In essence, Petitioners sought a broad hearing in which to litigate concerns outside the permissible scope of the hearing.

To obtain a hearing, a petitioner must demonstrate standing and proffer at least one admissible contention.¹¹ For an enforcement order, however, the threshold question, intertwined with both standing and contention admissibility issues, is whether the hearing request is within the scope of the proceeding outlined in the enforcement order itself, i.e., whether the Confirmatory Order should be sustained. The Commission has the authority to define the scope of the hearing,

⁷ NRC’s new adjudicatory rules, which became effective on February 13, 2004, apply to this proceeding. *See* Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004).

⁸ *See* LBP-04-11, 59 NRC 379 (2004).

⁹ 69 Fed. Reg. at 12,360.

¹⁰ *Id.*

¹¹ *See* 10 C.F.R. § 2.309(d), (f). The Commission imposed similar requirements for obtaining a hearing under our old adjudicatory rules. *See, e.g., Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 356-57 (2001); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 398 (2001).

including narrowly limiting the proceeding.¹² Accordingly, the only matters at issue here are the measures — described in the enforcement order — intended to improve FENOC’s self-assessment efforts.

As the Board noted, the Petitioners did not make any effort to show how the corrective measures would cause them any harm. By itself, this failure to establish injury-in-fact defeated standing of the Petitioners and required the Board to reject the hearing request.¹³

In addition to their failure to establish standing, the Petitioners did not offer any admissible contentions. This omission independently doomed the Petitioners’ hearing request. The Board correctly stated that issues would fall within the scope of the proceeding “only if they amount to matters that oppose the issuance of the order as unwarranted, so as to require relaxation, or affirmatively detrimental to the public health and safety, so as to require rescission (as opposed to supplementation).”¹⁴ The Petitioners have no interest that would be adversely affected by the conditions imposed by the Confirmatory Order at issue in this proceeding; indeed, Petitioners did not argue the contrary. Likewise, the Petitioners did not contend that any provision of the Confirmatory Order is unwarranted and ought to be relaxed. Finally, they did not suggest that the additional requirements of the Confirmatory Order are unnecessary.

The appellant bears the responsibility of clearly identifying the asserted errors in the decision on appeal.¹⁵ Here, however, the Petitioners did not identify any Board error. Instead, they merely reiterated their contentions and protested that they have not been allowed to litigate their concerns regarding FENOC’s operation of the repaired Davis-Besse reactor. But injury alleged as a result of failure to grant *more extensive relief* is not cognizable in a proceeding on a Confirmatory Order¹⁶ and thus does not constitute grounds for appeal.

¹² See *Bellotti v. NRC*, 725 F.2d 1380, 1381 (D.C. Cir. 1983), *aff’g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982); *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56 (2004); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441-42 (1980). *Bellotti* is the controlling precedent for this case. The Board has discussed *Bellotti* and our recent decision in *Maine Yankee* and accurately applied these precedents to this proceeding. See LBP-04-11, 59 NRC at 383-86. We see no need to repeat or amplify the Board’s well-reasoned analysis here.

¹³ See *Maine Yankee*, CLI-04-5, 59 NRC at 56 n.14.

¹⁴ LBP-04-11, 59 NRC at 385.

¹⁵ *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994), *aff’d, Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995).

¹⁶ See *Bellotti*, 725 F.2d at 1383. Filing a petition pursuant to 10 C.F.R. § 2.206 is the appropriate vehicle for the public to make requests to the NRC to modify a license.

III. CONCLUSION

As in *Maine Yankee*,¹⁷ we ask whether the Petitioners seek additional measures beyond those set out in the disputed order. Unmistakably, the answer to this question is “yes.” Therefore, under the principles enunciated in *Bellotti* and appropriately applied by the Board in this case, we affirm the Board’s decision to deny Petitioners’ hearing request and terminate this proceeding.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of August 2004.

¹⁷ See *Maine Yankee*, CLI-04-5, 59 NRC at 60-61.

Cite as 60 NRC 160 (2004)

CLI-04-24

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

**Docket Nos. 50-390-CivP
50-327-CivP
50-328-CivP
50-259-CivP
50-260-CivP
50-296-CivP**

**TENNESSEE VALLEY AUTHORITY
(Watts Bar Nuclear Plant, Unit 1;
Sequoyah Nuclear Plant, Units 1 and 2;
Browns Ferry Nuclear Plant,
Units 1, 2, and 3)**

August 18, 2004

The Commission affirms the Board's Initial Decision in part, reverses it in part, and remands the case for further proceedings consistent with this Memorandum and Order. In so doing, the Commission addresses novel issues involving the interpretation of its whistleblower regulations.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION; SECTION 211 (210)

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.7)

ATOMIC ENERGY ACT: SECTION 161

PROTECTED ACTIVITY

Strictly speaking, neither 10 C.F.R. § 50.7 nor its underlying statutory provisions (section 161 of the Atomic Energy Act and section 211 of the Energy Reorganization Act) employ the word “safety” when defining “protected activity.” They refer instead to regulatory and statutory violations. The term “protected activity” therefore includes, but is not limited to, protected activities related to safety issues.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION; SECTION 211 (210)

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.7)

ATOMIC ENERGY ACT: SECTION 161

PROTECTED ACTIVITY

Section 50.7 prohibits employers from taking adverse action against employees because of so-called “protected activities” — i.e., providing safety-related allegations to employers, Congress, or the Commission. Section 50.7 refers to two statutes, the AEA and the ERA. Specifically, the regulation prohibits licensees from “discriminat[ing] . . . against an employee for engaging in certain protected activities” as “established in section 211 of the Energy Reorganization Act . . . and in general . . . related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.” 10 C.F.R. § 50.7(a). The Commission invoked both the AEA and the ERA as authority when promulgating section 50.7. *See* Final Rule: “Whistleblower Protection for Employees of NRC-Licensed Activities,” 58 Fed. Reg. 52,406, 52,408 (Oct. 8, 1993).

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION; SECTION 211 (210)

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.7)

The Commission promulgated the current version of section 50.7 in 1993 “to reflect the changes in the whistleblower protection provisions brought about by [section 2902 of] the Energy Policy Act of 1992” (58 Fed. Reg. at 52,406-07), which amended a 1978 appropriations statute that had, in turn, added section 210 (now section 211) to the ERA.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION; SECTION 211 (210)

Congress, when enacting this section in 1978 and adding it to the provisions of the ERA, inadvertently identified the section as section 210, although another statutory provision (Act of Dec. 13, 1977, 91 Stat. 1482, 42 U.S.C. § 5850) had already been assigned that same section number. *See Union Electric Co.* (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 131 n.14 (1979), *aff’d* LBP-78-31, 8 NRC 366 (1978); Act of Nov. 6, 1978, Pub. L. No. 95-601, § 10, 1978 U.S.C.C.A.N. (92 Stat.) 2947, 2951 (codified at 42 U.S.C. § 5851). Congress corrected this error in the EPA. *See* Act of Oct. 24, 1992, § 2902, Pub. L. No. 102-486, 1992 U.S.C.C.A.N. (106 Stat.) 3123, 3124 (codified at 42 U.S.C. § 5851).

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION; SECTION 211 (210)

RULES OF PRACTICE: STANDARD OF PROOF; BURDEN OF PROOF

CIVIL PENALTIES: BURDEN OF PROOF

The pre-1992 version of section 211 was silent on what has become a key question in this case — the “causation” standard (i.e., the causal link between whistleblowing activity and an adverse personnel action). The original section 211 contained no evidentiary framework indicating who must go forward with evidence at different stages of a proceeding or indicating what standard of proof a complainant must meet. Congress addressed this problem in 1992 by adding

section 211(b)(3). Act of Oct. 24, 1992, Pub. L. No. 102-486, § 2902(d), 1992 U.S.C.C.A.N. (106 Stat.) 3124 (codified at 42 U.S.C. § 5851(b)(3)). This provision requires a complainant in a DOL whistleblowing proceeding to show that one or more protected activities was “a contributing factor” in the adverse action.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION; SECTION 211 (210)

RULES OF PRACTICE: STANDARD OF PROOF; BURDEN OF PROOF

CIVIL PENALTIES: BURDEN OF PROOF

In addition, the new section 211 laid out an entire evidentiary framework, both identifying for each stage of the DOL enforcement and adjudication process the party with the burden of going forward with the evidence and also specifying the standard and elements of proof applicable at each stage. The first two provisions apply to the preadjudicatory phases and the next two apply to the DOL hearing. Under the new section 211, the bottom line is that whistleblowers will prevail if they demonstrate (by preponderance of the evidence) that a protected activity was a “contributing factor” to an adverse personnel action — *unless* the employer comes back with “clear and convincing evidence” that it would have taken the same unfavorable personnel action notwithstanding the protected whistleblowing activity.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION; SECTION 211 (210)

RULES OF PRACTICE: STANDARD OF PROOF

Section 211 does not specify a “preponderance of the evidence” standard, but both the Secretary of Labor and the courts have found that the term “demonstrated” implies a preponderance of the evidence standard. *See, e.g., Dysert v. Secretary of Labor*, 105 F.3d 607, 610 (11th Cir. 1997).

RULES OF PRACTICE: DEFERENCE TO BOARD; STANDARD OF REVIEW (FINDINGS OF FACT); APPELLATE REVIEW; CREDIBILITY DETERMINATIONS

We ordinarily defer to our licensing boards' fact findings, so long as they are not "clearly erroneous." See 10 C.F.R. § 2.786(b)(4)(ii). See also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 25-26 (2003). A "clearly erroneous" finding is one that is not even "plausible in light of the record viewed in its entirety." *Kenneth G. Pierce* (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995), quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985). As we stated in *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 93-94 (1998), "[a]lthough the Commission has the authority to reject or modify a licensing board's factual findings, it will not do so lightly." "We will not overturn a hearing judge's findings simply because we might have reached a different result." *Id.*, quoting *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 473 (1987). Our deference is particularly great where "the Board bases its findings of fact in significant part on the credibility of the witnesses." *PFS*, CLI-03-8, 58 NRC at 26. Whistleblowing discrimination cases are, by their nature, peculiarly fact-intensive and dependent on witness credibility. See Millstone Independent Review Team, "Report of Review, Millstone Units 1, 2, and 3: Allegations of Discrimination in NRC Office of Investigation Case Nos. 1-96-002, 1-96-007, 1-97-007, and Associated Lessons Learned" at 22 (Mar. 12, 1999). A fact-based appeal in a whistleblower case, in short, faces an uphill climb before the Commission.

RULES OF PRACTICE: STANDARD OF REVIEW (CONCLUSIONS OF LAW); APPELLATE REVIEW

As for conclusions of law, our standard of review is more searching. We review legal questions *de novo*. See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 29 (2000). We will reverse a licensing board's legal rulings if they are "a departure from or contrary to established law." 10 C.F.R. § 2.786(b)(4)(ii). See generally *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-12, 58 NRC 185, 191 (2003).

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION; SECTION 211 (210)

RULES OF PRACTICE: STANDARD OF PROOF; BURDEN OF PROOF

CIVIL PENALTIES: BURDEN OF PROOF

Our evidentiary touchstone in a nuclear whistleblowing case is neither *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), nor *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), but rather the special evidentiary framework that Congress established in section 211 of the ERA.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION; SECTION 211 (210)

RULES OF PRACTICE: STANDARD OF PROOF; BURDEN OF PROOF

CIVIL PENALTIES: BURDEN OF PROOF

Such questions as whether this case is a ‘pretext’ case or a ‘dual motive’ case, whether the Commission has before it ‘direct’ or ‘circumstantial’ evidence, and whether (and when) the burdens of evidence production and persuasion should shift between the parties require subtle and complex analysis. But Congress rendered such analysis unnecessary when in 1992 it enacted a special evidentiary framework for nuclear whistleblowing cases — namely, section 211 of the ERA. As one court has put it, section 211 ‘is clear and supplies *its own free-standing evidentiary framework*,’ a framework that displaces ‘the sprawling body of general employment discrimination law.’ *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (emphasis added). *Accord Trimmer v. Department of Labor*, 174 F.3d 1098, 1101 & n.4 (10th Cir. 1999). Section 211 establishes a simple two-part approach: (1) employees (or, as in our case, the NRC Staff) must show that whistleblowing activity was a ‘contributing factor’ in an unfavorable personnel action; and (2) if that showing is made, employers still may escape liability if they demonstrate, by ‘clear and convincing evidence,’ that they would have taken the same personnel action anyway, regardless of the whistleblowing activity.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION; SECTION 211 (210)

RULES OF PRACTICE: STANDARD OF PROOF; BURDEN OF PROOF

CIVIL PENALTIES: BURDEN OF PROOF

Notwithstanding section 211, the Department of Labor continues to follow the *McDonnell Douglas* approach in whistleblower discrimination cases litigated on a “pretext” theory. See, e.g., *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 3 n.12 (Sept. 30, 2003). But we decline to follow DOL on that point. Nothing in section 211’s language or history suggests an exception for “pretext” cases. Authoritative judicial decisions have recognized no such exception, and indeed take the opposite approach. (Although an unpublished (and nonprecedential) Sixth Circuit case did disregard the section 211 evidentiary approach and use the *McDonnell Douglas* framework for a “pretext”-based whistleblower case, *Tennessee Valley Authority v. Secretary of Labor*, 59 Fed. Appx. 732 (6th Cir. 2003), 2003 WL 932433, we think that the published decisions from the Eleventh Circuit (*Stone & Webster*) and the Tenth Circuit (*Trimmer*) taking the opposite position reflect a more sensible reading of section 211.) And both clarity and simplicity counsel our following section 211’s straightforward approach in NRC enforcement adjudications rather than burdening them with the byzantine doctrines of traditional employment discrimination law. In practical terms, because we see few whistleblower enforcement adjudications at the NRC, because varying evidentiary frameworks are not necessarily outcome-determinative, and because the NRC’s general enforcement policy is to give deference to DOL’s whistleblower determinations, our disagreement with DOL on how to apply section 211 in adjudications is unlikely to lead to inconsistent results between the agencies very often, if at all.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION; SECTION 211 (210)

RULES OF PRACTICE: INTERPRETATION (10 C.F.R. § 50.7); STANDARD OF PROOF; BURDEN OF PROOF

CIVIL PENALTIES: BURDEN OF PROOF

Our own whistleblower protection regulation, section 50.7, while not setting out an evidentiary framework of its own, makes clear that engaging in protected

activities does not immunize employees “from discharge or discipline for legitimate reasons or from adverse action dictated by non-prohibited considerations.” 10 C.F.R. § 50.7(d). To give life to this provision, we must give employers defending whistleblower discrimination charges an opportunity to prove that “legitimate reasons” or “non-prohibited considerations” justified their actions. The most practicable way of doing this is by granting employers the same right of defense in an NRC enforcement proceeding as section 211 gives them in a Department of Labor compensation proceeding — i.e., the right to defend against a whistleblower discrimination charge on the ground that they would have taken the same personnel action regardless of the employee’s protected activities.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION; SECTION 211 (210)

RULES OF PRACTICE: INTERPRETATION (10 C.F.R. § 50.7); STANDARD OF PROOF; BURDEN OF PROOF

CIVIL PENALTIES: BURDEN OF PROOF

The “clear and convincing” standard puts a thumb on the scale in favor of employees. “For employers this is a tough standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves.” *Stone & Webster Engineering Corp.*, 115 F.3d at 1572. *See also Trimmer*, 174 F.3d at 1101. In recommending enactment of the current version of section 211, a House committee reported, “Recent accounts of whistleblower harassment at both NRC licensee . . . and DOE nuclear facilities . . . suggest that whistleblower harassment and retaliation remain all too common in parts of the nuclear industry. These reforms are intended to address those remaining pockets of resistance.” H.R. Rep. No. 102-474, pt. VIII, at 79 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 2282, 2297. *See also Whistleblower Issues in the Nuclear Industry: Hearing Before the Subcomm. on Clean Air and Nuclear Regulation of the Senate Comm. on Environment and Public Works*, 103d Cong. at 1-2 (1993) (statement submitted by the United States Nuclear Regulatory Commission).

WHISTLEBLOWERS

**ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION;
SECTION 211 (210)**

**RULES OF PRACTICE: ELEMENTS OF PROOF; EVIDENCE;
BURDEN OF PROOF**

CIVIL PENALTIES: BURDEN OF PROOF

Congress was careful in section 211, as we are in today's decision, to preserve the flexibility nuclear employers require to take appropriate action against alleged whistleblowers who also are ineffective on the job or unneeded in the workplace. Employers are simply asked to *prove* that they would have made the same personnel decisions regardless of any whistleblowing activity. This tough-minded approach to employer claims of legitimate, nondiscriminatory motives effectuates the policy of Congress (and the NRC) both to encourage nuclear whistleblowers to come forward with safety-related information and not to interfere unduly with employers' prerogative to manage their workers.

WHISTLEBLOWERS

**ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION;
SECTION 211 (210)**

RULES OF PRACTICE: INTERPRETATION (10 C.F.R. § 50.7)

Our whistleblower regulation, section 50.7, does not adopt the section 211 evidentiary paradigm as such, but neither does it adopt the *McDonnell Douglas* or *Price Waterhouse* paradigms. Our regulation is prohibitory, not procedural. It renders discriminatory conduct unlawful, but does not purport to prescribe evidentiary standards and approaches for use in NRC enforcement litigation. This presumably explains why the Commission promptly amended section 50.7 to incorporate Congress's more expansive view of "protected activities" (as set out in section 211), but saw no need to incorporate in section 50.7 Congress's new evidentiary framework.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION; SECTION 211 (210)

RULES OF PRACTICE: INTERPRETATION (10 C.F.R. § 50.7); STANDARD OF PROOF; BURDEN OF PROOF

CIVIL PENALTIES: BURDEN OF PROOF

In cases where our own rules do not prescribe a particular process or evidentiary approach, we frequently have looked to analogous outside sources of law — for example, judicial standing doctrines or federal rules of procedure and evidence. Here, section 211 — the most recent expression of congressional policy on nuclear whistleblower claims — is the obvious place to look for guidance on litigating whistleblower enforcement cases at the NRC. For one thing, we long have taken the view that our section 50.7 rests in part on the authority of Congress’s decision in section 211 to protect nuclear whistleblowers from employer retaliation. *See St. Mary’s Medical Center*, CLI-97-14, 46 NRC 287, 290 n.1 (1997). Section 50.7 also is grounded in the NRC’s general AEA authority to protect public health and safety. *See id.* Moreover, section 211 establishes a clear and straightforward evidentiary approach, eliminating some of the complexities of traditional employment discrimination litigation. The section 211 approach, while directly governing whistleblower compensation cases at the Department of Labor, is readily adaptable to the context of NRC enforcement cases. And, as we indicated above, section 211 represents a reasonable congressional effort to balance employer and whistleblower interests.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION; SECTION 211 (210)

Congress did not enact section 211’s “contributing factor” test in a vacuum. In laws covering whistleblowers in various industries and in the federal government, Congress has used the same “contributing factor” test as it did in section 211. Section 211, in fact, was “patterned after other whistleblower statutes affecting other industries.” *American Nuclear Resources, Inc. v. Department of Labor*, 134 F.3d 1292, 1294-95 (6th Cir. 1998). In using a “contributing factor” test in whistleblower protection laws, Congress “quite clearly made it easier for the plaintiff to make her case under the statute and more difficult for the defendant to avoid liability.” *Frobose v. American Savings and Loan Ass’n*, 152 F.3d 602, 612 (7th Cir. 1998). *See also Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993); *Rouse v. Farmers State Bank*, 866 F. Supp. 1191,

1208 (D. Iowa 1994). Congress was concerned that previous judicial rulings had imposed on whistleblowers an “excessively heavy burden” to show that the whistleblowing activity was a “significant” or “motivating” factor in his or her employer’s adverse action. *Marano*, 2 F.3d at 1140. *See also Rouse*, 866 F. Supp. at 1208. These court rulings, according to Congress, had, “in effect, . . . gutted the protection of whistleblowers.” *Marano*, 2 F.3d at 1140 (interpreting Whistleblower Protection Act). *See also Rouse*, 866 F. Supp. at 1208 (interpreting FIRREA); Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Era of Employment Dissent*, 51 Admin. L. Rev. 531, 554 (1999). Congress established a lenient “contributing factor” test, under which whistleblowers need show only that their protected activity affected the personnel action “in any way. We are aware of no judicial decision discussing what section 211’s “contributing factor” test means. But other courts construing identical “contributing factor” language in whistleblower statutes closely similar to section 211 have reached the same result as *Marano*. *See, e.g., Simas v. First Citizens’ Federal Credit Union*, 170 F.3d 37, 44 (1st Cir. 1999); *Frobose*, 152 F.3d at 612; *Rouse*, 866 F. Supp. at 1208. *See generally* Devine, 51 Admin. L. Rev. at 555. We see no reason to construe section 211 differently.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION; SECTION 211 (210)

This is not to say that the “contributing factor” test is entirely toothless. An employee may not simply engage in protected activities and expect immunity from future unfavorable personnel actions. Mere employer (or supervisor) knowledge of the protected activity does not suffice as a “contributing factor”; nor does “the equivalent of adding ‘a drop of water into the ocean.’” Report of Millstone Review Team at 8. The evidence, direct or indirect, must allow a reasonable person to infer that protected activities influenced the unfavorable personnel action to some degree. In cases where the evidence is weak, employers should be able to avoid liability by providing “clear and convincing evidence” that they would have taken the same personnel action anyway, based on nondiscriminatory grounds.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION

RULES OF PRACTICE: STANDARD OF PROOF; BURDEN OF PROOF

CIVIL PENALTIES: BURDEN OF PROOF

The proponents of a finding of violation must demonstrate to the trier of fact (by a preponderance of the evidence) that the protected activity “was actually ‘a contributing factor in the unfavorable personnel action.’” *See Stone & Webster*, 115 F.3d at 1572, *quoting* 42 U.S.C. § 5851(b)(3)(C). However, we acknowledge the unsettled and conflicting understandings of what kind of causation showing the employee (or, in NRC cases, the Staff) must make to prevail by a preponderance of the evidence. Decisions by the NRC or the courts of appeals, based on the particular circumstances of such cases, may clarify further the controlling test in this area.

RULES OF PRACTICE: STANDARD OF REVIEW; APPELLATE REVIEW; DEFERENCE TO BOARD

It is true, as TVA suggests, that the Commission has the raw power to override its licensing boards’ fact findings, “clearly erroneous” or not, but absent unusual circumstances, our usual practice is not to do so. Otherwise, the Commission would place itself in the untenable position of having to redo its licensing boards’ work in nearly every case.

RULES OF PRACTICE: STANDARD OF REVIEW; APPELLATE REVIEW; DEFERENCE TO BOARD

An effort to show that “the record evidence in this case may be understood to support a view sharply different from that of the Board” does not, in and of itself, establish the Board’s view as clearly erroneous. *Kenneth G. Pierce*, CLI-95-6, 41 NRC at 382.

RULES OF PRACTICE: STANDARD OF REVIEW; APPELLATE REVIEW; DEFERENCE TO BOARD

Our finding less than overwhelming evidence supporting the Board’s view is not the same as saying that the Board was “clearly erroneous.”

CIVIL PENALTIES: FAIR NOTICE AND CONSTITUTIONAL DUE PROCESS

DUE PROCESS: OPPORTUNITY FOR RESPONSE

RULES OF PRACTICE: ADMINISTRATIVE FAIRNESS; SCOPE AND TYPE OF PROCEEDING

ADJUDICATORY PROCEEDINGS: SCOPE

ENFORCEMENT ACTIONS: SCOPE OF PROCEEDINGS

Basic principles of fairness require that the licensee in an enforcement action know the bases underlying the Staff's finding(s) of violation. Just as "the penalty assessed by [the Staff] constitutes the upper bound of the penalty which may be imposed after [a] hearing" (*Atlantic Research Corp.* (Alexandria, Virginia), ALAB-594, 11 NRC 841, 849 (1980)), the grounds for the Staff's finding of a whistleblower violation must likewise form the upper bound for the grounds available to the Board when determining whether a violation has occurred. This principle regarding notice of, and opportunity to comment on, the fundamental bases for an enforcement action is analogous to our policy in licensing adjudications that "[a]n intervenor may not freely change the focus of an admitted contention at will as litigation progresses, but is bound by the terms of the contention." *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002) (citation and internal quotation marks omitted). It is likewise akin to our "longstanding practice" in licensing cases "requir[ing] adjudicatory boards to adhere to the terms of admitted contentions in order to give opposing parties advance notice of claims and a reasonable opportunity to rebut them." *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-02-22, 56 NRC 213, 227 (2002) (citations and internal quotation marks omitted).

ADJUDICATORY PROCEEDINGS: SCOPE

ENFORCEMENT ACTIONS: SCOPE OF PROCEEDINGS

RULES OF PRACTICE: SCOPE AND TYPE OF PROCEEDING

It is well established in Commission enforcement jurisprudence that the document setting the scope of an enforcement adjudication is ordinarily the enforcement order (e.g., an Order Imposing Civil Monetary Penalty). *See, e.g., Sequoyah Fuels Corp. and General Atomic* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 216, 222 (1997).

ADJUDICATORY PROCEEDINGS: SCOPE

ENFORCEMENT ACTIONS: SCOPE OF PROCEEDINGS

**RULES OF PRACTICE: SCOPE AND TYPE OF PROCEEDING;
ADMINISTRATIVE FAIRNESS**

DUE PROCESS: OPPORTUNITY FOR RESPONSE

We would not ordinarily consider the Notice of Violation to be the appropriate document for establishing the scope of an enforcement proceeding. Section 2.205(d) provides that the Staff shall “consider[] . . . the answer” to a Notice of Violation and only then shall “issue an order dismissing the proceeding or imposing, mitigating, or remitting the civil penalty.” Likewise, the 1971 Statement of Considerations for section 2.205 states that “a request for a hearing need not be made until after an answer to a notice of violation has been filed and an order imposing a civil penalty entered by the [Staff].” Final Rule: “Civil Penalties,” 36 Fed. Reg. 16,894, 16,895 (Aug. 26, 1971). The clear import of both these statements is that the Notice of Violation should not be the Staff’s final word regarding either the finding of a violation or the bases underlying that finding, but that the Staff’s subsequent Enforcement Order must take into account the licensee’s answer to the Notice. Although we are not in a position to know whether the Staff actually ignored TVA’s answer in this proceeding, the cursory nature of the Staff’s Order Imposing Civil Monetary Penalty and its incorporation of the Notice of Violation certainly give that impression. To avoid even an appearance of impropriety, we instruct the Staff not to use such an approach in the future, absent compelling circumstances.

ADJUDICATORY PROCEEDINGS: SCOPE

ENFORCEMENT ACTIONS: SCOPE OF PROCEEDINGS

RULES OF PRACTICE: SCOPE AND TYPE OF PROCEEDING

“Scope of proceeding” issues are jurisdictional in nature. *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 476 (1987) (footnotes omitted). *See also, e.g., Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985); *Commonwealth Edison Co.* (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645, 647 (1974).

ADJUDICATORY PROCEEDINGS: SCOPE

ENFORCEMENT ACTIONS: SCOPE OF PROCEEDINGS

**RULES OF PRACTICE: SCOPE AND TYPE OF PROCEEDING;
ADMINISTRATIVE FAIRNESS**

DUE PROCESS: OPPORTUNITY FOR RESPONSE

REGULATIONS: INTERPRETATION (10 C.F.R. § 50.7)

We disagree with the Staff's argument for the acceptability of supplementing the bases supporting the Notice of Violation to reflect new facts that surface during discovery — so long as the Staff does not change the underlying theory of its case. The Staff's proposed rule of thumb would allow the Staff virtually unfettered freedom to change the focus of an adjudication under section 50.7 or its sister regulations, subject only to the restriction that the case still involve violations of the salient whistleblower regulation. Such a restriction is, in our view, so broad as to be virtually meaningless, would leave the scope of an enforcement proceeding uncertain throughout the entire prehearing phase of an adjudication, and would undermine our twin goals of fairness and efficiency in adjudicatory decisionmaking. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998). Under the Staff's proposed approach, whistleblower enforcement adjudications would constantly be subject to change: new information on protected activities or adverse actions could be brought into the case without a disciplined notice and response process.

ADJUDICATORY PROCEEDINGS: SCOPE

ENFORCEMENT ACTIONS: SCOPE OF PROCEEDINGS

**RULES OF PRACTICE: SCOPE AND TYPE OF PROCEEDING;
ADMINISTRATIVE FAIRNESS**

DUE PROCESS: OPPORTUNITY FOR RESPONSE

CIVIL PENALTIES: JURISDICTION OF LICENSING BOARD

AEA: CIVIL PENALTIES (AUTHORITY OF PRESIDING OFFICER)

LICENSING BOARD(S): AUTHORITY

The Staff is not powerless in a whistleblower adjudication to update its NOV based on newly discovered facts. If the new facts support conclusions already in the NOV that a particular activity was protected, or that management was aware of the protected activity, or that management took a particular action adverse to the whistleblower, or that such action was in retribution for the protected activity

at issue, then the Staff would be free to use those newly discovered facts in its arguments and briefs. The Staff's cannot, however, include entirely new instances of protected activity, unmentioned in the NOV. Such an approach would take the Board proceeding beyond its permissible jurisdictional boundaries. Rather, in those situations, the Staff may either issue a revised NOV or initiate a new enforcement action.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION; SECTION 211 (210)

“Protected activity” includes the acts of notifying an “employer of an alleged violation” and refusing “to engage in any practice made unlawful by this Act [the Energy Policy Act of 1992] or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer.” 42 U.S.C. § 5851(a)(1)(A), (B). *See also* 10 C.F.R. § 50.7(a)(1)(i), (ii). The intent underlying the inclusion of these (and other) examples of whistleblowing activities was to protect employees who, knowingly or otherwise, risk retribution from their employers for pointing out safety or regulatory compliance problems.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION RULES OF PRACTICE: INTERPRETATION (10 C.F.R. § 50.7)

Whistleblower protection does not, however, require employees to predict that whistleblowing will subject them to their employers' wrath. For instance, a quality assurance inspector whose job entails pursuing safety issues is entitled to whistleblower protection even though he might not know that his employer would take umbrage at his safety-related reports. Any other result would undermine the Commission's goal of preventing a “chilling effect” on whistleblowers' fellow employees — something that could occur regardless of the whistleblower's lack of prescience.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION RULES OF PRACTICE: INTERPRETATION (10 C.F.R. § 50.7)

STATUTORY CONSTRUCTION

An employee is participating in a “protected activity” when he raises safety-related issues, even if the context in which he or she does so is the resolution (rather

than the raising) of another safety issue. This interpretation is consistent with the rule of statutory construction that remedial legislation (such as whistleblower and antidiscrimination statutes) should be broadly interpreted in order to accomplish its goals. *See, e.g., Kundrat v. District of Columbia*, 106 F. Supp. 2d 1, 4 (D.D.C. 2000) (“Title VII is a remedial statute which is generally broadly construed”). We believe that, if an employee on a safety issue resolution committee believes that the committee’s responses to the safety problem are misdirected or ineffective, the employee’s statements to that effect would constitute a “protected activity” even though made in the context of an attempt to resolve the same safety problem. Likewise, if an employee, while resolving a previously reported safety issue discovered by another, finds additional previously undiscovered safety problems, the employee’s reporting the new problems would constitute “protected activity.”

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION

RULES OF PRACTICE: INTERPRETATION (10 C.F.R. § 50.7)

We are unconvinced that 10 C.F.R. § 50.7(a)(1)(v) includes actions of an employee whose *sole* whistleblower-related conduct consists of helping to find a remedy for safety problems discovered by others. Subsection 50.7(a)(1)(v) refers *only* to the specific activities enumerated in subsections 50.7(a)(1)(i)-(iv). Consequently, to the extent that an employee was involved in *exclusively* remedial activities, then those would not fall within the bounds of “protected activity.” Such purely remedial activities are hardly the kind that would be taken “against the explicit or implicit directives or wishes of the employer.” 57 NRC at 610 (minority opinion). The mere involvement — without more — in the resolution of a safety or regulatory compliance issue raised by another person does not constitute “protected activity”; but we also conclude, conversely, that an employee’s involvement in the resolution of such an issue does not deprive an employee of the protections that section 50.7 offers for otherwise protected activities.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION; SECTION 211 (210)

RULES OF PRACTICE: INTERPRETATION (10 C.F.R. § 50.7)

Although an employee’s failure to prepare the proper administrative document on the safety issue is perhaps germane to how well he performed certain admin-

istrative aspects of his job, it is irrelevant to whether he engaged in a “protected activity.” We are not concerned with whether an employee procedurally crosses every “t” and dots every “i” when reporting safety problems to management. We are instead concerned with whether the employee gave management at least some form of notice of the safety or regulatory compliance problem. Indeed, such a hypertechnical approach would contravene more than 20 years of judicial interpretation of section 211 as covering “informal complaints.” *See Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926, 931-32 (11th Cir. 1995), and cited cases.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION

RULES OF PRACTICE: INTERPRETATION (10 C.F.R. § 50.7)

Were mere involvement to qualify as protected activity, then any employee who had participated in the resolution of any nuclear issue and who disagreed with a subsequent personnel action could initiate a section 50.7 claim without having engaged in whistleblowing activity. We do not adopt this position.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION

RULES OF PRACTICE: INTERPRETATION (10 C.F.R. § 50.7)

For purposes of ensuring regulatory compliance, the employee was telling TVA management what it did not want to hear regarding a potential violation of a procedure that would potentially be subject to enforcement action. This is one of the situations to which section 50.7 is intended to apply.

WHISTLEBLOWERS

**ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION;
SECTION 211 (210)**

RULES OF PRACTICE: INTERPRETATION (10 C.F.R. § 50.7)

In order to fall under the protection of section 211 and section 50.7, an employee’s activity regarding such regulatory compliance need not be directly related to safety.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION

RULES OF PRACTICE: INTERPRETATION (10 C.F.R. § 50.7)

Section 50.7(a)(1)(ii) protects any refusal “to engage in any practice made unlawful . . . if the employee has identified the *alleged* illegality to the employer” (emphasis added). Our regulation’s use of the adjective “alleged” to modify “illegality” indicates that an employee need not be correct in his or her legal assessment, but need only have a reasonable belief that the assessment is correct. *See, e.g., Stone & Webster*, 115 F.3d at 1575.

WHISTLEBLOWERS

ENERGY REORGANIZATION ACT: EMPLOYEE PROTECTION

RULES OF PRACTICE: INTERPRETATION (10 C.F.R. § 50.7)

Our refusal in a whistleblower proceeding to look into the merits of an employee’s safety concerns is also analogous to our approach toward management personnel decisions in whistleblower cases: we do not look behind those decisions, even if they strike us as ill-advised, so long as they do not have the effect of intentionally discriminating based on an employee’s whistleblower activity. *Cf. American Nuclear Resources*, 134 F.3d at 1296. Our position is also consistent with the practice of both the NRC Staff and DOL.

LICENSING BOARD(S): AUTHORITY

AEA: CIVIL PENALTIES (AUTHORITY OF PRESIDING OFFICER)

RULES OF PRACTICE: FINDINGS OF FACT

CIVIL PENALTIES: JURISDICTION OF LICENSING BOARD

Mitigation determinations are inherently fact-based, and the Licensing Board is responsible in the first instance for factfinding. *See, e.g., Commonwealth Edison Co. (Zion Station, Units 1 and 2)*, CLI-74-35, 8 AEC 374 (1974); *Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2)*, ALAB-932, 31 NRC 371, 396 (1990).

LICENSING BOARD(S): AUTHORITY

AEA: CIVIL PENALTIES (AUTHORITY OF PRESIDING OFFICER)

CIVIL PENALTIES: JURISDICTION OF LICENSING BOARD

The Commission has the “discretion to [impose] a civil penalty as prescribed by [AEA] Section 234 as a sanction for [a] violation” “[s]o long as [i] a violation has been established, [ii] . . . penalties may positively affect the conduct of the licensee or other similarly situated persons in accord with the policies in the Atomic Energy Act, and [iii] civil penalties are not grossly disproportionate to the gravity of the offense.” *Atlantic Research Corp.* (Alexandria, Virginia), CLI-80-7, 11 NRC 413, 421 (1980). Under such circumstances, a Board may take into account mitigating factors when determining whether to reduce a penalty amount. *See Atlantic Research*, ALAB-594, 11 NRC at 845-46. *See also* 10 C.F.R. § 2.205(f).

LICENSING BOARD(S): AUTHORITY

AEA: CIVIL PENALTIES (AUTHORITY OF PRESIDING OFFICER)

RULES OF PRACTICE: FINDINGS OF FACT; STANDARD OF PROOF

CIVIL PENALTIES: JURISDICTION OF LICENSING BOARD

We disagree with the Staff’s concept that the litmus test for Board mitigation is “abuse of discretion” — a very high level of deference to the Staff. The Staff’s position is inconsistent with the nature of civil penalty adjudications. They are *de novo* proceedings, not limited proceedings for review of NRC Staff decisions. This is clear from our agency’s appellate precedent. *Atlantic Research*, ALAB-594, 11 NRC at 849. *See also Radiation Technology, Inc.* (Lake Denmark Road, Rockaway, New Jersey 07866), ALAB-567, 10 NRC 533, 536 (1979).

LICENSING BOARD(S): AUTHORITY

AEA: CIVIL PENALTIES (AUTHORITY OF PRESIDING OFFICER)

RULES OF PRACTICE: FINDINGS OF FACT; COMMISSION POLICY STATEMENTS

CIVIL PENALTIES: JURISDICTION OF LICENSING BOARD

Since 1982, presiding officers have been required to act in conformity with our Enforcement Policy Statements. But those Policy Statements establish substantive parameters for civil penalties and other enforcement actions. They do not abrogate

licensing boards' mitigation power nor convert the boards' role into a reviewer of Staff action.

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.205(f))

LICENSING BOARD(S): AUTHORITY

AEA: CIVIL PENALTIES (AUTHORITY OF PRESIDING OFFICER)

CIVIL PENALTIES: JURISDICTION OF LICENSING BOARD

RULES OF PRACTICE: COMMISSION POLICY STATEMENTS

WHISTLEBLOWERS

The argument that the Commission's adoption of an Enforcement Policy implicitly deprives the Board of its authority to substitute its own judgment for that of the Staff regarding civil penalty amounts in whistleblower cases contravenes the general authority bestowed on the Board in 10 C.F.R. § 2.205(f) — which carves out no exception for whistleblower cases. Section 2.205(f) instead applies by its own terms to *all* civil penalty cases, and authorizes the Licensing Board to issue “an order . . . mitigating . . . the civil penalty,” consistent with Commission enforcement policy and precedent. In addition, the licensee would be denied the full hearing to which it is entitled on *all* aspects of the proposed enforcement action. The *de novo* character of the Board's review would also be undermined.

RULES OF PRACTICE: COMMISSION POLICY STATEMENTS

WHISTLEBLOWERS

LICENSING BOARD(S): AUTHORITY

AEA: CIVIL PENALTIES (AUTHORITY OF PRESIDING OFFICER)

CIVIL PENALTIES: JURISDICTION OF LICENSING BOARD

We disagree with the assertion that the current Enforcement Policy prohibits the Board from substituting its own judgment for that of the Staff. The Enforcement Policy is directed, in part, to the actions that the Staff takes under the authority delegated by the Commission. But the fact that the Staff initially applies the Commission's Enforcement Policy does not thereby confer upon the Staff exclusive discretion to determine the amount of a civil monetary penalty. The Policy applies just as much to the Board in its review of Staff enforcement actions as it does to the Staff itself.

RULES OF PRACTICE: COMMISSION POLICY STATEMENTS

The Board, like all subsidiary offices within the NRC, implements Commission policy. See *Hurley Medical Center* (One Hurley Plaza, Flint, Michigan), ALJ-87-2, 25 NRC 219, 238 (1987). NUREG-1600 (Rev. 1), ‘Revision of NRC [Enforcement] Policy Statement: General Statement of Policy and Procedure for NRC Enforcement Actions,’ 63 Fed. Reg. 26,630, 26,632-33 (May 13, 1998), says expressly that “[t]he following statement of policy and procedure explains the *enforcement policy* and procedures of the . . . Commission . . . and the NRC Staff . . . in initiating enforcement actions, and *of the presiding officers and the Commission in reviewing these actions*” (emphasis added). Regarding the second italicized phrase in NUREG-1600, each Commission enforcement policy statement contained the same or similar language from the document’s inception in October of 1980 until November of 1999, when the phrase was inadvertently deleted. See 64 Fed. Reg. 64,142, 64,145 (Nov. 9, 1999). See also NUREG-1600, ‘General Statement of Policy and Procedures for NRC Enforcement Actions’ (Oct. 31, 2002 (updating NUREG-1600, May 1, 2000, and containing no reference to the Board)), available on the NRC’s Web site. No change in meaning was intended, as is evident from the text of 10 C.F.R. § 2.205, which continues to contemplate *de novo* civil penalty adjudications before licensing boards. See also *Consolidated X-Ray Service Corp.* (P.O. Box 20195, Dallas, Texas 75220), ALJ-83-2, 17 NRC 693, 705 (1983). By contrast, the Appeal Board in *Atlantic Research* quite properly did not feel bound by the NRC Staff’s Inspection and Enforcement Manual, as that document reflected only *Staff* policy and did not have the Commission’s *imprimatur*. *Atlantic Research*, ALAB-594, 11 NRC at 851.

RULES OF PRACTICE: COMMISSION POLICY STATEMENTS

WHISTLEBLOWERS

AEA: CIVIL PENALTIES (AUTHORITY OF PRESIDING OFFICER)

CIVIL PENALTIES: JURISDICTION OF LICENSING BOARD

The Board was within its discretion to consider the totality of circumstances in assessing the final penalty. The Commission’s Enforcement Policy provides detailed guidance on civil penalty assessment including appropriate circumstances that warrant increasing or decreasing the penalty. Although the Board’s mitigating factors are not among those specifically addressed, the Enforcement Policy (section VI.C.d) contains a separate provision on the “exercise of discretion . . . to ensure that the proposed civil penalty reflects all relevant circumstances of the particular case.”

CIVIL PENALTIES: FAIR NOTICE AND CONSTITUTIONAL DUE PROCESS

DUE PROCESS: OPPORTUNITY FOR RESPONSE

RULES OF PRACTICE: ADMINISTRATIVE FAIRNESS

It is “well settled that an agency may not change theories in midstream without giving respondents reasonable notice of the change.” *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 354 (1975), quoting *Rodale Press, Inc. v. Federal Trade Commission*, 407 F.2d 1252, 1256 (D.C. Cir. 1968).

MEMORANDUM AND ORDER

In LBP-03-10, a split Atomic Safety and Licensing Board upheld the NRC Staff’s finding that the Tennessee Valley Authority (TVA), an NRC Licensee, had violated 10 C.F.R. § 50.7 by discriminating against an employee, Mr. Gary L. Fiser, on account of his “whistleblowing” activities. The majority, however, reduced by 60% the \$110,000 civil monetary penalty assessed by the Staff.¹ The third member of the Board filed a separate opinion, concurring in part and dissenting in part.² In CLI-03-9, we granted TVA’s Petition for Review of LBP-03-10 and sought briefs from TVA, the NRC Staff, and *amicus curiae* Nuclear Energy Institute (NEI).³ Based on our review of the appellate briefs and the record, we affirm the Board’s Initial Decision in part, reverse it in part, and remand the case for further proceedings consistent with this Memorandum and Order.

BACKGROUND

This case arises out of the NRC Staff’s issuance of a Notice of Violation⁴ and, later, an order imposing a \$110,000 civil monetary penalty against TVA.⁵

¹ 57 NRC 553, 558-608 (2003). Unless otherwise indicated, we will henceforth refer to the majority’s Initial Decision as the decision of “the Board.”

² *See id.* at 609-17 (“partial dissent”), interpreting the facts differently from the majority and concluding that the Staff had not met its burden of proof to show discrimination against Mr. Fiser.

³ 58 NRC 39 (2003).

⁴ Notice of Violation and Proposed Imposition of Civil Penalty (“Notice of Violation”), dated Feb. 7, 2000.

⁵ 66 Fed. Reg. 27,166 (May 16, 2001).

The Staff's order found that, in 1996, TVA had violated 10 C.F.R. § 50.7 by retaliating against Mr. Fiser for having engaged in protected whistleblowing activities. The alleged retaliatory actions were TVA's refusal in the summer of 1996 to "preselect" Mr. Fiser as a Chemistry Program Manager for Sequoyah and TVA's subsequent selection of a candidate other than Mr. Fiser for that same position. Under section 50.7(a), protected activities include providing the Congress, the Commission, or the employee's company with information about alleged violations of the Atomic Energy Act (AEA)⁶ and/or the Energy Reorganization Act (ERA).⁷ Section 50.7 prohibits NRC licensees from discriminating against employees for engaging in protected activities.

To demonstrate a whistleblower violation (variously described in shorthand as harassment, retribution, retaliation, intimidation, and discrimination), section 50.7 requires the NRC Staff to show three things: (1) an employee engaged in "protected activity" while working for a licensee, for an applicant, or for a contractor or subcontractor of a licensee or applicant; (2) the employer took adverse personnel action against the employee; and (3) the employer took such action "because" of the protected activity.⁸ Section 50.7(d) also provides that "[a]n 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 non-prohibited considerations."⁹

In July 1996, TVA management declined to select Mr. Fiser for a competitive position (Chemistry Program Manager) at its Sequoyah facility. According to the NRC Staff, TVA's decision constituted an adverse personnel action taken in response to various "protected activities" in which Mr. Fiser had engaged. TVA disagreed, claiming that its decision was instead motivated solely by business considerations associated with a massive reorganization that eliminated or modified the duties of thousands of its employees. Following a 25-day evidentiary hearing, the majority of the Board issued an Initial Decision (over a partial dissent by Judge Young) agreeing with the NRC Staff that TVA had unlawfully discriminated against Mr. Fiser:

the Staff has demonstrated, by a preponderance of the evidence, that Mr. Fiser's nonselection was motivated to some degree as retaliation for engaging in protected activities — including his having filed two complaints of discrimination before the Department of Labor . . . concerning his treatment at TVA for attempting to raise nuclear safety issues (albeit in a manner not conforming to the prescribed internal procedures for raising such safety concerns), and his contacting (along with two

⁶ 42 U.S.C. §§ 2201-2297(h)-13.

⁷ 42 U.S.C. §§ 2000d, 2206, 5801-5879.

⁸ 10 C.F.R. § 50.7(a), (d).

⁹ 10 C.F.R. § 50.7(d).

other TVA employees) a U.S. Senator concerning TVA employees' raising safety issues. . . . [C]opies of the letter to the U.S. Senator were also sent to NRC officials, so as to constitute a whistleblowing complaint before the NRC.¹⁰

The Board also agreed with the Staff that four instances where Mr. Fiser had provided technical advice to TVA likewise constituted "protected activities."¹¹

The Board, however, reduced the penalty amount from \$110,000 to \$44,000, on two grounds: "TVA had what appeared to it as seemingly significant performance-oriented reasons that apparently played a large part (although not the sole part) in its nonselection of Mr. Fiser for the position he was seeking"¹² and "TVA appears not to have been provided adequate notice (at least at the time of the nonselection of Mr. Fiser in 1996) of NRC's interpretation of section 50.7 as including adverse actions motivated in *any* part (not necessarily a substantial part) by an employee's engagement in protected activities."¹³

TVA sought Commission review of LBP-03-10 on the grounds that the Board had made clearly erroneous factual findings, had employed the wrong standard for assessing the causal link between Mr. Fiser's whistleblowing activities and his nonselection for the post of Chemical Program Manager, and had improperly treated as "protected" activities that either had not been included in the notice of violation or did not meet the section 50.7 definition.

In CLI-03-9,¹⁴ we agreed to review LBP-03-10. We also raised, on our own motion, an additional question: whether the Board applied the correct legal standard when determining whether (and by how much) to mitigate the civil monetary penalty. Finally, we allowed NEI to file *amicus* briefs on the merits of this mitigation question and on TVA's issues.¹⁵

¹⁰ 57 NRC at 558. Strictly speaking, neither section 50.7 nor its underlying statutory provisions (section 161 of the AEA and section 211 of the ERA) employ the word "safety" when defining "protected activity." They refer instead to regulatory and statutory violations. The term "protected activity" therefore includes, but is not limited to, protected activities related to safety issues.

¹¹ *Id.* at 582-92.

¹² *Id.* at 558. *See also id.* at 606-07.

¹³ *Id.* at 559 (emphasis added).

¹⁴ 58 NRC 39 (2003).

¹⁵ After TVA had submitted the last of its authorized appellate briefs, it filed a Motion for Leave To File Supplemental Authorities (Dec. 17, 2003). The Staff subsequently filed a Response objecting to TVA's filing (Dec. 31, 2003). Although we do not encourage out-of-time filings, we have reviewed both TVA's and the Staff's submittals in preparing today's Order.

DISCUSSION

I. INTRODUCTION

A. Statutory and Regulatory Authority

As outlined above, our whistleblower protection regulation, 10 C.F.R. § 50.7, prohibits employers from taking adverse action against employees because of so-called “protected activities” — i.e., providing safety-related allegations to employers, Congress, or the Commission. Section 50.7 refers to two statutes, the AEA and the ERA. Specifically, the regulation prohibits licensees from “discriminat[ing] . . . against an employee for engaging in certain protected activities” as “established in section 211 of the Energy Reorganization Act . . . and in general . . . related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.”¹⁶ The Commission invoked both the AEA and the ERA as authority when promulgating section 50.7.¹⁷

The Commission promulgated the current version of section 50.7 in 1993 “to reflect the changes in the whistleblower protection provisions brought about by [section 2902 of] the Energy Policy Act of 1992,”¹⁸ which amended a 1978 appropriations statute that had, in turn, added section 210 (now section 211) to the ERA.¹⁹ Prior to the 1992 amendments, section 210(a) (now 211(a)(1)) provided that:

No employer may . . . discriminate against any employee . . . because the employee . . . —

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act [specifically, complaints to the Department of Labor] or the Atomic Energy Act of 1954, as amended, or a proceeding for the

¹⁶ 10 C.F.R. § 50.7(a).

¹⁷ See Final Rule: “Whistleblower Protection for Employees of NRC-Licensed Activities,” 58 Fed. Reg. 52,406, 52,408 (Oct. 8, 1993).

¹⁸ 58 Fed. Reg. at 52,406-07.

¹⁹ Congress, when enacting this section in 1978 and adding it to the provisions of the ERA, inadvertently identified the section as section 210, although another statutory provision (Act of Dec. 13, 1977, 91 Stat. 1482, 42 U.S.C. § 5850) had already been assigned that same section number. See *Union Electric Co.* (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 131 n.14 (1979), *aff’g* LBP-78-31, 8 NRC 366 (1978); Act of Nov. 6, 1978, Pub. L. No. 95-601, § 10, 1978 U.S.C.C.A.N. (92 Stat.) 2947, 2951 (codified at 42 U.S.C. § 5851). Congress corrected this error in the EPA. See Act of Oct. 24, 1992, § 2902, Pub. L. No. 102-486, 1992 U.S.C.C.A.N. (106 Stat.) 3123, 3124 (codified at 42 U.S.C. § 5851).

administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.²⁰

The 1992 amendments renumbered the above three provisions as (1)(D), (1)(E), and (1)(F), and also added the following three categories of protected whistleblower activity:

(A) notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 . . . ;

(B) refused to engage in any practice made unlawful by this Act or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this Act or the Atomic Energy Act of 1954.²¹

The pre-1992 version of section 211 was silent on what has become a key question in our case — the “causation” standard (i.e., the causal link between whistleblowing activity and an adverse personnel action). The original section 211 contained no evidentiary framework indicating who must go forward with evidence at different stages of a proceeding or indicating what standard of proof a complainant must meet. Congress addressed this problem in 1992 by adding section 211(b)(3).²² This provision requires a complainant in a DOL whistleblowing proceeding to show that one or more protected activities was “a contributing factor” in the adverse action.

In addition, the new section 211 laid out an entire evidentiary framework, both identifying for each stage of the DOL enforcement and adjudication process the party with the burden of going forward with the evidence and also specifying the standard and elements of proof applicable at each stage. The first two provisions apply to the preadjudicatory phases and the next two apply to the DOL hearing:

²⁰ Act of Nov. 6, 1978, Pub. L. No. 95-601, § 10 (adding, *inter alia*, section 210(a)(1), (2), and (3) to the ERA), 1978 U.S.C.C.A.N. (92 Stat.) 2947, 2951 (codified at 42 U.S.C. § 5851(a)(1)(D), (E), (F)). *Cf.* 10 C.F.R. § 50.7(a)(1)(iii), (iv), (v).

²¹ Act of Oct. 24, 1992, Pub. L. No. 102-486, § 2902(a), 1992 U.S.C.C.A.N. (106 Stat.) 3123 (codified at 42 U.S.C. § 5851(a)(1)(A), (B), (C)). *Cf.* 10 C.F.R. § 50.7(a)(1)(i), (ii), (iv).

²² Act of Oct. 24, 1992, Pub. L. No. 102-486, § 2902(d), 1992 U.S.C.C.A.N. (106 Stat.) 3124 (codified at 42 U.S.C. § 5851(b)(3)).

(3)(A) The Secretary shall dismiss a complaint . . . and shall not conduct the investigation . . . , unless the complainant has made a prima facie showing that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.

(B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation . . . shall be conducted if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior.

(C) The Secretary may determine that a violation of subsection (a) of this section has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.

(D) Relief may not be ordered . . . if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.²³

Under the new section 211, the bottom line is that whistleblowers will prevail if they demonstrate (by preponderance of the evidence)²⁴ that a protected activity was a “contributing factor” to an adverse personnel action — *unless* the employer comes back with “clear and convincing evidence” that it would have taken the same unfavorable personnel action notwithstanding the protected whistleblowing activity.

B. Issues on Appeal

The NRC has never before adjudicated fully an enforcement case involving a civil monetary penalty for a violation of the NRC’s whistleblower regulations.²⁵

²³ *Id.*

²⁴ Section 211 does not specify a “preponderance of the evidence” standard, but both the Secretary of Labor and the courts have found that the term “demonstrated” implies a preponderance of the evidence standard. *See, e.g., Dysert v. Secretary of Labor*, 105 F.3d 607, 610 (11th Cir. 1997).

²⁵ There have been only six whistleblower-related AEA cases ever to reach the appellate levels of this agency (i.e., the Commission itself or the now-defunct Appeal Board): *St. Mary’s Medical Center*, CLI-97-14, 46 NRC 287 (1997); *Five Star Products, Inc. and Construction Products Research, Inc.*, CLI-93-23, 38 NRC 169 (1993); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-11, 37 NRC 251, 256-62 (1993); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 325-29 (1985), *reconsid’n denied*, CLI-85-7, 21 NRC 1104, 1109 (1985); *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), ALAB-890, 27 NRC 273 (1988); *Callaway*, ALAB-527, 9 NRC at 131 n.14. Licensing Boards began adjudications in two other whistleblower enforcement cases, but they were settled before reaching

(Continued)

The instant proceeding is only the second NRC whistleblower discrimination case of any kind actually to go to adjudication on the merits,²⁶ and it is the first NRC adjudication to be subject to section 211 (formerly 210) of the ERA.²⁷ As such, the case raises legal questions of first impression:

- (i) In civil penalty proceedings, should the Commission follow the traditional evidentiary approach for proving discrimination cases, as set out in *McDonnell Douglas Corp. v. Green*²⁸ and its progeny, or follow section 211's special evidentiary framework for nuclear whistleblower claims?
- (ii) What is the minimum degree of connection (between the whistleblowing activity and the adverse employment action) sufficient to constitute "causation" — a necessary element of proof in a section 50.7 whistleblower case?²⁹
- (iii) What kinds of activities are protected by section 211 and section 50.7?
- (iv) On what basis may a licensing board mitigate a civil penalty assessed by the NRC Staff?

On appeal, TVA argues in favor of the *McDonnell Douglas* evidentiary framework, a strict "but for" causation standard, limits on "protected activities," and broad Board authority to reduce civil penalty assessments. The parties' appellate briefs also debate the factual basis for the Licensing Board's finding of discrimination in this case. TVA insists that in making key discrimination findings, the Board had "no support in the record" and was "clearly erroneous."³⁰ Unsurprisingly, the NRC Staff counters that TVA's appellate brief has

either the Appeal Board or the Commission. See *FirstEnergy Nuclear Operating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-01-18, 53 NRC 410 (2001); *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 2), ALJ-87-6, 26 NRC 445 (1987), and ALJ-87-5, 25 NRC 973 (1987).

²⁶ The first was *Union Electric Co.* (Callaway Plant, Units 1 and 2), LBP-78-31, 8 NRC 366 (1978), *aff'd*, ALAB-527, 9 NRC 126, 131 n.14 (1979). *Callaway*, however, did not involve a civil penalty but instead raised issues involving the Staff's right to investigate allegations of discrimination against whistleblowers.

²⁷ The alleged whistleblowing activities and subsequent alleged discrimination in *Callaway* occurred prior to Congress's enactment of section 210 (now 211) in 1978 as an amendment to the ERA.

²⁸ 411 U.S. 792 (1973). *McDonnell Douglas* calls for a series of burden shifts between employee and employer, ultimately leading to a requirement that the employee show, by a preponderance of the evidence, that the employer's proffered reason for the personnel action is pretextual, and that the real motivation was a prohibited discriminatory animus. We discuss the *McDonnell Douglas* paradigm in more detail later in this opinion.

²⁹ See p. 183, *supra*.

³⁰ TVA's Oct. 2 Brief at 30.

merely “repackaged” already-rejected factual claims and has not “even remotely approached” the “high standard” of a “clearly erroneous” showing.³¹

C. Standard of Review

We ordinarily defer to our licensing boards’ fact findings, so long as they are not “clearly erroneous.”³² A “clearly erroneous” finding is one that is not even “plausible in light of the record viewed in its entirety.”³³ As we stated in *Claiborne Enrichment Center*, “[a]lthough the Commission has the authority to reject or modify a licensing board’s factual findings, it will not do so lightly.”³⁴ “We will not overturn a hearing judge’s findings simply because we might have reached a different result.”³⁵ Our deference is particularly great where “the Board bases its findings of fact in significant part on the credibility of the witnesses.”³⁶ Whistleblowing discrimination cases are, by their nature, peculiarly fact-intensive and dependent on witness credibility.³⁷ A fact-based appeal in a whistleblower case, in short, faces an uphill climb before the Commission.

³¹ NRC Staff’s Nov. 3 Brief at 3.

³² See 10 C.F.R. § 2.786(b)(4)(ii). See also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 25-26 (2003) (“*PFS*”) (“Although the Commission certainly has authority to make its own *de novo* findings of fact, we generally do not exercise that authority where a Licensing Board has issued a plausible decision that rests on carefully rendered findings of fact”; also referring to “[o]ur standard of ‘clear error’”).

³³ *Kenneth G. Pierce* (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995), quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985).

³⁴ *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 93-94 (1998).

³⁵ *Id.*, quoting *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 473 (1987).

³⁶ *PFS*, CLI-03-8, 58 NRC at 26.

³⁷ See Millstone Independent Review Team, “Report of Review, Millstone Units 1, 2, and 3: Allegations of Discrimination in NRC Office of Investigation Case Nos. 1-96-002, 1-96-007, 1-97-007, and Associated Lessons Learned” at 22 (Mar. 12, 1999) (“Report of Millstone Review Team”) (“witness credibility can be a significant factor in assessing the strength or weakness of evidence upon which inferences about discrimination will be based”), available on the Commission’s automated public document retrieval system (“ADAMS”) at Accession Nos. ML003673904, ML003673939, and ML003674479. The Board’s Initial Decision in this proceeding contains many credibility determinations. See 57 NRC at 572, 574, 575, 577, 582, 591-92, 592-93, 604.

As for conclusions of law, our standard of review is more searching. We review legal questions *de novo*.³⁸ We will reverse a licensing board’s legal rulings if they are “a departure from or contrary to established law.”³⁹

II. COMMISSION DECISION

A. Evidentiary Framework for Whistleblower Enforcement Cases at the NRC

On appeal TVA argues that the Licensing Board erred by not hewing closely to the traditional judicial approach for proving discrimination cases, evinced in such well-known Supreme Court decisions as *McDonnell Douglas Corp. v. Green*⁴⁰ and *Price Waterhouse v. Hopkins*.⁴¹ Our touchstone in a nuclear whistleblowing case, however, is not *McDonnell Douglas* or *Price Waterhouse*, but the special evidentiary framework that Congress established in section 211 of the ERA.

McDonnell Douglas established an evidentiary scheme for litigating “pre-text”-based employment discrimination cases resting on “indirect evidence.” (TVA says that our case fits the *McDonnell Douglas* mold.) In such cases, an employee must show, as a *prima facie* matter, membership in a protected class, knowledge by the employer of the employee’s protected status, an unfavorable personnel action, and a causal link between the employee’s protected status and the unfavorable action. If the employee makes that showing, the employer at that point must come forward with a legitimate, nondiscriminatory reason for the personnel action. The ultimate burden of persuasion then swings back to the employee to show, by a preponderance of the evidence, that the employer’s asserted reason is a pretext, and that the real motivation was a prohibited discriminatory animus. The various *McDonnell Douglas* burden-shifting steps come with additional nuances and complexities, but we need not explore them here.⁴²

A whole set of different burdens and standards applies in so-called “dual” (or “mixed”) motive cases. These are cases where the employee presents evidence of an improper discriminatory motive. In such cases, as the Supreme Court said in *Price Waterhouse*, “once a plaintiff . . . shows that [a prohibited consideration]

³⁸ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 29 (2000).

³⁹ 10 C.F.R. § 2.786(b)(4)(ii). See generally *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-12, 58 NRC 185, 191 (2003) (applying, *inter alia*, the test of whether the Board “misappl[ied] the law”).

⁴⁰ See note 28, *supra*.

⁴¹ 490 U.S. 228 (1989).

⁴² See, e.g., *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993).

played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [the prohibited consideration] to play such a role.’’⁴³ At one time it was thought that direct evidence of a discriminatory motive was necessary to trigger the “dual motive” approach, but the Supreme Court recently ruled that indirect or circumstantial evidence also suffices.⁴⁴

General employment discrimination law is, in short, ever-changing and often perplexing. But we need not wade into those deep waters to decide this case. Such questions as whether our case is a “pretext” case or a “dual motive” case, whether we have before us “direct” or “circumstantial” evidence, and whether (and when) the burdens of evidence production and persuasion should shift between the parties require subtle and complex analysis. But Congress rendered such analysis unnecessary when in 1992 it enacted a special evidentiary framework for nuclear whistleblowing cases — namely, section 211 of the ERA. As one court has put it, section 211 “is clear and supplies *its own free-standing evidentiary framework*,” a framework that displaces “the sprawling body of general employment discrimination law.”⁴⁵ Section 211 establishes a simple two-part approach: (1) employees (or, as in our case, the NRC Staff) must show that whistleblowing activity was a “contributing factor” in an unfavorable personnel action; and (2) if that showing is made, employers still may escape liability if they demonstrate, by “clear and convincing evidence,” that they would have taken the same personnel action anyway, regardless of the whistleblowing activity.

Notwithstanding section 211, the Department of Labor continues to follow the *McDonnell Douglas* approach in whistleblower discrimination cases litigated on a “pretext” theory.⁴⁶ But we decline to follow DOL on that point. Nothing in section 211’s language or history suggests an exception for “pretext” cases. Authoritative judicial decisions have recognized no such exception, and indeed take the opposite approach.⁴⁷ And clarity and simplicity counsel our following

⁴³ 490 U.S. at 244-45 (plurality opinion).

⁴⁴ *Desert Palace v. Costa*, 539 U.S. 90 (2003). One commentator has read *Desert Palace* to obliterate the distinction between “pretext” and “dual motive” cases, hence wiping out the traditional *McDonnell Douglas* approach. See William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. Pa. J. Lab. & Emp. L. 199 (2003).

⁴⁵ *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (emphasis added). *Accord Trimmer v. Department of Labor*, 174 F.3d 1098, 1101 & n.4 (10th Cir. 1999).

⁴⁶ See, e.g., *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 3 n.12 (Sept. 30, 2003).

⁴⁷ An unpublished (and nonprecedential) Sixth Circuit case did disregard the section 211 evidentiary approach and used the *McDonnell Douglas* framework for a “pretext”-based whistleblower case. See *Tennessee Valley Authority v. Secretary of Labor*, 59 Fed. Appx. 732 (6th Cir. 2003), 2003 WL 932433. We think that the published decisions from the Eleventh Circuit (*Stone & Webster*) and the Tenth Circuit (*Trimmer*) taking the opposite position reflect a more sensible reading of section 211.

section 211's straightforward approach in NRC enforcement adjudications rather than burdening them with the byzantine doctrines of traditional employment discrimination law. In practical terms, because we see few whistleblower enforcement adjudications at the NRC, because varying evidentiary frameworks are not necessarily outcome-determinative, and because the NRC's general enforcement policy is to give deference to DOL's whistleblower determinations,⁴⁸ our disagreement with DOL on how to apply section 211 in adjudications is unlikely to lead to inconsistent results between the agencies very often, if at all.

In the present case, although the Licensing Board referred to section 211 and invoked its "contributing factor" causation test,⁴⁹ the Board did not follow section 211's full evidentiary framework.⁵⁰ The Board stopped its analysis once it found that Mr. Fiser's protected activities "played at least some role in the adverse action taken against him."⁵¹ This arguably equates to a "contributing factor" finding under section 211. But the Board declined to take the further step of examining the record to see if it contained "clear and convincing evidence" that the employer would have taken the same action anyway. In the Board's view, that inquiry "is not applicable to the threshold issue of whether an employer has violated section 50.7 but only to the follow-on consideration of whether the employee is entitled to some relief."⁵²

We disagree with the Board. Our own whistleblower protection regulation, section 50.7, while not setting out an evidentiary framework of its own, makes clear that engaging in protected activities does not immunize employees "from discharge or discipline for legitimate reasons or from adverse action dictated by non-prohibited considerations."⁵³ To give life to this provision, we must give employers defending whistleblower discrimination charges an opportunity to prove that "legitimate reasons" or "non-prohibited considerations" justified their actions. The most practicable way of doing this is by granting employers the same right of defense in an NRC enforcement proceeding as section 211 gives them in a Department of Labor compensation proceeding — i.e., the right to defend against a whistleblower discrimination charge on the ground that

⁴⁸ DOL issued no such determination in Mr. Fiser's action against TVA, as the parties settled the case before DOL issued a decision on the merits. See *Fiser v. Tennessee Valley Authority*, 1997 ERA-59 (ALJ Sept. 25, 1998).

⁴⁹ See LBP-03-10, 57 NRC at 566-67, 569, 583, 605.

⁵⁰ The Board appeared to find the *McDonnell Douglas* approach applicable, at least in part, see 57 NRC at 603, but the Board also referred to the section 211 approach and at one point labeled our case a "dual-motive case." See *id.* at 565. (*McDonnell Douglas*, as noted above, does not apply to "dual-motive" cases.)

⁵¹ 57 NRC at 604.

⁵² *Id.* at 566.

⁵³ 10 C.F.R. § 50.7(d).

they would have taken the same personnel action regardless of the employee's protected activities.

To be sure, the “clear and convincing” standard puts a thumb on the scale in favor of employees. “For employers this is a tough standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves.”⁵⁴ In recommending enactment of the current version of section 211, a House committee reported, “Recent accounts of whistleblower harassment at both NRC licensee . . . and DOE nuclear facilities . . . suggest that whistleblower harassment and retaliation remain all too common in parts of the nuclear industry. These reforms are intended to address those remaining pockets of resistance.”⁵⁵

Still, Congress was careful in section 211, as we are in today's decision, to preserve the flexibility nuclear employers require to take appropriate action against alleged whistleblowers who also are ineffective on the job or unneeded in the workplace. Employers are simply asked to *prove* that they would have made the same personnel decisions regardless of any whistleblowing activity. This tough-minded approach to employer claims of legitimate, nondiscriminatory motives effectuates the policy of Congress (and the NRC) both to encourage nuclear whistleblowers to come forward with safety-related information and not to interfere unduly with employers' prerogative to manage their workers.

Preferring old-fashioned *McDonnell Douglas*-style burden shifting, TVA (supported by NEI as *amicus curiae*) resists application of the section 211 evidentiary approach in this NRC enforcement case. The crux of their argument is that an NRC regulation — 10 C.F.R. § 50.7 — rather than section 211 governs NRC whistleblower enforcement cases. They point out that after section 211's enactment the Commission amended section 50.7 to include section 211's expanded definition of “protected activities,” but took no action to incorporate section 211's new evidentiary approach. Hence, the argument goes, the Commission ought not apply the section 211 approach here, and the Commission instead should look to traditional jurisprudence (*McDonnell Douglas* and progeny) on employment discrimination.

In effect, TVA and NEI would have the Commission turn back the clock to 1991 (prior to the 1992 amendments to the ERA), and consider this case as if Congress never enacted section 211's “contributing factor”/“clear and

⁵⁴ *Stone & Webster Engineering Corp.*, 115 F.3d at 1572. See also *Trimmer*, 174 F.3d at 1101 (in amending section 211 “Congress intended to make it easier for whistleblowers to prevail in their discrimination suits”).

⁵⁵ H.R. Rep. No. 102-474, pt. VIII, at 79 (1992), reprinted in 1992 U.S.C.C.A.N. 1953, 2282, 2297. See also *Whistleblower Issues in the Nuclear Industry: Hearing Before the Subcomm. on Clean Air and Nuclear Regulation of the Senate Comm. on Environment and Public Works*, 103d Cong. 1-2 (1993) (statement submitted by the United States Nuclear Regulatory Commission).

convincing” evidentiary paradigm. We decline to do so. It is true that our whistleblower regulation, section 50.7, does not adopt the section 211 evidentiary paradigm as such, but neither does it adopt the *McDonnell Douglas* or *Price Waterhouse* paradigms. Our regulation is prohibitory, not procedural. It renders discriminatory conduct unlawful, but does not purport to prescribe evidentiary standards and approaches for use in NRC enforcement litigation. This presumably explains why the Commission promptly amended section 50.7 to incorporate Congress’s more expansive view of “protected activities” (as set out in section 211), but saw no need to incorporate in section 50.7 Congress’s new evidentiary framework.

In cases where our own rules do not prescribe a particular process or evidentiary approach, we frequently have looked to analogous outside sources of law — for example, judicial standing doctrines or federal rules of procedure and evidence.⁵⁶ Here, section 211 — the most recent expression of congressional policy on nuclear whistleblower claims — is the obvious place to look for guidance on litigating whistleblower enforcement cases at the NRC. For one thing, we long have taken the view that our section 50.7 rests in part on the authority of Congress’s decision in section 211 to protect nuclear whistleblowers from employer retaliation.⁵⁷ Moreover, section 211 establishes a clear and straightforward evidentiary approach, eliminating some of the complexities of traditional employment discrimination litigation. The section 211 approach, while directly governing whistleblower compensation cases at the Department of Labor, is readily adaptable to the context of NRC enforcement cases. And, as we indicated above, section 211 represents a reasonable congressional effort to balance employer and whistleblower interests.

Accordingly, we think it appropriate in NRC whistleblower cases for our licensing boards to ask section 211’s two questions: (1) Did the NRC Staff show, by a preponderance of the evidence, that protected activity was a “contributing factor” in an unfavorable personnel action? (2) Did the employer show, by “clear and convincing evidence,” that it would have taken the same personnel action regardless of the protected activity?

Where does our conclusion leave the present case? As we read the Licensing Board decision, it (in effect) applied the “contributing factor” prong of section

⁵⁶ See, e.g., *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001) (judicial standing doctrine); *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-22, 38 NRC 98, 102 (1993) (Federal Rules of Civil Procedure); *Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982) (Federal Rules of Evidence).

⁵⁷ See *St. Mary’s Medical Center*, CLI-97-14, 46 NRC at 290 n.1. Section 50.7 also is grounded in the NRC’s general AEA authority to protect public health and safety. See *id.*

211,⁵⁸ but not the “clear and convincing” prong. Indeed, as we mentioned above, the Board expressly declined to undertake section 211’s “clear and convincing evidence” inquiry.⁵⁹ In reducing the NRC Staff’s \$110,000 civil penalty, however, the Board referred to “the small role that protected activities may have played in leading to the adverse action against Mr. Fiser.”⁶⁰ This statement, along with a similar statement by Judge Young in her partial dissent,⁶¹ suggests the possibility — unexplored by the Board — that there may be “clear and convincing” record evidence justifying a finding that TVA would have taken action against Mr. Fiser regardless of his whistleblowing activity. Thus we have decided to vacate the Board’s decision sustaining the civil penalty against TVA and to remand the proceeding to the Board to consider whether the record contains clear and convincing evidence justifying TVA’s personnel action on nondiscriminatory grounds.

B. Causal Connection Between Protected Activity and Unfavorable Personnel Action

1. The Contributing Factor Test

TVA and the NRC Staff appear to agree that section 211’s “contributing factor” causation standard applies here — i.e., to sustain a civil penalty against TVA, the NRC Staff must show, by a preponderance of the evidence, that Mr. Fiser’s protected activities constituted a “contributing factor” in TVA’s personnel actions.⁶² But the parties decidedly do not agree on the kind of showing the “contributing factor” test entails. The Board, too, singled out, as a “most important” issue, the “degree to which protected activities must be involved to be deemed a contributing factor in the adverse action.”⁶³

TVA views the “contributing factor” test as requiring a showing that protected activities played a “significant,” “motivating,” “substantial,” or “actual and true” role in the personnel action — in short, that whistleblower discrimination be a decisive, or “but-for,” reason for the personnel action.⁶⁴ The Licensing Board, on the other hand, joined by the NRC Staff, sees in the “contributing factor” test a more lenient standard. In their view, the “contributing factor” test “permit[s]

⁵⁸ See LBP-03-10, 57 NRC at 604, 605.

⁵⁹ *Id.* at 566.

⁶⁰ *Id.* at at 607.

⁶¹ “I find it equally possible . . . that such actions were actually based only on performance-related factors together with inappropriate as well as possibly inept management practices and actions, personality clashes, personal dislike and hostility, and related grounds.” *Id.* at 615.

⁶² See TVA’s Oct. 2 Brief at 21-22; NRC Staff’s Nov. 3 Brief at 14-15.

⁶³ LBP-03-10, 57 NRC at 565-66.

⁶⁴ See TVA’s Oct. 2 Brief at 19-24.

consideration of whether an employee's engagement in protected activities *in any degree* contributed toward an adverse personnel action, even though not the primary or even a substantial basis for the action."⁶⁵ We think the Board and the NRC Staff have the better of the argument.

Congress did not enact section 211's "contributing factor" test in a vacuum. In laws covering whistleblowers in various industries and in the federal government, Congress has used the same "contributing factor" test as it did in section 211.⁶⁶ Section 211, in fact, was "patterned after other whistleblower statutes affecting other industries."⁶⁷

In using a "contributing factor" test in whistleblower protection laws, Congress "quite clearly made it easier for the plaintiff to make her case under the statute and more difficult for the defendant to avoid liability."⁶⁸ Congress was concerned that previous judicial rulings had imposed on whistleblowers an "excessively heavy burden" to show that the whistleblowing activity was a "significant" or "motivating" factor in his or her employer's adverse action.⁶⁹ These court rulings, according to Congress, had, "in effect, . . . gutted the protection of whistleblowers."⁷⁰

Hence, as the Federal Circuit explained in *Marano v. Department of Justice*, Congress established a lenient "contributing factor" test, under which whistleblowers need show only that their protected activity affected the personnel action "in any way":

⁶⁵ LBP-03-10, 57 NRC at 569. *See also id.* at 566, 567. The NRC Staff, and apparently the Board as well, believe that section 50.7's (partial) grounding in the AEA requires a broad construction of the "contributing factor" test. *See id.* at 566-67; NRC Staff's Nov. 3 Brief at 14-15. As we explain in the text, however, our understanding of the "contributing factor" test rests not on the AEA, but on the most common judicial understanding of the statutory term.

⁶⁶ *See, e.g.*, the Whistleblower Protection Act, 5 U.S.C. § 1221(e); Federal Deposit Insurance Act, *as amended by* the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 1831j(a)(1) ("FIRREA," incorporating the procedures of the Whistleblower Protection Act); the Federal Aviation Administration Authorization Act of 1994, *as amended by* the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42,121 ("Ford Act"); the Corporate and Criminal Fraud Accountability Act of 2002, 18 U.S.C. § 1514A (Title VIII of the Sarbanes-Oxley Act of 2002, incorporating the procedures of the Ford Act); and the Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60,129 (identical language to that in the Ford Act).

⁶⁷ *American Nuclear Resources, Inc. v. Department of Labor*, 134 F.3d 1292, 1294-95 (6th Cir. 1998).

⁶⁸ *Frobose v. American Savings and Loan Association*, 152 F.3d 602, 612 (7th Cir. 1998). *See also Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993); *Rouse v. Farmers State Bank*, 866 F. Supp. 1191, 1208 (D. Iowa 1994).

⁶⁹ *Marano*, 2 F.3d at 1140. *See also Rouse*, 866 F. Supp. at 1208.

⁷⁰ *Marano*, 2 F.3d at 1140 (interpreting Whistleblower Protection Act). *See also Rouse*, 866 F. Supp. at 1208 (interpreting FIRREA); Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Era of Employment Dissent*, 51 Admin. L. Rev. 531, 554 (1999).

Rather than being required to prove that the whistleblowing disclosure was a “significant” or “motivating” factor, the whistleblower under the [Whistleblower Protection Act] must evidence only that his protected disclosure played a role in, or was “a contributing factor” to, the personnel action taken:

The words “a contributing factor” . . . mean *any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision*. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a “significant,” “motivating,” “substantial,” or “predominant” factor in a personnel action in order to overturn that action.⁷¹

We are aware of no judicial decision discussing what section 211’s “contributing factor” test means. But other courts construing identical “contributing factor” language in whistleblower statutes closely similar to section 211 have reached the same result as *Marano*.⁷² We see no reason to construe section 211 differently.

Thus, contrary to TVA’s view, we think that the Licensing Board here acted on a correct understanding of the “contributing factor” test when it inquired whether Mr. Fiser’s protected activity contributed “in any degree” or played “at least some role” in TVA’s personnel decisions.⁷³

This is not to say that the “contributing factor” test is entirely toothless. An employee may not simply engage in protected activities and expect immunity from future unfavorable personnel actions. Mere employer (or supervisor) knowledge of the protected activity does not suffice as a “contributing factor”; nor does “the equivalent of adding ‘a drop of water into the ocean.’”⁷⁴ The evidence, direct or indirect, must allow a reasonable person to infer that protected activities influenced the unfavorable personnel action to some degree.⁷⁵ In cases where the evidence is weak, employers should be able to avoid liability by providing “clear and convincing evidence” that they would have taken the same personnel action anyway, based on nondiscriminatory grounds.

⁷¹ *Marano*, 2 F.3d at 1140 (emphasis added by the court to the internal quotation from 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S.20)).

⁷² See, e.g., *Simas v. First Citizens’ Federal Credit Union*, 170 F.3d 37, 44 (1st Cir. 1999); *Frobese*, 152 F.3d at 612; *Rouse*, 866 F. Supp. at 1208. See generally Devine, 51 Admin. L. Rev. at 555.

⁷³ See LBP-03-10, 57 NRC at 569, 604.

⁷⁴ See Report of Millstone Review Team at 8.

⁷⁵ The proponents of a finding of violation must demonstrate to the trier of fact (by a preponderance of the evidence) that the protected activity “was actually ‘a contributing factor in the unfavorable personnel action.’” See *Stone & Webster Eng’g Corp.*, 115 F.3d at 1572, quoting 42 U.S.C. § 5851(b)(3)(C). However, we acknowledge the unsettled and conflicting understandings of what kind of causation showing the employee (or, in NRC cases, the Staff) must make to prevail by a preponderance of the evidence. Decisions by the NRC or the courts of appeals, based on the particular circumstances of such cases, may clarify further the controlling test in this area.

Below (in the next section), we explain why we do not find “clearly erroneous” the Board’s factual finding that Mr. Fiser’s whistleblowing “played at least some role” in TVA’s personnel actions.⁷⁶ We are quick to add, though, that a “contributing factor” finding does not end our case. As we explained above, under section 211 (and under analogous whistleblower laws) employers still may avoid liability if they show, by “clear and convincing evidence,” that they would have taken the same unfavorable personnel action even in the absence of whistleblowing. The Licensing Board has yet to rule on that issue in our case. But pursuant to our decision today, the Board will do so on remand.

2. *The Board’s Contributing Factor Finding*

On appeal, TVA argues at some length that we should strike down as “clearly erroneous” the Board’s factual findings, particularly its findings that Mr. Fiser’s protected activities played a causal role in TVA’s personnel decisions. But TVA’s fact-based arguments turn in part on its view — which we reject today — that the NRC Staff was required to show causation in a strict “but-for” or “substantial factor” sense.⁷⁷ TVA also takes inadequate account of how high a hurdle the “clearly erroneous” standard erects. As we set out above under the heading “Standard of Review,” to overturn licensing board fact findings as clearly erroneous requires a showing that the findings are entirely implausible on the record; in other words, that no reading of the record justifies the findings. It is true, as TVA suggests,⁷⁸ that the Commission has the raw power to override its licensing boards’ fact findings, “clearly erroneous” or not, but absent unusual circumstances, our usual practice is not to do so. Otherwise, the Commission would place itself in the untenable position of having to redo its licensing boards’ work in nearly every case.

On appeal, TVA’s brief parses the record from its point of view, and tells a story congenial to its interests. But an effort to show that “the record evidence in this case may be understood to support a view sharply different from that of the Board” does not, in and of itself, establish the Board’s view as clearly erroneous.⁷⁹ TVA’s task is complicated by two factors: (1) the Board rested its fact findings significantly on its determinations of witness credibility, determinations we are ill-positioned to second-guess; and (2) the Board’s finding of discrimination is rooted not just in one or two events, but in a large collection of circumstantial

⁷⁶LBP-03-10, 57 NRC at 604.

⁷⁷See, e.g., TVA’s Nov. 24 Brief at 3 (arguing that “misapplication of law” renders inapplicable the deferential “clearly erroneous” standard of review of fact findings).

⁷⁸See TVA’s Nov. 24 Brief at 2-3.

⁷⁹*Kenneth G. Pierce*, CLI-95-6, 41 NRC at 382.

evidence from which the Board draws inferences. These complications permeate TVA's challenge to the Board's fact findings.

For example, when TVA argues on appeal that TVA supervisors lacked timely knowledge of Mr. Fiser's protected activities and therefore could not have acted out of a discriminatory animus, TVA in effect is asking the Commission to take those supervisors' testimony at face value. But the Licensing Board expressly found the supervisors' testimony not credible in significant respects.⁸⁰ It is the Board's credibility finding, not TVA's reconstruction of events, to which we owe deference on appeal. And, while TVA's appellate brief takes great trouble to break down TVA's relationship with Mr. Fiser into individual episodes, and argues strongly that innocent, nondiscriminatory purposes animated certain TVA actions, TVA does not really gainsay the Board's broader point: "the sum total of these many inferential adverse actions present a pattern of discrimination."⁸¹

The Board's findings were cumulative, resting on many incidents. The Board found that Mr. Fiser had suffered a "plethora of career-damaging situations," going "well beyond unfortunate circumstances and/or chance."⁸² The Board also pointed to "criticisms by management" of Mr. Fiser's participation in several protected activities.⁸³ Given these broad findings, TVA cannot impeach the Board's inference that protected activities "played at least some role" in Mr. Fiser's troubles simply by arguing that particular employment episodes recounted by the Board may have had entirely benign explanations.

To be sure, the factual basis for the Board's discrimination finding seems to us less than overwhelming — one reason why we are asking the Board on remand to consider whether TVA's evidence amounts to a "clear and convincing" showing that TVA would have treated Mr. Fiser the same regardless of his whistleblowing activity. But our finding less than overwhelming evidence supporting the Board's view is not the same as saying that the Board was "clearly erroneous" when it found, based on the record as a whole, that Mr. Fiser's whistleblowing was a "contributing factor" in TVA's unfavorable treatment of him.

One final point warrants mention here. In the next section of today's decision, on "protected activities," we hold that the Board inappropriately viewed as "protected" some activities that either do not fit the statutory and regulatory definition of protected activities or were not properly noticed in advance of the adjudication. On remand, the Board should consider whether leaving some protected activities out of the case, as we direct below, requires any change in the Board's "contributing factor" finding.

⁸⁰ See, e.g., LBP-03-10, 57 NRC at 604.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

C. “Protected Activities” That Are Properly Before the Licensing Board in This Proceeding

To determine which protected activities were properly before the Licensing Board, we need to address two questions: (1) whether the Board considered any “protected activities” that suffered from defective notice to TVA, and (2) whether the Board incorrectly considered as “protected” certain of Mr. Fiser’s activities that did not, as a matter of law, qualify as “protected activities.” Because the answer to both these questions is “yes,” we conclude that the Board “depart[ed] from [and ruled] contrary to established law,”⁸⁴ and we reverse those portions of LBP-03-10 that considered those nonnoticed or nonprotected activities. On remand, the Board should not consider those particular activities.

1. Improper Consideration of Nonnoticed Activities

a. Procedural Background

The NRC Staff in its Notice of Violation relied on only two “protected activities” to support its conclusion that TVA had violated the NRC’s whistleblowing regulation by retaliating against Mr. Fiser. The first activity was actually a combination of the following: Mr. Fiser’s identification of three chemistry-related nuclear safety concerns in 1991-1993 involving radiation monitor set points, his involvement in the “filter change-out scenario,” and his expressions of concern during the period February 19 through early March of 1992 regarding the applicability of the NRC’s requirements for conducting Post Accident Sampling System (PASS) analyses. The second activity was his filing of a DOL complaint on September 23, 1993, based in part on these same three chemistry-related nuclear safety concerns.

By the time discovery had concluded, the Staff had supplemented its first two grounds with three additional ones. The first was Mr. Fiser’s August 16, 1993 letter to Senator Sasser, with a copy to the Commission, in which he complained that TVA was discouraging employees from raising nuclear safety issues (including one involving diesel generator fuel oil storage tanks).⁸⁵ The second was his participation in the resolution of two safety issues previously identified by another employee (one in November 20-21, 1991, involving data trending, and the other on August 23, 1989, concerning diesel generator fuel oil storage tanks). And the third was his June 25, 1996 DOL complaint alleging disparate treatment by TVA.

⁸⁴ 10 C.F.R. § 2.786(b)(4)(ii).

⁸⁵ According to TVA, the Staff first described the Sasser letter as a “protected activity” in a January 24, 2002, response to TVA interrogatories. See LBP-03-10, 57 NRC at 575 n.22.

The Board similarly considered the following five activities to be both “protected” and relevant to the alleged violations in this adjudication.⁸⁶ The first was a set of two protected activities that occurred from 1991 to 1993, involving the identification of chemistry-related nuclear safety concerns (radiation monitor set points and the NRC’s requirements for conducting PASS analyses). The second was his 1993 DOL complaint regarding, among others, those same two activities. The third was his 1996 letter to Senator Sasser. The fourth was his involvement in addressing two nuclear safety issues from 1991 to 1993 (data trending, and diesel generator fuel oil storage tanks). And the fifth was his 1996 DOL complaint. In short, the Board considered as “protected” all of the Staff’s enumerated activities except for Mr. Fiser’s involvement in the “filter change-out scenario.”

b. The Parties’ Positions

TVA complains that the Board’s Initial Decision was based in part on three “protected activities” that the Staff had not identified in the Notice of Violation — Mr. Fiser’s participation in the resolution of the two previously identified safety issues (regarding data trending and diesel generator fuel oil storage tanks), the 1996 DOL complaint, and the letter to Senator Sasser. TVA claims that the Board’s consideration of these unnoticed matters was prejudicial error.⁸⁷

In support, TVA refers us to 10 C.F.R. § 2.205(a) which requires the Staff to “serve a written notice of violation upon the person charged” and “specify the date or dates, facts, and nature of the alleged act or omission with which the person is charged.” TVA also relies on *Radiation Technology*,⁸⁸ which held that the Staff is “require[d] [to] give licensees written notice of specific violations and consider their responses in deciding whether penalties are warranted.”⁸⁹ TVA asserts that the Board ignored these procedural safeguards and fair-notice mandate, as well as TVA’s procedural due process rights under the Constitution to notice and an opportunity to be heard. TVA, while acknowledging that the Board’s hearing was *de novo*,⁹⁰ nonetheless maintains that the Notice of Violation still defines the charges in this proceeding and therefore prescribes the bounds of the case.

In response, the Staff asserts that it could legitimately use at the hearing the information regarding two of the three new bases (the 1996 DOL complaint and the

⁸⁶ 57 NRC at 558, 559, 580-92, 601.

⁸⁷ See TVA’s Oct. 2 Brief at 39-40; TVA’s Nov. 24 Brief at 18-19; TVA’s Reply to the Staff’s Findings of Fact and Conclusions of Law, dated March 7, 2003, at 97, 128.

⁸⁸ *Radiation Technology, Inc.* (Lake Denmark Road, Rockaway, New Jersey 07866), ALAB-567, 10 NRC 533 (1979).

⁸⁹ *Id.* at 537.

⁹⁰ See *Atlantic Research Corp.* (Alexandria, Virginia), ALAB-594, 11 NRC 841, 849 (1980).

Sasser letter)⁹¹ because that information had been uncovered during discovery — after the issuance of both the Notice of Violation and the Enforcement Order. The Staff also argues that TVA had, and took advantage of, numerous opportunities to address those two new bases, both in its prehearing filings and during the hearing. And finally the Staff maintains that, even though the Staff did present evidence of these two additional protected activities, it never changed its underlying theory of the case.⁹² The Staff’s is, essentially, a “no prejudice” defense.

c. Analysis

Section 234b of the AEA requires that, “[w]henver the Commission has reason to believe that a person has become subject to the imposition of a civil penalty under the provisions of this section, it shall notify such person in writing (1) setting forth the date, facts and nature of each act or omission with which the person is charged . . . [and] [t]he person so notified shall be granted an opportunity to show in writing . . . why such penalty should not be imposed.”⁹³ Basic principles of fairness likewise require that the licensee in an enforcement action know the bases underlying the Staff’s finding(s) of violation.

Just as “the penalty assessed by [the Staff] constitutes the upper bound of the penalty which may be imposed after [a] hearing,”⁹⁴ the grounds for the Staff’s finding of a whistleblower violation must likewise form the upper bound for the grounds available to the Board when determining whether a violation has occurred. This principle regarding notice of, and opportunity to comment on, the fundamental bases for an enforcement action is analogous to our policy in licensing adjudications that “[a]n intervenor may not freely change the focus of an admitted contention at will as litigation progresses, but is bound by the terms of the contention.”⁹⁵ It is likewise akin to our “longstanding practice” in licensing cases “requir[ing] adjudicatory boards to adhere to the terms of

⁹¹ The Staff does not address why its introduction of its third new set of “protected activities” (involving data trending and diesel generator fuel oil storage tanks) was permissible. We therefore consider the Staff to have abandoned that position. *See generally Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001) (“We deem waived any arguments not raised before the Board or not clearly articulated in the petition for review” (citations omitted)).

⁹² NRC Staff’s Nov. 3 Brief at 26-27.

⁹³ 42 U.S.C. § 2282(b). *Accord* 10 C.F.R. § 2.205(a).

⁹⁴ *See Atlantic Research*, ALAB-594, 11 NRC at 849.

⁹⁵ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002) (citation and internal quotation marks omitted).

admitted contentions in order to give opposing parties advance notice of claims and a reasonable opportunity to rebut them.”⁹⁶

For us to determine whether the Staff has provided lawful advance notice here, we need to answer three questions: (i) what Commission document(s) establish the scope of this civil penalty proceeding, (ii) what level of specificity is required in such document(s) notifying TVA of the regulatory violation with which it is charged (i.e., is it sufficient for the document to set forth merely the general theory of violation, or must the document also provide the specific factual bases for the ultimate finding of violation), and (iii) whether the document(s) in the instant proceeding were sufficiently detailed to provide TVA with adequate notice of the three additional grounds for the violation at issue here.

Regarding the first of these questions, it is well established in Commission enforcement jurisprudence that the document setting the scope of an enforcement adjudication is ordinarily the enforcement order⁹⁷ (e.g., an Order Imposing Civil Monetary Penalty). Our Notice of Hearing in *this* proceeding, however, makes clear that the scope of the violation issues (though not the penalty issues) was established instead by the Notice of Violation:

The issues to be considered, as set forth in the Order Imposing Civil Monetary Penalty, are (a) whether the Licensee violated the Commission’s requirements, *as set forth in the Notice of Violation and Proposed Imposition of Civil Penalty*, dated February 7, 2001; and, if so, (b) whether, on the basis of such violation, the Order Imposing Civil Monetary Penalty should be sustained.⁹⁸

⁹⁶ *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-02-22, 56 NRC 213, 227 (2002) (citations and internal quotation marks omitted).

⁹⁷ *See, e.g., Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 216, 222 (1997).

⁹⁸ *See* Notice of Hearing, Tennessee Valley Auth. (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2 & 3), 66 Fed. Reg. 35,467, 35,468 (July 5, 2001) (emphasis added). *See also* Order Imposing Civil Monetary Penalty, 66 Fed. Reg. 27,166, 27,167 (May 16, 2001).

Although both the cursory nature of the Order Imposing Civil Monetary Penalty and its reliance on the Notice of Violation made the above-quoted reference to the Notice of Violation appropriate, we would not ordinarily consider the Notice of Violation to be the appropriate document for establishing the scope of an enforcement proceeding. Section 2.205(d) provides that the Staff shall “consider[. . . the answer” to a Notice of Violation and only then shall “issue an order dismissing the proceeding or imposing, mitigating, or remitting the civil penalty.” Likewise, the 1971 Statement of Considerations for section 2.205 states that “a request for a hearing need not be made until after an answer to a notice of violation has been filed and an order imposing a civil penalty entered by the [Staff].” Final Rule: “Civil Penalties,” 36 Fed. Reg. 16,894, 16,895 (Aug. 26, 1971). The clear import of both these statements is that the Notice of Violation should not be the Staff’s final word regarding either the finding of a violation or the bases underlying that finding, but that the Staff’s subsequent Enforcement Order must take into account the licensee’s answer to the Notice. Although we are not in a position

(Continued)

The Staff acknowledged all of this at the hearing. In its Reply to TVA's Proposed Findings of Fact, the Staff stated that "the issues before the Board in this proceeding are limited to the [two] issues identified in th[e] notice of hearing,"⁹⁹ and that, as for "issues . . . outside the scope of the hearing notice, the Board lacks the jurisdiction to consider them."¹⁰⁰ Indeed, Commission appellate jurisprudence has long held this kind of "scope of proceeding" issue to be *jurisdictional* in nature:

It is well settled that NRC licensing boards and administrative law judges do not have plenary subject matter jurisdiction in adjudicatory proceedings. Agency fact finders are delegates of the Commission who may exercise jurisdiction only over those matters the Commission specifically commits to them in the various hearing notices that initiate the proceedings. Thus, the scope of the proceeding spelled out in the notice of hearing identifies the subject matter of the hearing and the hearing judge can neither enlarge nor contract the jurisdiction conferred by the Commission.¹⁰¹

We therefore move to the second threshold question — what level of detail must the TVA Notice of Violation contain to satisfy our notice requirements? As noted above, the Staff argues for the acceptability of supplementing the bases supporting the Notice of Violation to reflect new facts that surface during discovery — so long as the Staff does not change the underlying theory of its case.¹⁰² We disagree with the Staff. Its proposed rule of thumb would allow the Staff virtually unfettered freedom to change the focus of an adjudication under section 50.7 or its sister regulations, subject only to the restriction that the case still involve violations of the salient whistleblower regulation. Such a restriction is, in our view, so broad as to be virtually meaningless, would leave the scope of an enforcement proceeding uncertain throughout the entire prehearing phase of an adjudication, and would undermine our twin goals of fairness and efficiency in adjudicatory decisionmaking.¹⁰³ Under the Staff's proposed approach, whistle-

to know whether the Staff actually ignored TVA's answer in this proceeding, the cursory nature of the Staff's Order Imposing Civil Monetary Penalty and its incorporation of the Notice of Violation certainly give that impression. To avoid even an appearance of impropriety, we instruct the Staff not to use such an approach in the future, absent compelling circumstances.

⁹⁹ NRC Staff's Findings of Fact at 2.

¹⁰⁰ *Id.* at 5.

¹⁰¹ *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 476 (1987) (footnotes omitted). *See also, e.g., Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985); *Commonwealth Edison Co.* (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645, 647 (1974).

¹⁰² Staff's Nov. 3 Brief at 26-27.

¹⁰³ *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998).

blower enforcement adjudications would constantly be subject to change: new information on protected activities or adverse actions could be brought into the case without a disciplined notice and response process.

In so ruling, however, we do not mean to suggest that the Staff is powerless in a whistleblower adjudication to update its NOV based on newly discovered facts. If the new facts support conclusions already in the NOV that a particular activity was protected, or that management was aware of the protected activity, or that management took a particular action adverse to the whistleblower, or that such action was in retribution for the protected activity at issue, then the Staff would be free to use those newly discovered facts in its arguments and briefs. We cannot, however, accept the Staff's proposed extension of this principle to include entirely new instances of protected activity, unmentioned in the NOV. As discussed above, such an approach would take the Board proceeding beyond its permissible jurisdictional boundaries. Rather, in those situations, the Staff may either issue a revised NOV¹⁰⁴ or initiate a new enforcement action.

Finally, we reach the third and dispositive question whether the Notice of Violation in this proceeding contained the necessary level of specificity. It is beyond dispute that the Notice of Violation contains no references to the three new bases in question. Indeed, the Staff itself acknowledges as much — describing these as “additional” protected activities¹⁰⁵ and conceding that these were instead “developed during discovery”¹⁰⁶ — a stage of the proceeding that of course *follows* the issuance of a Notice of Violation.¹⁰⁷ The Staff could have supplemented its Notice of Violation or its enforcement order, just as complainants regularly supplement their discrimination claims under Title VII of the Civil Rights Act.¹⁰⁸ However, the Staff, for whatever reason, chose not to do so.

Based on our answers to these three threshold questions, we conclude that the three new bases are, as a matter of law, beyond both the scope of this adjudication

¹⁰⁴ The Staff has amended Notices of Violation in the past. *See, e.g., Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), 1991 WL 215290 (NRC), n.5 (Licensing Board, Mar. 30, 1995); *Consolidated X-Ray Service Corp.* (P.O. Box 20195, Dallas, Texas 75220), ALJ-83-2, 17 NRC 693, 698 (1983).

¹⁰⁵ NRC Staff's Nov. 3 Brief at 27.

¹⁰⁶ *Id.* at 27 n.21.

¹⁰⁷ The Staff issued the Notice of Violation on February 7, 2000. Discovery took place from July 19, 2001, through January 22, 2002; the Board held the evidentiary hearing intermittently from April 23, 2002, through September 13, 2002. *See* LBP-03-10, 57 NRC at 561.

¹⁰⁸ *See, e.g., Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 549 (10th Cir. 1999), *referring to* 42 U.S.C. §§ 2000(e) *et seq.*

and the jurisdiction of the Board, and that the Board erred in considering them.¹⁰⁹ We therefore remand this issue to the Board with the instruction that it reexamine its relevant rulings in light of both our conclusion and our underlying reasoning.

2. *Improper Consideration of Non-“Protected” Activities*

As noted above, “protected activity” includes the acts of notifying an “employer of an alleged violation” and refusing “to engage in any practice made unlawful by this Act [the Energy Policy Act of 1992] or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer.”¹¹⁰ The intent underlying the inclusion of these (and other) examples of whistleblowing activities was to protect employees who, knowingly or otherwise, risk retribution from their employers for pointing out safety or regulatory compliance problems.

Although TVA agrees with the Board and the Staff that Mr. Fiser’s 1993 DOL complaint and his letter to Senator Sasser each constitute a “protected activity,”¹¹¹ TVA disagrees with their conclusion that “protected activity” includes participation in the resolution of safety issues *previously raised by another*. TVA asserts that Mr. Fiser neither discovered, identified, raised, nor documented the four technical issues to which he referred in the 1993 DOL complaint and/or his letter to Senator Sasser, and which the Board found to qualify as “protected activities.”¹¹² In support, TVA quotes the minority opinion to the effect that “there is no finding that [Mr. Fiser] did anything against management’s wishes, other than *not* resolving an issue successfully or adequately . . . or refusing to initiate a procedure that might, if *not* followed, subject TVA to a finding of a violation of procedures.”¹¹³ Therefore, according to TVA, Mr. Fiser’s participation does not qualify as “protected” and the Board erred in considering it.

NEI similarly argues that “there is . . . no basis in law or policy . . . [to rule] that an employee’s mere participation in the resolution of a safety related issue, without some additional action (e.g., identifying a problem that is either related

¹⁰⁹The Staff’s argument that TVA had an opportunity at the hearing to rebut the Staff’s new “protected activity” claims fails to carry the day because (1) the Staff deprived TVA of an opportunity to make its case to the NRC enforcement staff prior to hearing, as guaranteed by statute (AEA § 234b, 42 U.S.C. § 2282(b)), and (2) the Staff’s failure to include sufficient detail in its charging documents is a jurisdictional default, depriving the Board of authority to adjudicate the new claims.

¹¹⁰42 U.S.C. § 5851(a)(1)(A), (B). *See also* 10 C.F.R. § 50.7(a)(1)(i), (ii).

¹¹¹*See* LBP-03-10, 57 NRC at 580, 582.

¹¹²TVA’s Oct. 2 Brief at 24-28. The four safety issues are radiation monitor set points (discussed in LBP-03-10, 57 NRC at 583-84), PASS analysis (*id.* at 585-87), diesel generator fuel oil storage tank issue (*id.* at 587-89), and data trending (*id.* at 589-92). As previously noted, the Board found that Mr. Fiser’s involvement in a fifth safety issue — the “filter change out scenario” — did not constitute a “protected activity” (*id.* at 584-85).

¹¹³TVA’s Oct. 2 Brief at 24 (emphasis in original), *quoting* 57 NRC at 611 (minority opinion).

to the solution or some other safety concern prompted by participation in the resolution) is protected.”¹¹⁴

The NRC Staff responds that TVA’s and NEI’s position reflects “an extremely narrow view of what constitutes ‘protected activity’ within the meaning of Section 50.7 and Section 211.”¹¹⁵ The Staff contends that “Section 50.7(a)(1)(iv) [*sic*, “iv” should be “v”] specifically covers ‘assisting’ others who engage in protected activities as well as any ‘participation’ in protected activities.”¹¹⁶

The parties’ arguments on this general issue are both factual and legal. In today’s decision, we need only examine the legal question whether the Board in LBP-03-10 properly interpreted the term “protected activity.” For the reasons set forth below, we conclude that the Board did not do so in its general discussion of that concept and in its analysis of one of the four technical issues. We therefore remand those two portions of LBP-03-10 and instruct the Board to revise its findings of fact and conclusions of law to make them consistent with our discussion of “protected activity.”

a. General Meaning of “Protected Activity”

The Board offers scant explanation as to why it considers “protected activities” to include involvement in safety-related issues that Mr. Fiser neither discovered, identified, raised, reported, nor documented.¹¹⁷ The Board simply adopts the Staff’s position that participation in such issues’ resolution is sufficient to qualify as a “protected activity.”¹¹⁸ In support, the Board cites only one case — a decision by the Secretary of Labor (*Zinn v. University of Missouri*¹¹⁹) which, according to the Board, “makes it clear that protected activities are not limited to those initially raised, documented, or identified by the complainant.”¹²⁰

We believe that the Board has misread *Zinn*. The University of Missouri (Dr. Zinn’s employer) set up a Shipping Task Force to conduct a “global review of shipping procedures [of radioactive materials from] . . . the [University’s research] reactor in order to pursue . . . remedial steps to prevent . . . shipping errors in the future.”¹²¹ Dr. Zinn was a member of that Task Force. During the course of the Task Force’s consideration of the shipping procedures, he insisted that the “‘global review’ should address not only the previously raised issue of

¹¹⁴ NEI’s Oct. 2 Brief at 17.

¹¹⁵ NRC Staff’s Nov. 3 Brief at 9.

¹¹⁶ *Id.*

¹¹⁷ See LBP-03-10, 57 NRC at 580-81. See also TVA’s Oct. 2 Brief at 24.

¹¹⁸ See 57 NRC at 580-81, 584.

¹¹⁹ Case Nos. 93-ERA-34, 93-ERA-36, 1996 WL 171417 (Sec’y Jan. 18, 1996).

¹²⁰ LBP-03-10, 57 NRC at 580-81.

¹²¹ 1996 WL 171417 at *1.

accuracy in addressing shipments *but also another issue* related to the amount of radioactivity in each shipment leaving the reactor, viz, the accurate description of the targets submitted for irradiation, including any trace elements.”¹²² *Zinn* was thus not a case involving merely someone working solely to resolve a previously raised issue. Rather, it concerned Dr. Zinn and another University employee, both of whom were raising a *new* safety issue, albeit in the context of an effort to resolve a previously raised one.

More specifically, though it is true that the two complainants in *Zinn* did not discover, identify, report, or document the original safety issue, they did attend meetings at which one or both of them engaged in activities described as “express[ing] concern,”¹²³ “rais[ing] safety concerns,”¹²⁴ “rais[ing] objections,”¹²⁵ and “pursu[ing] th[e] subject” of the new safety issue.¹²⁶ The complainants also pursued the safety issues outside of the meetings.¹²⁷ The *Zinn* decision thus makes clear that the complainants were actively opposing the management and that their actions thus fell squarely within the congressional intent to protect employees who were risking the disapproval and wrath of their employers for pointing out safety problems.¹²⁸

We read the *Zinn* decision to support the proposition that an employee is participating in a “protected activity” when he raises safety-related issues, even if the context in which he or she does so is the resolution (rather than the raising) of another safety issue. This interpretation is consistent with the rule of statutory construction that remedial legislation (such as whistleblower and antidiscrimination statutes) should be broadly interpreted in order to accomplish its goals.¹²⁹ We believe that, if an employee on a safety issue resolution committee

¹²² *Id.* at *2 (emphasis added).

¹²³ *Id.* at *8.

¹²⁴ *Id.* at *12 n.10.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at *4, *7, *10, *12 n.10.

¹²⁸ See generally *Trimmer*, 174 F.3d at 1104 (“Whistleblower provisions are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment” (citation and internal quotation marks omitted)). Whistleblower protection does not, however, require employees to predict that whistleblowing will subject them to their employers’ wrath. For instance, a quality assurance inspector whose job entails pursuing safety issues is entitled to whistleblower protection even though he might not know that his employer would take umbrage at his safety-related reports. Any other result would undermine the Commission’s goal of preventing a “chilling effect” on whistleblowers’ fellow employees — something that could occur regardless of the whistleblower’s lack of prescience.

¹²⁹ See, e.g., *Kundrat v. District of Columbia*, 106 F. Supp. 2d 1, 4 (D.D.C. 2000) (“Title VII is a remedial statute which is generally broadly construed”).

believes that the committee's responses to the safety problem are misdirected or ineffective, the employee's statements to that effect would constitute a "protected activity" even though made in the context of an attempt to resolve the same safety problem. Likewise, if an employee, while resolving a previously reported safety issue discovered by another, finds additional previously undiscovered safety problems, the employee's reporting the new problems would constitute "protected activity."¹³⁰

We do not, however, go so far down this path as the Staff would lead us. We are unconvinced by the NRC Staff's interpretation of section 50.7(a)(1)(v) as including actions of an employee whose *sole* whistleblower-related conduct consists of helping to find a remedy for safety problems discovered by others. The Staff considers such remedial activities as constituting the "assist[ance]" of others engaged in protected activities as well as "participation" in protected activities.¹³¹ The Staff ignores the fact that subsection 50.7(a)(1)(v) refers *only* to the specific activities enumerated in subsections 50.7(a)(1)(i)-(iv). Consequently, to the extent that Mr. Fiser was involved in *exclusively* remedial activities, then those would not fall within the bounds of "protected activity." Such purely remedial activities are hardly the kind that would be taken "against the explicit or implicit directives or wishes of the employer."¹³²

In short, we conclude that the mere involvement — without more — in the resolution of a safety or regulatory compliance issue raised by another person does not constitute "protected activity"; but we also conclude, conversely, that an employee's involvement in the resolution of such an issue does not deprive an employee of the protections that section 50.7 offers for otherwise protected activities. We move now to an examination of Mr. Fiser's involvement in each technical issue, where we find that — despite the Board's overly general interpretation of the phrase "protected activity" — all but one of the four technical actions on which the Board relies are indeed "protected activities" as we interpret that term above.

b. The Board's Application of the "Protected Activity" Concept to Four Technical Actions

1. Regarding the first technical issue, the Board found that the "radmonitor set-points . . . issue was first identified to TVA by [the] NRC through an IE bulletin in 1982, prior to [the beginning of] Mr. Fiser's employment by TVA . . .

¹³⁰ Cf. Zinn, *supra*.

¹³¹ NRC Staff's Nov. 3 Brief at 9.

¹³² LBP-03-10, 57 NRC at 610 (minority opinion).

in 1987.”¹³³ Consequently, the Board concluded that “Mr. Fiser did not initially raise the issue before TVA. Nor did he sign the corrective action document . . . that closed the issue.”¹³⁴ The Board further found, however, that Mr. Fiser “suspected that the issue had not been resolved properly” and therefore “participated in the discussion of salient parts of the issue that eventually led TVA to undertake corrective action.”¹³⁵ In Mr. Fiser’s own words, he “started the questioning process about the way the issue was resolved,”¹³⁶ and “started the initial investigation” in 1988 into the question whether the safety issue had been properly resolved.¹³⁷ As a legal matter, this reraising of the safety issue strikes us, as it did the Board, as “protected activity.” Mr. Fiser was risking the disapproval of TVA management by raising this matter.

TVA complains, *inter alia*, that Mr. Fiser failed to prepare the proper administrative document on the safety issue, and argues that we should therefore not consider this activity as “protected.” Although this is perhaps germane to how well he performed certain administrative aspects of his job, it is irrelevant to whether he engaged in a “protected activity.” We are not concerned with whether an employee procedurally crosses every “t” and dots every “i” when reporting safety problems to management. We are instead concerned with whether the employee gave management at least some form of notice of the safety or regulatory compliance problem. Indeed, such a hypertechnical approach would contravene more than 20 years of judicial interpretation of section 211 as covering “informal complaints.”¹³⁸

2. The second technical issue listed in the 1993 DOL complaint (and also identified in Mr. Fiser’s letter to Senator Sasser) is a dispute over whether the Sequoyah plant personnel were able to conduct PASS analyses in the 3 hours allotted by the NRC. The Board accepted TVA’s argument that Mr. Fiser did not identify or raise the PASS issue and that he was in fact in an entirely unrelated office at the time the Sequoyah Plant’s Nuclear Safety Review Board raised this issue.¹³⁹

The Licensing Board inferred from the record, however, that Mr. Fiser (and a colleague Mr. William F. Jocher) had disagreed with the site’s vice-president (Mr. Jack Wilson) in 1992 regarding the applicability of the PASS requirement, that Mr. Jocher had subsequently contacted the NRC to confirm that applicability,

¹³³ *Id.* at 583.

¹³⁴ *Id.* at 584.

¹³⁵ *Id.*

¹³⁶ *Id.* at 583, quoting Tr. 1136.

¹³⁷ *Id.* at 583, quoting Tr. 2644.

¹³⁸ See *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926, 931-32 (11th Cir. 1995), and cited cases.

¹³⁹ LBP-03-10, 57 NRC at 585-86.

that Messrs. Fiser and Jocher had later discussed the PASS testing program and had begun preparing appropriate questions, and that TVA management had then transferred Mr. Fiser to the position of Acting Corporate Chemistry Manager before Mr. Jocher had administered the tests.¹⁴⁰ The Board then concluded that, “under these circumstances, Mr. Fiser was involved and participated to some extent in resolving the PASS question and thus was entitled to be treated as participating in a protected activity.”¹⁴¹

Based on the Board’s factual descriptions and findings (particularly the one regarding Mr. Fiser’s disagreement with Mr. Wilson regarding the applicability of an NRC requirement), this conclusion strikes us as reasonable and supported by the record. We therefore agree with the Board’s conclusion of law that this activity was “protected.”

3. The third safety problem (also cited in Mr. Fiser’s letter to Senator Sasser but not included in his 1993 DOL complaint) related to the emergency diesel generator 7-day fuel oil storage tank recirculation system at the Sequoyah facility. Mr. Fiser wrote to the Senator that problems with the procedure for taking samples from this system “rendered the emergency diesel generators inoperable and placed both units at Sequoyah in a Limiting Condition of Operation.”¹⁴² TVA objects that Mr. Fiser did not identify, raise, or document this issue and that the Board therefore should not have considered it.¹⁴³

The Board found that “Mr. Fiser did not technically initiate this issue, nor did he sign the [1989 Significant Corrective Action Report] that documented it.”¹⁴⁴ But the Board also found that Mr. Fiser “obviously participated in its resolution” and that Dr. Wilson C. McArthur became aware of the matter in 1993 when investigating several issues raised in Mr. Fiser’s letter to Senator Sasser.¹⁴⁵ From these last two findings, the Board concluded as a matter of law that “we are treating this issue as a protected activity in which Mr. Fiser was involved.”¹⁴⁶

¹⁴⁰ *Id.* at 586. *See also id.* at 571-74.

¹⁴¹ *Id.* at 586.

¹⁴² *Id.* at 587, quoting the Staff’s Proposed Findings of Fact ¶ 2.94. *See also* NRC Staff’s Nov. 3 Brief at 11. The Limiting Condition of Operation required the plant’s management to complete the required sampling within 24 hours or shut down the plant. LBP-03-10, 57 NRC at 587, quoting the Staff’s Proposed Findings of Fact ¶ 2.94.

¹⁴³ 57 NRC at 587.

¹⁴⁴ *Id.* at 589. *See also id.* at 610 (“another person [than Mr. Fiser] actually pointed the way to the source of the problem and directed Mr. Fiser how to go about resolving it”) (minority opinion).

¹⁴⁵ *Id.* at 589. Dr. McArthur was the selecting official responsible for filling the positions of PWR and BWR Chemistry Program Manager that Mr. Fiser was ultimately not offered. The assignment of that position to someone else constituted one of the “adverse actions” that later became one of the Staff’s grounds for the instant proceeding. *See id.* at 596. *See also id.* at 599.

¹⁴⁶ *Id.* at 589.

Earlier in this Order (pp. 200-206), we excluded this third activity (along with the fourth one, *infra*) from consideration due to the Staff's failure to include it in the Notice of Violation. But as the two issues have been fully litigated before both the Board and us, we will consider them for purposes of offering guidance for future cases.

As we discussed above, the Board's reliance on Mr. Fiser's mere involvement in the *resolution* of the safety issues contravenes our practice of limiting whistleblower protection to employees who are raising or identifying safety or regulatory compliance issues. We see no indication here that Mr. Fiser, while involved in the issue's resolution, was raising new safety or regulatory compliance concerns — particularly those that would suggest he was “acting to [his] own possible detriment *against* the explicit or implicit directives or wishes of the employer, to address safety matters that might not otherwise be addressed.”¹⁴⁷ Were mere involvement to qualify as protected activity, then any employee who had participated in the resolution of any nuclear issue and who disagreed with a subsequent personnel action could initiate a section 50.7 claim without having engaged in whistleblowing activity. Moreover, the second factor on which the Board relies (Dr. McArthur's awareness of the matter) is, as a matter of logic, simply unrelated to the question whether Mr. Fiser's actions constituted “protected activity.” We therefore, if we had not already excluded this issue, would have reversed the Board's decision insofar as it relied on this activity when finding TVA in violation of section 50.7.

4. The final activity on which the Board relies involved data trending and apparently occurred between November 10, 1991, and early March of 1992.¹⁴⁸ According to the Board, “[d]ata trending involved the production of histogram plots for different contaminants, and different chemical control analysis on various plant systems.”¹⁴⁹ In 1991, the plant's Nuclear Safety Review Board identified a safety-related problem — the computers that generated trend plots were inoperable.¹⁵⁰ The Nuclear Safety Review Board instructed Mr. Fiser to draft a procedure requiring the Chemistry program to generate all the trend plots daily, including weekends and holidays.¹⁵¹ Mr. Fiser declined for three reasons:

First, and most important, he explained that if the computer were to break again, then, if the trending were required by a procedure, the Chemistry program would be in violation of the procedure and potentially subject to enforcement action by NRC

¹⁴⁷ *Id.* at 610 (minority opinion) (emphasis in original). *See also id.* at 611 (minority opinion).

¹⁴⁸ *Id.* at 589-92. The Board does not provide the exact date(s) or date range in which Mr. Fiser engaged in this “protected activity.” *See also id.* at 614 (minority opinion).

¹⁴⁹ *Id.* at 589.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 589-90.

as a result. . . . Second, Mr. Fiser explained that incorporating the trending into a procedure would require tremendous overtime by the chemistry technicians who performed the trending, overtime for which Mr. Fiser lacked approval. . . . Finally, Mr. Fiser expressed concern about a potential procedural violation emanating from the proposed trending procedure because Sequoyah had recently had problems with procedural violations, for which a corrective action document would have to be prepared and NRC eventually informed.¹⁵²

The Board concluded that Mr. Fiser had declined to follow the Nuclear Safety Review Board's instructions

for what he regarded as safety-related reasons, i.e., the likely regulatory infractions that could result from such a procedure. For these reasons, although Mr. Fiser did not raise this issue — the [Nuclear Safety Review Board] did so — we consider Mr. Fiser's involvement in the data-trending issue as another protected activity in which he was involved.¹⁵³

We agree with the Board's conclusion. For purposes of ensuring regulatory compliance,¹⁵⁴ Mr. Fiser was telling TVA management what it did not want to hear regarding a potential "violation of a procedure" that would "potentially [be] subject to enforcement action."¹⁵⁵ This is one of the situations to which section 50.7 is intended to apply.

Our conclusion is not altered by the possibility that Mr. Fiser's refusal to follow instructions may have been based, in NEI's words, merely "on a concern about some hypothetical regulatory infraction"¹⁵⁶ or a "fear of agency enforcement action for failure to properly perform at some point in the future."¹⁵⁷ Mr. Fiser was concerned about a possible violation that could lead to NRC enforcement action. Section 50.7(a)(1)(ii) protects any refusal "to engage in any practice made unlawful . . . if the employee has identified the *alleged* illegality to the employer" (emphasis added). Our regulation's use of the adjective "alleged" to modify "illegality" indicates that an employee need not be correct in his or her legal assessment, but need only have a reasonable belief that the assessment is correct.¹⁵⁸ As former Chairman Ivan Selin stated regarding this question,

¹⁵² *Id.* at 590.

¹⁵³ *Id.* at 591.

¹⁵⁴ In order to fall under the protection of section 211 and section 50.7, an employee's activity regarding such regulatory compliance need not be directly related to safety. *See* note 10, *supra*.

¹⁵⁵ LBP-03-10, 57 NRC at 590.

¹⁵⁶ NEI's Oct. 2 Brief at 18. *See also* TVA's Nov. 24 Brief at 15 (referring to Mr. Fiser's "hypothetical concern that he . . . might . . . cause a violation").

¹⁵⁷ NEI's Oct. 2 Brief at 19 n.8.

¹⁵⁸ *See, e.g., Stone & Webster*, 115 F.3d at 1575.

[a]lthough . . . concerns are . . . raised [by alleged] where . . . , albeit in good faith, the alleged was technically wrong, it is nonetheless, important that employees, regardless of the merits of their concerns, feel free to raise their safety concerns.¹⁵⁹

[P]eople who come forward with dumb ideas . . . should be protected also.¹⁶⁰

Our refusal in a whistleblower proceeding to look into the merits of an employee's safety concerns is also analogous to our approach toward management personnel decisions in whistleblower cases: we do not look behind those decisions, even if they strike us as ill-advised, so long as they do not have the effect of intentionally discriminating based on an employee's whistleblower activity.¹⁶¹ Finally, our position is consistent with the practice of both the NRC Staff¹⁶² and DOL.¹⁶³

5. For the reasons set forth above, we reverse the Board's general ruling that involvement in the resolution of a safety issue, without more, qualifies as a "protected activity." We also affirm the Board's rulings that the first (radiation monitor set points) and second (PASS) technical actions are "protected activities." Had we not previously ruled that the fourth action (data trending) was not properly noticed and therefore beyond the scope of this proceeding, we

¹⁵⁹ Statement submitted by the United States Nuclear Regulatory Commission at 209. *Cf.* Discrimination Task Group Report, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues" at 7 (April 2002), paraphrasing then-Chairman Ivan Selin to the effect that "the significance of the technical complaint, in particular, was probably not an appropriate factor in determining whether to investigate a complaint." (The Task Group Report was released to the public on Oct. 4, 2002, and is available on ADAMS at Accession No. ML022120514.)

¹⁶⁰ Task Group Report at 7, *quoting* then-Chairman Ivan Selin. Our use of these quotations should not be construed to suggest that we consider Mr. Fiser's concerns to be either "dumb" or "technically wrong." We need not and do not take a position on the merits of those concerns.

¹⁶¹ *Cf. American Nuclear Resources*, 134 F.3d at 1296 ("an employer may fire an employee for any reason at all, so long as the reason does not violate a Congressional statute").

¹⁶² *See, e.g.*, Letter to Honolulu Medical Group from L.J. Callan, NRC Regional Administrator, at 2 (Jan 23, 1997), *attached to Honolulu Medical Group* (Honolulu, HI), EA-95-006, Notice of Violation (Jan. 23, 1997), both documents available on the NRC Web site:

[Licensee] stated that "the NRC should exercise discretion in this case *because the complaints raised by [allegor] Smith were never substantiated* [emphasis added]." Whether a complaint is substantiated makes no difference with respect to the protections afforded employees under the law. Employees are protected against retaliation even if their perceptions of noncompliance or safety problems are not validated.

See also Letter to Crane Nuclear, Inc., from J.E. Dyer, Regional Administrator, at 1 (Jan. 17, 2002), *attached to Crane Nuclear, Inc.* (Kennesaw, GA), EA-01-073, Notice of Violation (Jan. 17, 2002), both documents available on the NRC Web site.

¹⁶³ *See Keene v. Houston Lighting & Power Co.*, ARB No. 96-004, ALJ No. 95-ERA-4, at 7 (ARB Feb. 19, 1997); *Seater v. Southern California Edison Co.*, ARB No. 96-013, ALJ No. 95-ERA-13, at 4-5 (ARB Sept. 27, 1996). *See also General Electric Co.* (Wilmington, North Carolina Facility), DD-89-1, 29 NRC 325, 332 n.10 (1989).

would have affirmed the Board’s ruling that the activity qualified as “protected.” And, had we not previously ruled that the third (diesel generator) issue was also not properly noticed, we would have reversed the Board’s ruling that the issue qualified as “protected.”

3. Conclusion

On remand, the Board should consider only the following three activities as being “protected”: Mr. Fiser’s September 23, 1993 DOL complaint, his identification of chemistry-related nuclear safety concerns in 1991-1993 involving radiation monitor set points, and his expressions of concern in February 19 through early March of 1992 regarding the applicability of the NRC’s requirements for conducting PASS analyses. To the extent the Board considers temporal proximity as evidence on the “contributing factor” question,¹⁶⁴ it should compare the dates of these three activities (1991-1993) with the dates of the two adverse personnel actions at issue here (the Summer of 1996).¹⁶⁵ The Board should then consider whether the proximity of these dates either does or does not support a finding of causation.

D. Mitigation of Monetary Penalty

We recognize that our rulings so far in this Order may ultimately render moot any question of mitigation of civil penalties. That depends on how, on remand, the Board rules on the “contributing factor” and “clear and convincing evidence” prongs of the section 211 evidentiary framework. But we did seek appeal briefs on the appropriate standard for a licensing board to apply when determining whether to mitigate the amount of a civil monetary penalty in a whistleblower enforcement adjudication.¹⁶⁶ Because the issue has been fully briefed and is a legal issue of first impression at the NRC, we choose to address it now, for the possible benefit of not only the TVA Board on remand but also other boards in future cases.

Mitigation determinations are inherently fact-based, and the licensing board is responsible in the first instance for factfinding.¹⁶⁷ Therefore, if the Board on remand concludes again that TVA has violated section 50.7, we instruct the Board

¹⁶⁴The Board briefly discussed temporal proximity in its Initial Decision. *See* 57 NRC at 567-68, 603.

¹⁶⁵I.e., (1) TVA’s refusal to “pre-select” Mr. Fiser as PWR or BWR Chemistry Program Manager for Sequoyah, and (2) the subsequent selection of candidates other than Mr. Fiser for those positions.

¹⁶⁶CLI-03-9, 58 NRC at 43, 44.

¹⁶⁷*See, e.g., Commonwealth Edison Co.* (Zion Station, Units 1 and 2), CLI-74-35, 8 AEC 374 (1974); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 396 (1990).

to reconsider the mitigation section of LBP-03-10 in light of our rulings and guidance below.

The Commission has the “discretion to [impose] a civil penalty as prescribed by [AEA] Section 234 as a sanction for [a] violation” “[s]o long as [i] a violation has been established, [ii] . . . penalties may positively affect the conduct of the licensee or other similarly situated persons in accord with the policies in the Atomic Energy Act, and [iii] civil penalties are not grossly disproportionate to the gravity of the offense.”¹⁶⁸ Under such circumstances, a Board may take into account mitigating factors when determining whether to reduce a penalty amount.¹⁶⁹

As noted above, the Board in LBP-03-10 based its mitigation ruling “large[ly]” on the conclusions that TVA appeared to base its decision on “seemingly significant performance-based reasons”¹⁷⁰ and that TVA appeared not to have received adequate notice in 1996 of what the Board considered the NRC Staff’s new interpretation of section 50.7 as including adverse actions motivated in *any* part by an employee’s engagement in protected activities (rather than solely those adverse actions that were premised “in significant portion” on protected activities).¹⁷¹ In CLI-03-9, we asked the parties to address the question of what standard the Board should have applied when determining whether to mitigate the amount of a civil monetary penalty.

1. Appropriate Standard for Mitigating a Civil Monetary Penalty

The NRC Staff answers our question by asserting that the correct standard is “whether the Staff . . . abused its discretion in applying the Commission’s [enforcement] policy,” i.e., whether the Staff either failed to follow that policy “without adequate justification” or imposed a penalty that “is clearly unreasonable given the circumstances of the case.”¹⁷² Along a somewhat similar vein, the Staff also argues that the Commission’s Enforcement Policy deprives the Board of authority to substitute its judgment for that of the Staff regarding the appropriate penalty amount. The Staff asserts that the Board’s approach to mitigation is analogous to the tort concept of comparative negligence — a doctrine under which the court may reduce the damages to reflect a plaintiff’s share of responsibility

¹⁶⁸ *Atlantic Research Corp.* (Alexandria, Virginia), CLI-80-7, 11 NRC 413, 421 (1980).

¹⁶⁹ *See Atlantic Research*, ALAB-594, 11 NRC at 845-46. *See also* 10 C.F.R. § 2.205(f) (“If a hearing is held, an order will be issued after the hearing by the presiding officer or the Commission dismissing the proceeding or imposing, *mitigating*, or remitting the civil penalty” (emphasis added)).

¹⁷⁰ LBP-03-10, 57 NRC at 558. *See also id.* at 606-07.

¹⁷¹ *Id.* at 559, 607.

¹⁷² NRC Staff’s Oct. 2 Brief at 8.

for an accident. The Staff then argues that such an approach improperly allows boards to hold licensees only partially responsible for regulatory violations.

We disagree with the Staff's concept that the litmus test for Board mitigation is "abuse of discretion" — a very high level of deference to the Staff. The Staff's position is inconsistent with the nature of civil penalty adjudications. They are *de novo* proceedings, not limited proceedings for review of NRC Staff decisions. This is clear from our agency's appellate precedent. In *Atlantic Research*, for example, the Appeal Board ruled that licensing boards have plenary power to mitigate civil penalties:

[T]he adjudicatory hearing in a civil penalty proceeding is essentially a trial *de novo*. Subject only to observance of the principle that the penalty assessed by the [Director of the Office of Inspection and Enforcement] constitutes the upper bound of the penalty which may be imposed after that hearing, the Administrative Law Judge (and this Board and the Commission on review) may substitute their own judgment for that of the Director. Stated otherwise, if deemed to be warranted in the totality of circumstances, the adjudicator is entirely free to mitigate or remit the assessed penalty.¹⁷³

The Staff's argument that the Commission's adoption of an Enforcement Policy implicitly deprives the Board of its authority to substitute its own judgment for that of the Staff regarding civil penalty amounts in whistleblower cases contravenes the general authority bestowed on the Board in 10 C.F.R. § 2.205(f) — which carves out no exception for whistleblower cases. Section 2.205(f) instead applies by its own terms to *all* civil penalty cases, and authorizes the Licensing Board to issue "an order . . . mitigating . . . the civil penalty,"¹⁷⁴ consistent with Commission enforcement policy and precedent. In addition, the Staff's proposed exemption would deny a licensee the full hearing to which it is entitled on *all* aspects of the proposed enforcement action, and would undermine the *de novo* character of the Board's review. Finally as to the proposed exemption, the Staff itself acknowledges in this proceeding the authority of the Board to mitigate civil penalties, presumably under section 2.205.¹⁷⁵

¹⁷³ *Atlantic Research*, ALAB-594, 11 NRC at 849. See also *Radiation Technology*, ALAB-567, 10 NRC at 536 ("It is the presiding officer at th[e] hearing, not the Director [of Inspection and Enforcement], who finally determines on the basis of the hearing record whether the charges are sustained and civil penalties warranted"). Since 1982, presiding officers have been required to act in conformity with our Enforcement Policy Statements. But those Policy Statements establish substantive parameters for civil penalties and other enforcement actions. They do not abrogate licensing board's mitigation power or convert the boards' role into a reviewer of Staff action.

¹⁷⁴ See also *Atlantic Research*, ALAB-594, 11 NRC at 845-46.

¹⁷⁵ NRC Staff's Nov. 21 Brief at 1.

We similarly disagree with the Staff's related assertion that the current Enforcement Policy prohibits the Board from substituting its own judgment for that of the Staff. The Enforcement Policy is directed, in part, to the actions that the Staff takes under the authority delegated by the Commission. But the fact that the Staff initially applies the Commission's Enforcement Policy does not thereby confer upon the Staff exclusive discretion to determine the amount of a civil monetary penalty. The policy applies just as much to the Board in its review of Staff enforcement actions as it does to the Staff itself.¹⁷⁶

Finally, we cannot accept the Staff's "comparative negligence" argument. The Board was within its discretion to consider the totality of circumstances in assessing the final penalty. The Commission's Enforcement Policy provides detailed guidance on civil penalty assessment including appropriate circumstances that warrant increasing or decreasing the penalty. Although the Board's mitigating factors are not among those specifically addressed, the Enforcement Policy contains a separate provision on the "exercise of discretion . . . to ensure that the proposed civil penalty reflects all relevant circumstances of the particular case." Section VI.C.d.

For these reasons, we conclude both that the Board need not apply an "abuse of discretion" standard when reviewing a civil monetary penalty amount, and that the Board instead has *de novo* authority to mitigate that amount, consistent with our Enforcement Policy.

¹⁷⁶The Board, like all subsidiary offices within the NRC, implements Commission policy. See *Hurley Medical Center* (One Hurley Plaza, Flint, Michigan), ALJ-87-2, 25 NRC 219, 238 (1987). NUREG-1600 (Rev. 1), "Revision of NRC [Enforcement] Policy Statement: General Statement of Policy and Procedure for NRC Enforcement Actions," 63 Fed. Reg. 26,630, 26,632-33 (May 13, 1998) says expressly that "[t]he following statement of policy and procedure explains the *enforcement policy* and procedures of the . . . Commission . . . and the NRC Staff . . . in initiating enforcement actions, and *of the presiding officers and the Commission in reviewing these actions*" (emphasis added). Regarding the second italicized phrase in NUREG-1600, each Commission enforcement policy statement contained the same or similar language from the document's inception in October of 1980 until November of 1999, when the phrase was inadvertently deleted. See 64 Fed. Reg. 64,142, 64,145 (Nov. 9, 1999). See also NUREG-1600, "General Statement of Policy and Procedures for NRC Enforcement Actions" (Oct. 31, 2002) (updating NUREG-1600 (May 1, 2000) and containing no reference to the Board), available on the NRC's Web site. No change in meaning was intended, as is evident from the text of 10 C.F.R. § 2.205, which continues to contemplate *de novo* civil penalty adjudications before licensing boards. See also *Consolidated X-Ray Service Corp.*, ALJ-83-2, 17 NRC at 705. By contrast, the Appeal Board in *Atlantic Research* quite properly did not feel bound by the NRC Staff's Inspection and Enforcement Manual, as that document reflected only *Staff* policy and did not have the Commission's *imprimatur*. *Atlantic Research*, ALAB-594, 11 NRC at 851.

2. *The Board's Incomplete Consideration of Mitigating Circumstances*

The Board in LBP-03-10 based its mitigation ruling on two factors. The more important factor in the Board's view was the conclusion that TVA appeared to base its decision on "seemingly significant performance-based reasons."¹⁷⁷ The other factor was that TVA appeared not to have received adequate notice in 1996 of the NRC Staff's new interpretation of section 50.7 as including adverse actions motivated in *any* part by an employee's engagement in protected activities (rather than solely those adverse actions that were premised "in significant portion" on protected activities).¹⁷⁸

We find the Licensing Board's overall mitigation approach to be largely consistent with our own order remanding the *Atlantic Research* proceeding to the Appeal Board to "consider whether *the circumstances of th[at] case* would justify mitigation of the amount of the penalty."¹⁷⁹ Although the TVA Board did consider some relevant circumstances, we conclude that it failed to take two into account.¹⁸⁰ Specifically, the Board did not consider the statement in section VII.B.5 of the Enforcement Policy that mitigation "discretion would *normally not* be exercised [i] in cases in which the licensee does not appropriately address the overall work environment . . . or [ii] in cases that involve . . . allegations of discrimination caused by a manager above the first-line supervisor."¹⁸¹

First, we note that the Board affirmatively found that TVA fostered a hostile work environment for whistleblowers.¹⁸² Although the Board stated that it "considered all the evidence submitted by the parties and the entire record of this proceeding"¹⁸³ when reaching its mitigation ruling, the Board did not specifically discuss whether or how TVA's hostile work environment affected that determination.¹⁸⁴ This was error.

¹⁷⁷ LBP-03-10, 57 NRC at 558. *See also id.* at 606-07.

¹⁷⁸ *Id.* at 559, 607.

¹⁷⁹ *Atlantic Research*, CLI-80-7, 11 NRC at 425. *See also Radiation Oncology Center at Marlton* (Marlton, New Jersey), LBP-95-25, 42 NRC 237, 239 (1995); *Tulsa Gamma Ray, Inc.*, LBP-91-40, 34 NRC 297, 321 (1991); *Reich Geo-Physical, Inc.* (1019 Arlington Drive, Billings, Montana), ALJ-85-1, 22 NRC 941, 965 (1985); *Consolidated X-Ray Service Corp.*, ALJ-83-2, 17 NRC at 707-08.

¹⁸⁰ The Enforcement Policy requires that "all relevant circumstances" be considered. "General Statement of Policy and Procedures for NRC Enforcement Actions," 22 (§ VI.C.2), 28 (§ VI.C.2.d), 30 (§ VII) (Oct. 31, 2002) (updating NUREG-1600 (May 1, 2000)) (emphasis added), available on the NRC's Web site. *See also* NRC Enforcement Manual §§ 6.1, 6.3.6.a, available on the NRC's Web site.

¹⁸¹ "General Statement of Policy and Procedures for NRC Enforcement Actions," 35 (§ VII.B.5) (Oct. 31, 2002).

¹⁸² LBP-03-10, 57 NRC at 581-82.

¹⁸³ *Id.* at 607.

¹⁸⁴ *Id.* at 605-07.

Second, both LBP-03-10 and the record indicate that management above first-line supervisors were involved in the adverse personnel actions.¹⁸⁵ The Board referred to this factor in LBP-03-10¹⁸⁶ but did not address section VII.B.5 of the Enforcement Policy regarding the involvement of management above the level of first-line supervisor.¹⁸⁷ Nor did the Board specifically explain what circumstances justified its taking a tack different from the “normal” approach described above. This too was error.

The Board, to the extent it finds it necessary to revisit the mitigation issue, should address these two issues. It should also address the Staff’s appellate argument (together with TVA’s and NEI’s responses) regarding TVA’s performance-based reasons for taking adverse action against Mr. Fiser.¹⁸⁸ If the Board finds the Staff’s reasoning unconvincing, then the Board should cite the specific portions of the record supportive of its conclusion that TVA had performance-based reasons for taking the adverse action; it should address whether TVA failed to present such reasons to this agency pursuant to section 50.9; and it should discuss whether (and, if so, why) such failure would render those reasons inappropriate for consideration in this section 50.7 proceeding.

Finally, the Board may also take into consideration the Staff’s assertion that, prior to the hearing, it had already applied the Commission’s Enforcement Policy by combining all violations into one, and that it had thereby already “effectively mitigat[ed] the penalty before imposition” by reducing the penalty from \$176,000 to the statutory maximum of \$110,000 for a single violation.¹⁸⁹

3. *Other Matter*

We need to address one final Staff argument regarding mitigation. The Staff argues on appeal that its evidence of a *per se* violation of section 211 supports its conclusion that the Board should not have lowered the penalty amount. According to the Staff, immediately prior to the TVA Selection Review Board’s determination that Mr. Sam L. Harvey rather than Mr. Fiser would be appointed a Chemistry Program Manager at the Sequoyah plant, Mr. Charles Kent (Sequoyah’s Plant Manager and a member of the Selection Review Board) told at

¹⁸⁵ *Id.* at 577, 579, 600, 605 (*citing* Tr. 301 (Leuhman)).

¹⁸⁶ *Id.* at 566-67.

¹⁸⁷ For instance, both Dr. Wilson C. McArthur and Mr. Thomas McGrath were, at one point or another, Mr. Fiser’s second-line supervisors. *See id.* at 577, 579.

¹⁸⁸ *See, particularly*, NRC Staff’s Oct. 2 Brief at 3-5; NRC Staff’s Nov. 3 Brief at 19-20; TVA’s Nov. 4 Brief at 8-9 & nn.7-8; NRC Staff’s Nov. 21 Brief at 3-4. Given our conclusion that the Board used an incomplete standard when determining whether to mitigate the penalty amount, it would be premature for us now to consider the Staff’s arguments.

¹⁸⁹ NRC Staff’s Oct. 2 Brief at 8.

least one other Board member that Mr. Fiser was a whistleblower and had filed a DOL complaint. This “improper mention of an individual’s protected activities” was, according to the Staff, a *per se* violation of section 211.¹⁹⁰

Our difficulty with this argument is that the Staff failed to refer to the “*per se* violation” in the NOV. As we discuss at length above, such inclusion is required in order to provide the Licensee sufficient notice of the enforcement charges against it. Moreover, the Staff’s reliance upon Mr. Kent’s remark as an independent violation introduces not just a new allegation of violation but an entirely new enforcement theory. It is “well settled that an agency may not change theories in midstream without giving respondents reasonable notice of the change.”¹⁹¹

CONCLUSION

We *affirm* the Board’s order in part, *reverse* it in part, and *remand* the proceeding for further Board action consistent with this Memorandum and Order. In particular, on remand the Board should take the following steps:

1. The Board should determine whether eliminating certain protected activities from consideration, as outlined in Part C of this Order, requires modification or retraction of the Board’s finding that protected activities were a “contributing factor” in TVA’s unfavorable personnel actions regarding Mr. Fiser (*see* Part B of this Order).
2. If the “contributing factor” finding stands, the Board should determine, as outlined in Part A of this Order, whether TVA has shown, by “clear and convincing evidence” that it would have taken the same actions regarding Mr. Fiser regardless of his protected activities.
3. If the Board finds against TVA on both the “contributing factor” and “clear and convincing evidence” issues, it should reconsider the question whether and to what extent the civil penalty should be mitigated, as outlined in Part D of this Order.

¹⁹⁰ *Id.* at 7.

¹⁹¹ *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 354 (1975), quoting *Rodale Press, Inc. v. Federal Trade Commission*, 407 F.2d 1252, 1256 (D.C. Cir. 1968).

It is so ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 18th day of August 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 70-3103-ML

LOUISIANA ENERGY SERVICES, L.P.
(National Enrichment Facility)

August 18, 2004

The Commission reviews five contentions referred to it by the Atomic Safety and Licensing Board. The Commission affirms the Board's determinations in all respects but one. On one contention, concerning depleted uranium's proper classification under 10 C.F.R. Part 61, the Commission itself takes review of the contention and sets forth a briefing schedule.

RULES OF PRACTICE: CONTENTIONS

Our contention admissibility and timeliness requirements demand a level of discipline and preparedness on the part of petitioners, who must examine the publicly available material and set forth their claims and the support for their claims at the outset.

RULES OF PRACTICE: CONTENTIONS

The petitioners' reply brief should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC Staff answer. In Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief.

MEMORANDUM AND ORDER

In LBP-04-14,¹ the Atomic Safety and Licensing Board ruled that all Petitioners in this proceeding have standing to intervene and that all submitted at least one admissible contention challenging the application of the Louisiana Energy Services, L.P. (LES) to build and operate a uranium enrichment facility. Accordingly, the Board admitted the following Petitioners as parties to this proceeding: the New Mexico Environment Department (NMED), the New Mexico Attorney General (N MAG), the Nuclear Information and Resource Service (NIRS), and Public Citizen (PC). The Board also referred five of its contention determinations to the Commission, pursuant to 10 C.F.R. § 2.323(f). The Commission has reviewed the contentions referred to us by the Board, and affirms the Board's determinations in all respects but one. We have decided to review further a contention² concerning depleted uranium's appropriate classification under 10 C.F.R. Part 61.

Four of the referred contentions were submitted by the NMED and the N MAG.³ The Board rejected these contentions for failure to meet the NRC's contention requirements under 10 C.F.R. § 2.309(f). In rejecting these contentions, the Board declined to consider new "purportedly material" information in support of the contentions that was first submitted as part of a reply pleading.⁴ The Board stressed that it took into account any information from the reply briefs that "legitimately amplified" issues presented in the NMED and AGNM hearing petitions, but that "in several instances . . . NMED and AGNM 'reply' filings essentially constituted untimely attempts to amend their original petitions that, not having been accompanied by any attempt to address the late-filing factors in section 2.309(c), (f)(2), [could not] be considered in determining the admissibility of their contentions."⁵

The Commission has reviewed the hearing petitions and replies submitted by NMED and AGNM. On all four of these contentions, we concur with the Board that the reply briefs constituted a late attempt to reinvigorate thinly supported contentions by presenting entirely new arguments in the reply briefs. Indeed, in some places, the reply briefs present what effectively amount to entirely new *contentions*. As the Commission has stressed, our contention admissibility and

¹ 60 NRC 40 (2004).

² NIRS/PC EC-3/TC-1, basis D.

³ One of these contentions was filed by the NMED, and is identified as NMED TC-1/EC-1. The other three were filed by the N MAG, and are identified as AGNM EC-ii, AGNM EC-iii, and AGNM MC-i. "TC" refers to contentions involving primarily technical health and safety issues, "EC" involves primarily environmental claims, and "MC"-designated contentions are a separate miscellaneous category. See "Initial Prehearing Order" (Apr. 15, 2004).

⁴ LBP-04-14, 60 NRC at 58.

⁵ *Id.*

timeliness requirements “demand a level of discipline and preparedness on the part of petitioners,” who must examine the publicly available material and set forth their claims and the support for their claims at the outset.⁶ The Petitioners’ reply brief should be “narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer,”⁷ a point the Board itself emphasized in this proceeding.⁸ As we face an increasing adjudicatory docket, the need for parties to adhere to our pleading standards and for the Board to enforce those standards are paramount. There simply would be “no end to NRC licensing proceedings if petitioners could disregard our timeliness requirements” and add new bases or new issues that “simply did not occur to [them] at the outset.”⁹

The NMED acknowledged that its petition did not satisfy all of the contention rule requirements, stating that it did not have “adequate time to prepare its petition” to meet the NRC’s “rigorous” contention requirements.¹⁰ Similarly, the NMAG claimed that her office was in the middle of a “budget crisis,” and was therefore “unable to obtain timely supporting expert testimony.”¹¹ The NMAG also apparently was under the mistaken impression that a more generalized “notice” pleading would suffice to meet the contention standard.¹² But if there were in fact exigent or unavoidable circumstances warranting an extension of the deadline for filing a hearing petition, a timely request for an extension of time should have been made to the Board. Instead, both the NMED and the NMAG requested — and were granted — an extension of time in which to file reply briefs, but inappropriately used the occasion of the reply briefs to present for the first time various new claims in support of their contentions. In Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief.¹³ We therefore affirm the Board’s disposition of these four contentions.

The Board admitted the fifth contention that has been now referred to us.¹⁴ NIRS and PC, two public interest organizations, submitted this contention. It contends that LES does not have a “plausible strategy” to dispose of the depleted

⁶ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003).

⁷ Final Rule: “Changes to Adjudicatory Process,” 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004).

⁸ See Memorandum and Order (Granting Extension of Time) (Apr. 27, 2004) at 2.

⁹ *McGuire/Catawba*, CLI-03-17, 58 NRC at 428-29 (citation omitted).

¹⁰ See NMED’s Motion for Extension of Time To File Reply in Support of Petition for Leave To Intervene (Apr. 22, 2004) at 2.

¹¹ See NMAG’s Motion for Extension of Time (May 5, 2004) at 4.

¹² *Id.*

¹³ See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 261 (1996). See generally *Amgen Inc. v. Smith*, 357 F.3d 103, 117 (D.C. Cir. 2004).

¹⁴ This contention is identified as NIRS/PC EC-3/TC-1.

uranium hexafluoride waste that the LES facility will produce. Of note, in the hearing notice issued for this proceeding, the Commission set forth what would constitute one possible “plausible strategy” for disposal of the LES depleted tails. There, we said that “unless LES demonstrates a use for the uranium in the depleted tails as a potential resource, the depleted tails may be considered waste.”¹⁵ We went on to specify that if, additionally, “such waste meets the definition of ‘waste’ in 10 C.F.R. § 61.2, the depleted tails are to be considered low-level radioactive waste within the meaning of 10 C.F.R. Part 61,” in which case “an approach by LES to transfer to DOE for disposal by DOE of LES’s depleted tails pursuant to section 3113 of the USEC Privatization Act constitutes a ‘plausible strategy’ for dispositioning the LES depleted tails.”

One basis of the NIRS/PC “plausible strategy” contention, titled basis “D,” alleges that the depleted uranium hexafluoride does not meet the Part 61 definition of low-level radioactive waste, and therefore would not be suitable for transfer to DOE under the USEC Privatization Act. The hearing record reflects some confusion in interpreting the Commission’s original hearing notice.¹⁶ That notice should not be understood to preclude consideration of whether Petitioners’ contention on appropriate waste classification amounts to an impermissible attack on NRC regulations (10 C.F.R. Part 61). The Board considered the waste classification issue a “novel legal or policy question.”¹⁷ Hence, we have decided to review the waste classification issue ourselves. Below, we establish a schedule allowing the parties to file briefs with the Commission on the issue.¹⁸

The Board also accepted two other bases for the NIRS/PC “plausible strategy” contention. Those bases, titled bases “B” and “C,” raise the question whether LES has submitted a credible “plausible strategy” for *private sector* conversion and disposal of the tails. Those bases reflect a sufficiently supported challenge to LES’s submitted strategies for the private conversion and disposal of the tails. While a “plausible strategy” for private conversion of the tails does not mean a definite or certain strategy, to include completion of all necessary contractual arrangements, it must represent more than mere speculation. Petitioners’ bases “B” and “C” permit an inquiry of this kind.

In conclusion, the Commission *affirms* the Board’s determinations on the five referred contentions, except for its acceptance of basis D of the “plausible

¹⁵ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-3, 59 NRC 10, 22 (2004), reprinted in 69 Fed. Reg. 5873, 5877 (Feb. 6, 2004).

¹⁶ *See id.*

¹⁷ LBP-04-14, 60 NRC at 67.

¹⁸ In addition to whatever other materials they deem appropriate, the parties should address in particular 10 C.F.R. §§ 61.2, 61.55(a)(6), and *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), Licensing Board Memorandum and Order (Ruling on Intervenor’s Petition To Waive Certain Regulations) (unpublished) (Mar. 2, 1995), *vacated*, CLI-98-5, 47 NRC 113 (1998).

strategy'' contention. On that issue, the Commission *directs* interested parties to file briefs arguing their position. Such briefs may not exceed 25 pages and must be filed on or before September 8, 2004. The parties may also file answering briefs, not to exceed 10 pages, no later than September 17, 2004. All briefs should be served electronically on the Commission and on all other parties.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 18th day of August 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Paul B. Abramson
Dr. Anthony J. Baratta

In the Matter of

Docket No. 52-007-ESP
(ASLBP No. 04-821-01-ESP)

EXELON GENERATION COMPANY, LLC
(Early Site Permit for Clinton
ESP Site)

August 6, 2004

Ruling on a petition submitted by several public interest organizations seeking to intervene in this proceeding regarding the application of Exelon Generation Company, LLC, for a 10 C.F.R. Part 52 early site permit to construct one or more new nuclear reactors on the site of the existing Clinton nuclear power station, the Licensing Board concludes that, having established the requisite standing and proffering at least one admissible contention, each of the Petitioners is admitted as a party to the proceeding.

RULES OF PRACTICE: STANDING TO INTERVENE

In determining standing as of right for those seeking party status, the agency has applied contemporaneous judicial standing concepts that require a participant to establish (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable

decision. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). In this regard, in cases involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been considered sufficient to establish the requisite injury-in-fact. *See Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

RULES OF PRACTICE: INTERVENTION PETITION (PLEADING REQUIREMENTS); STANDING TO INTERVENE (AUTHORIZATION)

When an entity seeks to intervene on behalf of its members, that entity must show it has an individual member who can fulfill all the necessary standing elements and who has authorized the organization to represent his or her interests.

RULES OF PRACTICE: STANDING TO INTERVENE (UNCONTESTED; CONSTRUCTION OF PETITION)

In assessing a petition to determine whether the necessary standing elements are met, which the Board must do even though there are no objections to a petitioner's standing, the Commission has indicated that the Board is to "construe the petition in favor of the petitioner." *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY; MATERIALITY; SCOPE OF THE PROCEEDING; SPECIFICITY AND BASIS)

A contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. *See* 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), and (vi). In addition, the Petitioner must demonstrate that the issue raised in the contention is both "within the scope of the proceeding" and "material to the findings the NRC must make to support the action that is involved in the proceeding." *Id.* § 2.309(f)(1)(iii)-(iv). Failure to comply with any of these requirements is grounds for dismissing a contention. *See Private Fuel Storage,*

L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

RULES OF PRACTICE: CONTENTIONS (CHALLENGES TO STATUTORY REQUIREMENTS/REGULATORY PROCESS/COMMISSION RULE)

An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process. See *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974). Similarly, a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. See 10 C.F.R. § 2.335; *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974); see also *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); see also *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff'd in part and rev'd in part on other grounds*, CLI-91-12, 34 NRC 149 (1991). By the same token, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue. See *Peach Bottom*, ALAB-216, 8 AEC at 20-21 & n.33.

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)

All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board. See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). As a consequence, any contention that falls outside the specified

scope of the proceeding must be rejected. *See Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

It is the petitioner's obligation to present the factual information and expert opinions necessary to support its contention. *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *and aff'd in part*, CLI-95-12, 42 NRC 111 (1995). Failure to provide such an explanation regarding the bases of a proffered contention requires the contention be rejected. *See Palo Verde*, CLI-91-12, 34 NRC at 155. In this connection, neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

If a petitioner neglects to provide the requisite support for its contentions, it is not within the Board's power to make assumptions of fact that favor the petitioner, nor may the Board supply information that is lacking. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001); *Georgia Tech Research Reactor*, LBP-95-6, 41 NRC at 305.

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

Providing any material or document as a basis for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention. *See Fansteel*, CLI-03-13, 58 NRC at 205. Along these lines, any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996). Thus, the material provided in support of a contention will be carefully examined by the Board to confirm that it does indeed supply an adequate basis for the contention. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power

Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990).

RULES OF PRACTICE: CONTENTIONS (MATERIALITY)

In order to be admissible, all contentions must assert an issue of law or fact that is material to the outcome of a licensing proceeding, meaning that the subject matter of the contention must impact the grant or denial of a pending license application. *See* 10 C.F.R. § 2.309(f)(1)(iv). This requirement of materiality often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment. *See Yankee Nuclear*, LBP-96-2, 43 NRC at 75; *see also Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), *petition for review denied*, CLI-03-12, 58 NRC 185, 191 (2003). Agency case law further suggests this requirement of materiality mandates certain showings in specific contexts. For instance, a contention challenging whether an emergency response plan's provisions provide the requisite reasonable assurance based on the adequacy of implementing procedures for those provisions fails to present a material issue. *See Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1107 (1983).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE TO LICENSE APPLICATION)

All properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the application (including the Safety Analysis Report and Environmental Report) so as to establish that a genuine dispute exists with the applicant on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(vi). Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

RULES OF PRACTICE: CONTENTIONS (SCOPE)

Although licensing boards generally are to litigate “contentions” rather than “bases,” it has been recognized that “[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases.” *Public Service Co. of New*

Hampshire (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff'd sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002).

MEMORANDUM AND ORDER **(Ruling on Standing and Contentions)**

Before the Licensing Board is the request of the Environmental Law and Policy Center (ELPC), the Nuclear Energy Information Service (NEIS), the Blue Ridge Environmental Defense League (BREDL), the Nuclear Information and Resource Service (NIRS), and Public Citizen (PC) (collectively, Clinton Petitioners) seeking to intervene in this proceeding to challenge the application of Exelon Generation Company, LLC (EGC), for a 10 C.F.R. Part 52 early site permit (ESP). The ESP application seeks approval of the site of the existing Clinton nuclear power station in DeWitt County, Illinois, for the possible construction of one or more new nuclear reactors. For the reasons set forth below, we find that the Clinton Petitioners have established the requisite standing to intervene in this proceeding and have submitted one admissible contention concerning the EGC application, denoted as Environmental Contention (EC) 3.1 — The Clean Energy Alternatives Contention, which is set forth in an appendix to this decision. Accordingly, we admit the Clinton Petitioners as parties to this proceeding. Additionally, we outline certain procedural and administrative rulings regarding the litigation of these admitted contentions.

I. BACKGROUND

A. EGC Early Site Permit Application

Under the Part 52 licensing process, an entity may apply for an ESP, which allows it to resolve key site-related environmental, safety, and emergency planning issues before deciding to build or choosing the design of a nuclear power facility on that site. Thus, if granted, an ESP essentially would allow an entity to “bank” a possible site for the future construction of new nuclear power generation facilities. EGC, a wholly owned subsidiary of Exelon Ventures Company, LLC, filed an ESP application on September 25, 2003, that consists of a section on Administrative Information about EGC, a Site Safety Analysis Report (SSAR), an Environmental Report (ER), an Emergency Plan (EP), and a Site Redress Plan (SRP). The particular site for which EGC seeks to obtain an ESP is the Clinton

Power Station property (Clinton), where an existing nuclear power plant has been producing electricity since 1987. *See* [EGC ESP] Application at 1-2 (Sept. 2003) [hereinafter Clinton ESP Application].

Two other companies, Dominion Nuclear North Anna, LLC (DNNA), and System Energy Resources, Inc. (SERI), recently submitted ESP applications for the sites at the existing North Anna and Grand Gulf nuclear facilities. *See* [DNNA] North Anna [ESP] Application (Sept. 25, 2003); [SERI] Grand Gulf Site ESP Application (Oct. 16, 2003). Because of the temporal and substantive similarity of the three applications, and because these Part 52 licensing proceedings are the first of their kind, as is noted below, preliminary matters in the Part 52 licensing process concerning these applications have been afforded joint consideration by the Commission and the Licensing Board for purposes of efficiency and ensuring uniformity among the three proceedings.

B. Clinton Petitioners' Hearing Request and Petition To Intervene

In response to a December 8, 2003 notice of hearing and opportunity to petition for leave to intervene regarding the EGC ESP application, 68 Fed. Reg. 69,426 (Dec. 12, 2003), on January 12, 2004, the Clinton Petitioners filed a request for hearing and petition to intervene, Hearing Request and Petition To Intervene by the [Clinton Petitioners] (Jan. 12, 2004) [hereinafter Hearing Request]. EGC and the NRC Staff responded to the Clinton Petitioners' hearing request on January 26 and January 29, 2004, respectively. *See* [EGC] Answer to Hearing Request and Petition To Intervene filed by [Clinton Petitioners] (Jan. 26, 2004) [hereinafter EGC Hearing Request Response]; NRC Staff's Answer to Hearing Request and Petition To Intervene by the [Clinton Petitioners] (Jan. 29, 2004) [hereinafter Staff Hearing Request Response]. With one exception,¹ EGC and the Staff did not challenge the Clinton Petitioners' representational standing, but noting that the Clinton Petitioners must present at least one litigable contention to be admitted as parties to this proceeding, both challenged the admissibility of one or more of the Clinton Petitioners' issue statements.

C. Commission Application of Revised 10 C.F.R. Part 2 Rules of Practice and Referral of Hearing Petition

On January 28, 2004, EGC submitted a motion to apply the recently revised version of 10 C.F.R. Part 2, which permits the use of an informal hearing process

¹ The Staff challenged NEIS representational standing because in the supporting affidavits of its members Mr. Galewsky and Ms. Lindberg, they did not state that NEIS was the sole representative they authorized to represent their interests in this proceeding. *See* Staff Hearing Request Response at 7.

for ESP applications. *See* [EGC] Motion To Apply New 10 C.F.R. Part 2 Rules of Adjudication (Jan. 28, 2004); *see also* 69 Fed. Reg. 2182, 2188 (Jan. 14, 2004). The Clinton Petitioners opposed EGC's motion, citing a lack of fairness, effectiveness, and efficiency applying the new Part 2 to this proceeding, while the Staff supported using the newly adopted procedures. *See* [Clinton Petitioners'] Opposition to [EGC] Application for New Adjudicatory Process (Feb. 6, 2004); NRC Staff's Answer to [EGC] Motion To Apply New 10 C.F.R. Part 2 Rules of Adjudication (Feb. 12, 2004). Ultimately, in a March 2, 2004 issuance, the Commission granted the EGC motion and found that applying the new Part 2 would not result in any interruption, unwarranted delay, added burden, or unfairness in this or the other two ESP proceedings. *See* CLI-04-8, 59 NRC 113, 118-19 (2004). As part of that decision, the Commission also gave the Clinton Petitioners 60 days within which to file their contentions in the proceeding and referred their hearing petition to the Atomic Safety and Licensing Board Panel for further consideration. *See id.* at 119.

D. Post-Referral Developments

Responding to the Commission's referral, in a March 8, 2004 initial prehearing order, among other things, the Licensing Board Panel Chief Administrative Judge reaffirmed the May 3, 2004 deadline for submitting contentions and requested that each contention be placed in one or more of the following subject matter categories: (1) Administrative, (2) Site Safety Analysis, (3) Environmental, (4) Emergency Planning, or (5) Miscellaneous.² *See* Licensing Board Panel Memorandum and Order (Initial Prehearing Order) at 3-4 (Mar. 8, 2004) (unpublished). The initial prehearing order also set a May 28, 2004 deadline for EGC and Staff responses to the Clinton Petitioners' petition supplement and a June 4, 2004 deadline for the Clinton Petitioners to reply to the EGC and Staff responses. *See id.* at 4. Thereafter, on March 22, 2004, this Atomic Safety and Licensing Board was established to adjudicate this ESP proceeding.³ *See* 69 Fed. Reg. 15,910 (Mar. 26,

² Because section 2.714(a)(3) of the superceded Part 2 rules permitting petitioners to supplement their hearing requests to provide standing-related information did not have an analog in the new Part 2, the Clinton Petitioners were allowed to supplement their petition with standing-related information when they filed their contentions. Further, they were permitted to make any request under section 2.309(g) regarding the selection of hearing procedures other than the Subpart L procedures that otherwise apply under the new Part 2. *See* Licensing Board Panel Memorandum and Order (Initial Prehearing Order) at 2 (Mar. 8, 2004) (unpublished).

³ That same day, Board establishment notices were issued for the *North Anna* and *Grand Gulf* ESP proceedings setting up two Boards with the same membership as this Board. *See* 69 Fed. Reg. 15,910 (Mar. 26, 2004) (*North Anna* proceeding); 69 Fed. Reg. 15,911 (Mar. 26, 2004) (*Grand Gulf* proceeding). Although the Board designation notices for these proceedings established three separate
(Continued)

2004). In a memorandum and order issued on the same day, the Board established a June 21, 2004 date for an initial prehearing conference for this proceeding (as well as the *North Anna* and *Grand Gulf* ESP proceedings) at the NRC's Rockville, Maryland headquarters facility.⁴ See Licensing Board Memorandum and Order (Scheduling Initial Prehearing Conference) (Mar. 22, 2004) (unpublished).

The Clinton Petitioners timely filed their contentions supplement, along with a hearing petition supplement,⁵ on May 3, 2004. See Contentions of [BREDL], [NIRS], [NEIS], and [PC] Regarding [ESP] Application for Site of Clinton Nuclear Power Plant (May 3, 2004) [hereinafter Contentions]; Supplemental Request for Hearing and Petition To Intervene by [Clinton Petitioners] (May 3, 2004) [hereinafter Hearing Petition Supplement]. On May 28, 2004, EGC and the Staff filed their answers to the Clinton Petitioners' proposed contentions. See [EGC] Answer to Proposed Contentions (May 28, 2004) [hereinafter EGC Contentions Response]; NRC Staff's Response to Petitioners' Contentions Regarding the [ESP] Application for the Clinton Site (May 28, 2004) [hereinafter Staff Contentions Response]. Following a June 1, 2004 motion for extension of time to reply to the EGC and Staff responses to their contentions, which the Licensing Board granted on June 3, the Clinton Petitioners filed their reply to the EGC and Staff answers on June 9, 2004. See Petitioners' Motion for Extension of Time To Reply to Responses to Contentions (June 1, 2004); [EGC] Answer in Opposition to Petitioners' Motion for Extension of Time To Reply to Response to Contentions (June 2, 2004); Licensing Board Order (Granting Extension Request) (June 3, 2004); Reply in Support of [Supplemental Request] by [Clinton Petitioners] (June 9, 2004) [hereinafter Clinton Petitioners' Reply].

On June 21-22, 2004, the Board conducted a 2-day prehearing conference during which it heard oral presentations regarding the standing of each of the

licensing boards, for simplicity we will refer to these Boards in the singular when referencing rulings that affected all three proceedings identically.

⁴The Petitioners in all three ESP proceedings filed a motion on April 1, 2004, to hold separate prehearing conferences in the vicinity of each proposed ESP site, as opposed to one single prehearing conference for all three proceedings at the NRC's Rockville, Maryland headquarters. See Petitioners' Motion for Reconsideration of Memorandum and Order Scheduling Initial Prehearing Conference (Apr. 1, 2004). The Licensing Board denied this motion on the grounds that, given the similarity of the three proceedings and the location of principal counsel for all parties in the Washington, D.C. area, the most efficient and effective means for conducting the prehearing conference was to do so jointly in Rockville. See Licensing Board Memorandum and Order (Denying Motion Requesting Reconsideration of Initial Prehearing Conference Location) at 2-3 (Apr. 5, 2004) (unpublished).

⁵As part of the Clinton Petitioners' hearing request supplement, Ms. Lindberg amended her statement to give NEIS sole authority to represent her interests in this proceeding. See Supplemental Request for Hearing and Petition To Intervene by [Clinton Petitioners] (May 3, 2004) at 21. The Clinton Petitioners said nothing in their supplemental submission about hearing procedure selection under section 309(g).

ESP Petitioners and the admissibility of their contentions, which were grouped by topic into separate categories.⁶ *See* Tr. at 1-410.

II. ANALYSIS

A. Clinton Petitioners' Standing

1. *Standards Governing Standing*

In determining standing as of right for those seeking party status, the agency has applied contemporaneous judicial standing concepts that require a participant to establish (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). In this regard, in cases involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been considered sufficient to establish the requisite injury-in-fact. *See Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). Further, when an entity seeks to intervene on behalf of its members, that entity must show it has an individual member who can fulfill all the necessary standing elements and who has authorized the organization to represent his or her interests. Moreover, in assessing a petition to determine whether these elements are met, which the Board must do even though there are no objections to a petitioner's standing, the Commission has indicated that we are to "construe the petition in favor of the petitioner." *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

We apply these rules and guidelines in evaluating each of the Clinton Petitioners' standing presentations.

2. *ELPC*

DISCUSSION: Hearing Request at 2-4, attachments 1-5; EGC Hearing Request Response at 1; Staff Hearing Request Response at 5-6; Tr. at 12-13.

⁶ As a result of the Board's concurrent consideration of the three ESP cases, today we also are issuing standing/contentions admission rulings in those cases as well. *See Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253 (2004); *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 NRC 277 (2004).

RULING: ELPC is a not-for-profit organization whose members oppose the issuance of an ESP to EGC. Attached to the Clinton Petitioners' hearing request are the affidavits of five ELPC members, each of whom states that ELPC is authorized to represent his or her interests. All five members reside within 40 miles of the Clinton site. These individuals' asserted health, safety, and environmental interests and their agreement to permit ELPC to represent their interests are sufficient to establish ELPC's standing to intervene in this proceeding.

3. *BREDL*

DISCUSSION: Hearing Request at 2-4, attachments 6-9; EGC Hearing Request Response at 1; Staff Hearing Request Response at 6; Tr. at 12-13.

RULING: BREDL is a not-for-profit organization whose members oppose the issuance of an ESP to EGC. Attached to the Clinton Petitioners' hearing request are the affidavits of four BREDL members, each of whom states that BREDL is authorized to represent his or her interests. All four members reside within 40 miles of the Clinton site. These individuals' asserted health, safety, and environmental interests and their agreement to permit BREDL to represent their interests are sufficient to establish BREDL's standing to intervene in this proceeding.

4. *NIRS*

DISCUSSION: Hearing Request at 2-4, attachments 10-11; EGC Hearing Request Response at 1; Staff Hearing Request Response at 7; Tr. at 12-13.

RULING: NIRS is a not-for-profit corporation whose members oppose the issuance of an ESP to ESC. Attached to the Clinton Petitioners' hearing request are the affidavits of two NIRS members, each of whom states that NIRS is authorized to represent his or her interests. Both members reside within 40 miles of the Clinton site. These individuals' asserted health, safety, and environmental interests and their agreement to permit NIRS to represent their interests are sufficient to establish NIRS's standing to intervene in this proceeding.

5. *NEIS*

DISCUSSION: Hearing Request at 2-4, attachments 12-13; EGC Hearing Request Response at 1; Staff Hearing Request Response at 7; Tr. at 12-13.

RULING: NEIS is a not-for-profit organization whose members oppose the issuance of an ESP to EGC. Attached to the Clinton Petitioners' hearing request are the affidavits of two NEIS members, each of whom states that NEIS is authorized to represent his or her interests. Both members reside within 40 miles

of the Clinton site. These individuals' asserted health, safety, and environmental interests and their agreement to permit NEIS to represent their interests are sufficient to establish NEIS's standing to intervene in this proceeding.

6. PC

DISCUSSION: Hearing Request at 2-4, attachments 14-16; EGC Hearing Request Response at 1; Staff Hearing Request Response at 7-8; Tr. at 12-13.

RULING: PC is a not-for-profit organization whose members oppose the issuance of an ESP to EGC. Attached to the Clinton Petitioners' hearing request are the affidavits of three PC members, each of whom states that PC is authorized to represent his or her interests. All three members reside within 40 miles of the Clinton site. These individuals' asserted health, safety, and environmental interests and their agreement to permit PC to represent their interests are sufficient to establish PC's standing to intervene in this proceeding.

B. Clinton Petitioners' Contentions

1. Contention Admissibility Standards

Section 2.309(f) of the Commission's rules of practice specifies the requirements that must be met if a contention is to be deemed admissible. Specifically, a contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. *See* 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), and (vi). In addition, the petitioner must demonstrate that the issue raised in the contention is both "within the scope of the proceeding" and "material to the findings the NRC must make to support the action that is involved in the proceeding." *Id.* § 2.309(f)(1)(iii)-(iv). Failure to comply with any of these requirements is grounds for dismissing a contention. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

NRC case law has further developed these requirements, as is summarized below.

a. *Challenges to Statutory Requirements/Regulatory Process/Regulations*

An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process. See *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974). Similarly, a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. See 10 C.F.R. § 2.335; *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974); see also *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); see also *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff'd in part and rev'd in part on other grounds*, CLI-91-12, 34 NRC 149 (1991). By the same token, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue. See *Peach Bottom*, ALAB-216, 8 AEC at 20-21 & n.33.

b. *Challenges Outside Scope of Proceeding*

All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board. See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). As a consequence, any contention that falls outside the specified scope of the proceeding must be rejected. See *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

c. *Need for Adequate Factual Information or Expert Opinion*

It is the petitioner's obligation to present the factual information and expert opinions necessary to support its contention. See *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305,

vacated in part and remanded on other grounds, CLI-95-10, 42 NRC 1, and *aff'd in part*, CLI-95-12, 42 NRC 111 (1995). Failure to provide such an explanation regarding the bases of a proffered contention requires the contention be rejected. See *Palo Verde*, CLI-91-12, 34 NRC at 155. In this connection, neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention. See *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner neglects to provide the requisite support for its contentions, it is not within the Board's power to make assumptions of fact that favor the petitioner, nor may the Board supply information that is lacking. See *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001); *Georgia Tech Research Reactor*, LBP-95-6, 41 NRC at 305.

Likewise, providing any material or document as a basis for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention. See *Fansteel*, CLI-03-13, 58 NRC at 205. Along these lines, any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny. See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996). Thus, the material provided in support of a contention will be carefully examined by the Board to confirm that it does indeed supply an adequate basis for the contention. See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990).

d. Materiality

In order to be admissible, the regulations require that all contentions assert an issue of law or fact that is material to the outcome of a licensing proceeding, meaning that the subject matter of the contention must impact the grant or denial of a pending license application. See 10 C.F.R. § 2.309(f)(1)(iv). This requirement of materiality often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment. See *Yankee Nuclear*, LBP-96-2, 43 NRC at 75; see also *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), *petition for review denied*, CLI-03-12, 58 NRC 185, 191 (2003). Agency case law further suggests this requirement of materiality mandates certain showings in specific contexts. For instance, a contention challenging whether an emergency response plan's provisions provide the requisite reasonable assurance based on the adequacy of implementing procedures for those provisions

fails to present a material issue. *See Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1107 (1983).

e. Insufficient Challenges to Application

All properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the application (including the SAR and ER) so as to establish that a genuine dispute exists with the applicant on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(vi). Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

2. Scope of Contentions

Although licensing boards generally are to litigate “contentions” rather than “bases,” it has been recognized that “[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases.” *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002). As outlined below, exercising our authority under 10 C.F.R. §§ 2.316, 2.319, 2.329, we have acted to further define and/or consolidate contentions when the issues sought to be raised by one or more of the Petitioners appear related or when redrafting would clarify the scope of a contention.

3. Contentions Regarding Site Safety Analysis (SSA) Report

SSA 2.1 — FAILURE TO PROVIDE ADEQUATE SAFETY ASSESSMENT OF REACTOR INTERACTION

CONTENTION: The ESP application for the Clinton site fails to comply with 10 C.F.R. § 52.17 because its safety assessment does not contain an adequate analysis and evaluation of the major structures, systems, and components of the facility that bear significantly on the acceptability of the site under the radiological consequences evaluation factors identified in 10 C.F.R. § 50.34(a)(1). In particular, the safety assessment does not adequately take into account the potential effects on radiological accident consequences of co-locating new reactors with advanced designs next to an older reactor. The safety assessment should contain a comprehensive evaluation and

analysis of the ways in which interaction of the old and new plants under accident conditions may exacerbate the consequences of a radiological accident. Without such an evaluation and analysis, the presiding officer cannot make a finding that, taking into consideration the site criteria in Part 100 of the regulations, the proposed reactors can be operated “without undue risk to the health and safety of the public.” 10 C.F.R. § 52.21.

DISCUSSION: Contentions at 2-7; EGC Contentions Response at 8-11; Staff Contentions Response at 8-17; Tr. at 16-62.

RULING: Inadmissible, in that this contention and its supporting bases raise a matter that is not within the scope of this proceeding and/or impermissibly challenges Commission regulatory requirements. *See* section II.B.1.a, b.

This contention of omission alleges that the SSAR does not contain information relating to the design of the control room and equipment of the not-as-yet selected new plant; however, that information is not required to be specified at the ESP stage, which focuses upon acceptability of the site assuming the new plant falls within the Applicant’s submitted plant parameters envelope (PPE). It is neither possible nor necessary for the Applicant to provide the requested level of detailed information about control room and equipment design at the ESP stage of the licensing process. A challenge to the Applicant’s choice of control room and equipment design, which this contention posits, belongs in a proceeding under either Subparts B or C of the 10 C.F.R. Part 52 licensing process.

SSA 2.2 — FAILURE TO EVALUATE SITE SUITABILITY FOR BELOW-GRADE PLACEMENT OF REACTOR CONTAINMENT

CONTENTION: The Site Safety Analysis Report for the Clinton ESP application is inadequate because it does not evaluate the suitability of the site to locate the reactor containment below grade-level. Below-grade construction is advisable and appropriate, if not necessary, in order to maintain an adequate level of security in the post-9/11 threat environment.

DISCUSSION: Contentions at 7-12; EGC Contentions Response at 12-16; Staff Contentions Response at 17-21; Tr. at 64-115, 227-33.

RULING: Inadmissible, in that this contention and its supporting bases improperly challenge the Commission’s regulatory requirements and/or raise an issue outside the scope of the proceeding. *See* section II.B.1.a, b, above.

Petitioners would have this Board rely upon the provisions of 10 C.F.R. § 100.21(f), which require that site characteristics be such that adequate security plans and measures can be developed, to impose a new regulatory requirement to include analysis of below-grade placement in ESP applications. Because the regulations that govern an ESP application do not impose any requirement upon

an applicant to select any particular plant design or surface/subsurface location, this contention improperly challenges Commission regulations.

In fact, this contention does not raise any question of site suitability, which is the focus of the ESP proceeding, but instead essentially raises a “policy” matter, i.e., whether or not a site approval hearing “today” should attempt to project future requirements or needs in the site review process. A contention that attempts to litigate the merits of below-grade reactor placement and requires speculation about the Commission’s possible future modification of the review process is not within the scope of this proceeding.

3. *Environmental Contentions (EC)*

EC 3.1 — THE CLEAN ENERGY ALTERNATIVES CONTENTION

CONTENTION: The Environmental Review fails to rigorously explore and objectively evaluate all reasonable alternatives. In Section 9.2 of the Environmental Report, Exelon claims to satisfy 10 C.F.R. § 51.45(b)(3), which requires a discussion of alternatives that is “sufficiently complete to aid the Commission in developing and exploring” “appropriate alternatives . . . concerning alternative uses of available resources,” pursuant to the National Environmental Policy Act. However, Exelon’s analysis is premised on several material legal and factual flaws that lead it to improperly reject better, lower-cost, safer, and environmentally preferable energy efficiency, renewable energy resource, distributed generation, and “clean coal” resource alternatives. Therefore, Exelon’s ER does not provide the basis for the rigorous exploration and objective evaluation of all reasonable alternatives to the ESP that is required by NEPA.

DISCUSSION: Supplemental Request at 1-14; EGC Contentions Response at 17-28; Staff Contentions Response at 22-28; Clinton Petitioners’ Reply at 2-10; Tr. at 186-219.

RULING: Inadmissible, to the degree this contention and its supporting bases (Bases A, B, and D) raise matters outside the scope of this proceeding and/or impermissibly challenge the Commission’s regulations as the contention asserts consideration of the “need for power” is required in an ER associated with an ESP. *See* section II.B.1.a, b, above; *see also* 10 C.F.R. §§ 52.17(a)(2), 52.18.

Also outside the scope of this proceeding and/or an impermissible challenge to the Commission’s regulation is the Clinton Petitioners’ claim that EGC must consider such alternatives as energy conservation (demand side management) or other alternative generation methods that are not typically employed by independent power generators would require an analysis of energy conservation methods that essentially equates to a “need for power” analysis that is outside the scope of this proceeding and/or an impermissible challenge to the Commission’s regulations. In this regard, we agree with EGC that in preparing information on any energy

generation method alternative for an ER, it is appropriate for the Applicant fully to consider its own business objectives and status as an independent power provider — as opposed to a public utility — as it analyzes alternatives.

Finally, to the extent the contention and its bases challenge the ER discussion of the combination of coal and gas-fired generation (Basis C) and distributed gas-fired generation (Basis E3), it is inadmissible as failing adequately to challenge the ER discussion regarding those subjects. *See* section II.B.1.e, above. This contention is, however, admitted as supported by bases sufficient to raise genuine issues of material fact adequate to warrant further inquiry to the degree it alleges (a) a failure by EGC in its evaluation of the alternatives that could be used by an independent power provider in its power generation mix adequately to address a combination of wind power, solar power, natural gas-fired generation, and “clean coal” technology (Basis C); and (b) the Applicant’s use of potentially flawed and outdated information regarding wind and solar power generation methods (Bases E1 and E2).

A revised version of this contention incorporating this ruling is set forth in Appendix A to this Memorandum and Order.

EC 3.2 — THE WASTE CONFIDENCE RULE CONTENTION

CONTENTION: The Waste Confidence Rule does not apply to this proceeding and thus the Environmental Review must evaluate whether and in what time frame spent fuel generated by the proposed new Clinton 2 plant can be safely disposed of. The ER for the Clinton ESP application is deficient because it fails to discuss the environmental implications of the lack of options for permanent disposal of the irradiated fuel that will be generated by the proposed new Clinton nuclear plant if it is built and operated. Nor has the NRC made an assessment on which Exelon can rely regarding the degree of assurance now available that radioactive waste generated by the proposed reactors “can be safely disposed of [and] when such disposal or off-site storage will be available.” Final Waste Confidence Decision, 49 Fed. Reg. 34,658 (August 31, 1984), citing *State of Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979). Accordingly, the ER fails to provide a sufficient discussion of the environmental impacts of the proposed new nuclear reactors.

DISCUSSION: Supplemental Request at 14-18; EGC Contentions Response at 29-32; Staff Contentions Response at 28-33; Clinton Petitioners’ Reply at 10-15; Tr. at 140-80.

RULING: Inadmissible, in that this contention and its supporting bases impermissibly challenge the Commission’s regulatory requirements. *See* section II.B.1.a, above. The matters the Petitioners seek to raise have been generically addressed by the Commission through the Waste Confidence Rule, the plain language of which states:

[T]he Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of *any* reactor to dispose of the commercial high-level waste and spent fuel originating in such reactor and generated up to that time.

10 C.F.R. § 51.23(a) (emphasis added). Furthermore, when the Commission amended this rule in 1990, it clearly contemplated and intended to include waste produced by a new generation of reactors.⁷

EC 3.3 — EVEN IF THE WASTE CONFIDENCE DECISION APPLIES TO THIS PROCEEDING, IT SHOULD BE RECONSIDERED

CONTENTION: As discussed in a contention submitted separately by Petitioners in conjunction with the Environmental Law and Policy Center, Petitioners do not believe that the Waste Confidence decision applies to this proceeding. Even if the Waste Confidence Decision is found to apply to this proceeding, however, it should be reconsidered, in light of significant and pertinent unexpected events that raise substantial doubt about its continuing validity, i.e., the increased threat of terrorist attacks against U.S. facilities.

DISCUSSION: Contentions at 12-14; EGC Contentions Response at 32-34; Staff Contentions Response at 28-33; Tr. at 180-85.

RULING: Inadmissible, in that the contention and its supporting bases raise a matter that is not within the scope of this proceeding and/or impermissibly seek to challenge a Commission regulatory requirement. *See* section II.B.1.a, b, above. Absent a showing of “special circumstances” under 10 C.F.R. § 2.335(b), which the Petitioners have not made, this matter must be addressed through Commission rulemaking.

4. *Miscellaneous Contention (MC)*

MC 5.1 — ILLINOIS STATE MORATORIUM STATUTE CONTENTION

CONTENTION: The Illinois state law imposing a moratorium on new nuclear plants forecloses the issuance of an ESP for Clinton 2. Exelon’s ESP permit application fails to address the Illinois statute, 220 ILCS 5/8-406(c), which prohibits any new nuclear power plant within the state until such time as the Director of the Illinois Environmental Protection Agency (“IEPA”) finds that the United States

⁷ *See* 55 Fed. Reg. 38,474, 38,504 (Sept. 18, 1990) (“The availability of a second repository would permit spent fuel to be shipped offsite well within 30 years after expiration of [the current fleet of] reactors’ [operating licenses]. The same would be true of the spent fuel discharged from any new generation of reactor designs.”); *see also id.* at 38,501-04.

government has identified and approved a demonstrable technology or means for the disposal of high-level nuclear waste. The Director of the IEPA has, properly, not made the requisite finding, meaning that no new nuclear plant may now be built in Illinois and the issuance of an ESP is legally foreclosed.

DISCUSSION: Supplemental Request at 18-21; EGC Contentions Response at 34-38; Staff Contentions Response at 33-35; Clinton Petitioners' Reply at 16-18; Tr. at 379-400.

RULING: Inadmissible, in that this contention and its supporting basis raise a matter outside the scope of this proceeding and/or fail to raise a material legal or factual dispute. *See* section II.B.1.b, d, above. This contention concerns the authority of the Director of the Illinois Environmental Protection Agency. An NRC adjudicatory proceeding is not the proper forum for seeking to litigate and resolve controversies about other governmental agencies' permitting authority. *See Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 122 n.3 (1998); *see also Consumers Power Co.* (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 124 (1979). In addition, the Clinton Petitioners do not contend that the Illinois State laws they cite bind this Board or the agency of which it is part, and the parties agree that issuance of an ESP will have no effect whatsoever on the rights of Illinois State agencies to enforce State laws restricting the issuance of construction authorizations or certificates of convenience and necessity, making the outcome of this ESP proceeding immaterial relative to the matter raised by this contention.

III. PROCEDURAL/ADMINISTRATIVE MATTERS

As indicated above, the Clinton Petitioners are admitted as parties to this proceeding as they each have established standing and have set forth at least one admissible contention. Below is procedural guidance for further litigating the above-admitted contentions.

Unless all parties agree that this proceeding should be conducted pursuant to 10 C.F.R. Part 2, Subpart N, this proceeding will be conducted in accordance with the procedures of 10 C.F.R. Part 2, Subparts C and L. Assuming the parties do not consent to conducting this proceeding under Subpart N, per our discussion at the end of the June 2004 prehearing conference (Tr. at 401), the parties should meet within 10 days of the date of this issuance to discuss their particular claims and defenses and the possibility of settlement or resolution of any part of the

proceeding and make arrangements for the required disclosures under 10 C.F.R. § 2.336(a).⁸

The Board will oversee the discovery process through status reports and/or conferences, and expects that each of the parties will comply with the process

⁸In this regard, among the items to be discussed is whether the Staff's section 2.336(b) hearing file can be provided electronically via the NRC Web site sooner than 30 days from the date of this issuance.

Relative to the Staff's hearing file, in accord with 10 C.F.R. § 2.336(b), in creating and providing the hearing file for this proceeding, the Staff can utilize one of two options:

1. Hard copy file. The hearing file that is submitted to the Licensing Board and the parties in hard copy must contain a chronologically numbered index of each item contained in it and each file item shall be separately tabbed in accordance with the index and be separated from the other file items by a substantial colored sheet of paper that contains the tab(s) for the immediately following item. Additionally, the items shall be housed in hole-punched three-ring binders of no more than 4 inches in thickness.
2. Electronic file. For an electronic hearing file, the Staff shall make available to the parties and the Licensing Board a list that contains the ADAMS accession number, date, and title of each item so as to make the item readily retrievable from the agency's Web site, *www.nrc.gov*, using the ADAMS "Find" function. Additionally, the Staff should create a separate folder in the agency's ADAMS system, which it should label "Exelon Generation Company — 52-007-ESP Hearing File," and give James Cutchin of ASLBP and the SECY group (Office of the Secretary) viewer rights to that folder. Once created, the Staff should place in that folder copies of the ADAMS files for all the Hearing Docket materials. For documents in ADAMS packages a subfolder should be created into which the package content should be placed. The subfolder should have a title that comports with the title of the package. Thereafter, as part of its notice to the parties and the Licensing Board regarding the availability of the Hearing File materials in ADAMS, the Staff should advise the Licensing Board that this process is complete and the "Hearing File" folder is available for viewing. (As an information matter for the parties, once this notice is received, the contents of the folder will be copied so as to make its contents available to an ASLBP-created ADAMS folder that will be accessible to ASLBP personnel only and into a folder that will be accessible by the parties from the NRC Web site.)

If the Staff thereafter provides any updates to the hearing file, it should place a copy of those items in "Exelon Generation Company — 52-007-ESP Hearing File" ADAMS folder and indicate it has done so in the notification regarding the update that is then sent to the Licensing Board and the parties. Additionally, if at any juncture the Staff anticipates placing any nonpublic documents into the hearing file for the proceeding, it should notify the Licensing Board of that intent prior to placing those documents into the "Exelon Generation Company — 52-007-ESP Hearing File" and await further instructions regarding those documents from the Licensing Board. (Questions regarding the electronic hearing file creation process should be addressed to James Cutchin at 301-415-7397 or *jmc3@nrc.gov*.)

If the Staff decides to utilize option 2, as part of the discovery report required under this section it should give notice to the Licensing Board and the parties of that election. If any party objects to this method of providing the hearing file, it shall file a response within 7 days outlining the reasons why access to an electronic hearing file will place an undue burden on that party's ability to participate in this proceeding.

to the maximum extent possible, with failure to do so resulting in appropriate Board sanctions.⁹ In this regard, the Board will conduct a prehearing conference call to discuss initial discovery disclosures, scheduling and other matters on a date to be established by the Board in a subsequent order. Additionally, during that prehearing conference the parties should be prepared to provide estimates (discussed during their meeting) regarding exactly when this case will be ready to go to hearing and the time necessary to try the admitted contention if it were to go to hearing.¹⁰ They also should be prepared to indicate the status of any settlement negotiations relative to the admitted contention, and whether a “settlement judge” would be helpful in those discussions.

IV. CONCLUSION

For the reasons set forth above, we find that the Clinton Petitioners have established their standing to intervene and have put forth one litigable contention so as to be entitled to party status in this proceeding. The text of their admitted contention is set forth in Appendix A to this decision.

For the foregoing reasons, it is, this 6th day of August, ORDERED that:

1. Relative to the contentions specified in paragraph 2 below, the Clinton Petitioners’ hearing request is *granted* and these Petitioners are admitted as parties to this proceeding.
2. The following Petitioner contention is admitted for litigation in this proceeding: EC-3.1.
3. The following Petitioner contentions are rejected as inadmissible for litigation in this proceeding: SAR 2.1, SAR 2.2, EC 3.2, EC 3.3, and MC 5.1.
4. The parties are to take the actions required by section III, above, in accordance with the schedule established herein.

⁹In this regard, when a party claims privilege and withholds information otherwise discoverable under the rules, the party shall expressly make the claim and describe the nature of what is not being disclosed to the extent that, without revealing what is sought to be protected, other parties will be able to determine the applicability of the privilege or protection. The claim and identification of privileged materials must occur within the time provided for such disclosure of the withheld materials. *See* 10 C.F.R. § 2.336(a)(3), (b)(5).

¹⁰EGC and the Staff also should be prepared to provide their views on how the Board should proceed relative to the “mandatory hearing” findings required of the Board under the December 2003 hearing notice. *See* 68 Fed. Reg. at 69,427. In this regard, we ask that these parties provide their views on the difference, if any, between what is required under this mandatory hearing proceeding and that involving the proposed Louisiana Energy Services, L.P. uranium enrichment facility relative to matters that are not the subject of admitted contentions. *Compare Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-3, 59 NRC 10, 12-13 (2004).

5. In accordance with the provisions of 10 C.F.R. § 2.311, as it rules upon intervention petitions, any appeal to the Commission from this Memorandum and Order must be taken within ten (10) days after it is served.

THE ATOMIC SAFETY AND
LICENSING BOARD¹¹

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Paul B. Abramson
ADMINISTRATIVE JUDGE

Anthony J. Baratta
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 6, 2004

¹¹ Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant EGC, (2) the Clinton Petitioners, and (3) the Staff.

APPENDIX A. ADMITTED CONTENTION

EC 3.1 — THE CLEAN ENERGY ALTERNATIVES CONTENTION

CONTENTION: The Environmental Review fails to rigorously explore and objectively evaluate all reasonable alternatives. In Section 9.2 of the Environmental Report, Exelon claims to satisfy 10 C.F.R. § 51.45(b)(3), which requires a discussion of alternatives that is “sufficiently complete to aid the Commission in developing and exploring” “appropriate alternatives . . . concerning alternative uses of available resources,” pursuant to the National Environmental Policy Act. However, Exelon’s analysis is premised on several material legal and factual flaws that lead it to improperly reject the better, lower-cost, safer, and environmentally preferable wind power and solar power alternatives, and fails to address adequately a mix of these alternatives along with the gas-fired generation and “clean coal” resource alternatives. Therefore, Exelon’s ER does not provide the basis for the rigorous exploration and objective evaluation of all reasonable alternatives to the ESP that is required by NEPA.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Paul B. Abramson
Dr. Anthony J. Baratta

In the Matter of

Docket No. 52-008-ESP
(ASLBP No. 04-822-02-ESP)

DOMINION NUCLEAR NORTH
ANNA, LLC
(Early Site Permit for North Anna
ESP Site)

August 6, 2004

Ruling on a petition submitted by several public interest organizations seeking to intervene in this proceeding regarding the application of Dominion Nuclear North Anna, LLC, for a 10 C.F.R. Part 52 early site permit to construct two or more new nuclear reactors on the site of the existing North Anna nuclear power stations, the Licensing Board concludes that, having established the requisite standing and proffering at least one admissible contention, each of the Petitioners is admitted as a party to the proceeding.

RULES OF PRACTICE: STANDING TO INTERVENE

In determining standing as of right for those seeking party status, the agency has applied contemporaneous judicial standing concepts that require a participant to establish (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury is fairly traceable to

the challenged action; and (3) the injury is likely to be redressed by a favorable decision. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). In this regard, in cases involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been considered sufficient to establish the requisite injury-in-fact. *See Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

RULES OF PRACTICE: INTERVENTION PETITION (PLEADING REQUIREMENTS); STANDING TO INTERVENE (AUTHORIZATION)

When an entity seeks to intervene on behalf of its members, that entity must show it has an individual member who can fulfill all the necessary standing elements and who has authorized the organization to represent his or her interests.

RULES OF PRACTICE: STANDING TO INTERVENE (UNCONTESTED; CONSTRUCTION OF PETITION)

In assessing a petition to determine whether the necessary standing elements are met, which the Board must do even though there are no objections to a petitioner's standing, the Commission has indicated that the Board is to "construe the petition in favor of the petitioner." *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY; MATERIALITY; SCOPE OF THE PROCEEDING; SPECIFICITY AND BASIS)

A contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. *See* 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), and (vi). In addition, the petitioner must demonstrate that the issue raised in the contention is both "within the scope of the proceeding" and "material to the findings the NRC must make to support the action that is involved in the proceeding." *Id.* § 2.309(f)(1)(iii)-(iv). Failure to comply with any of these

requirements is grounds for dismissing a contention. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

RULES OF PRACTICE: CONTENTIONS (CHALLENGES TO STATUTORY REQUIREMENTS/REGULATORY PROCESS/COMMISSION RULE)

An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process. *See Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974). Similarly, a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. *See* 10 C.F.R. § 2.335; *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974); *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff'd in part and rev'd in part on other grounds*, CLI-91-12, 34 NRC 149 (1991). By the same token, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue. *See Peach Bottom*, ALAB-216, 8 AEC at 20-21 & n.33.

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)

All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785,

790-91 (1985). As a consequence, any contention that falls outside the specified scope of the proceeding must be rejected. *See Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

It is the petitioner's obligation to present the factual information and expert opinions necessary to support its contention. *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *and aff'd in part*, CLI-95-12, 42 NRC 111 (1995). Failure to provide such an explanation regarding the bases of a proffered contention requires the contention be rejected. *See Palo Verde*, CLI-91-12, 34 NRC at 155. In this connection, neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

If a petitioner neglects to provide the requisite support for its contentions, it is not within the Board's power to make assumptions of fact that favor the petitioner, nor may the Board supply information that is lacking. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001); *Georgia Tech Research Reactor*, LBP-95-6, 41 NRC at 305.

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

Providing any material or document as a basis for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention. *See Fansteel*, CLI-03-13, 58 NRC at 205. Along these lines, any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996). Thus, the material provided in support of a contention will be carefully examined by the Board to confirm that it does indeed supply an adequate basis for the contention.

See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990).

RULES OF PRACTICE: CONTENTIONS (MATERIALITY)

In order to be admissible, all contentions must assert an issue of law or fact that is material to the outcome of a licensing proceeding, meaning that the subject matter of the contention must impact the grant or denial of a pending license application. *See* 10 C.F.R. § 2.309(f)(1)(iv). This requirement of materiality often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment. *See Yankee Nuclear*, LBP-96-2, 43 NRC at 75; *see also Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), *petition for review denied*, CLI-03-12, 58 NRC 185, 191 (2003). Agency case law further suggests this requirement of materiality mandates certain showings in specific contexts. For instance, a contention challenging whether an emergency response plan's provisions provide the requisite reasonable assurance based on the adequacy of implementing procedures for those provisions fails to present a material issue. *See Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1107 (1983).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE TO LICENSE APPLICATION)

All properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the application (including the SAR and ER) so as to establish that a genuine dispute exists with the applicant on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(vi). Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

RULES OF PRACTICE: CONTENTIONS (SCOPE)

Although licensing boards generally are to litigate “contentions” rather than “bases,” it has been recognized that “[t]he reach of a contention necessarily

hinges upon its terms coupled with its stated bases.’’ *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002).

MEMORANDUM AND ORDER **(Ruling on Standing and Contentions)**

Before the Licensing Board is the request of the Blue Ridge Environmental Defense League (BREDL), the Nuclear Information and Resource Service (NIRS), and Public Citizen (PC) (collectively, North Anna Petitioners) seeking to intervene in this proceeding to challenge the application of Dominion Nuclear North Anna, LLC (DNNA), for a 10 C.F.R. Part 52 early site permit (ESP). The ESP application seeks approval of the site of the existing North Anna nuclear power stations in Louisa County, Virginia, for the possible construction of two or more new nuclear reactors. For the reasons set forth below, we find that the North Anna Petitioners have established the requisite standing to intervene in this proceeding and have submitted two admissible contentions concerning the DNNA application, denoted as Environmental Contention (EC) 3.3.2 — Impacts on Striped Bass in Lake Anna, and EC 3.3.4 — Failure To Provide Adequate Consideration of the No-Action Alternative, which are set forth in an appendix to this decision. Accordingly, we admit the North Anna Petitioners as parties to this proceeding. Additionally, we outline certain procedural and administrative rulings regarding the litigation of these admitted contentions.

I. BACKGROUND

A. DNNA Early Site Permit Application

Under the Part 52 licensing process, an entity may apply for an ESP, which would allow it to resolve key site-related environmental, safety, and emergency planning issues before deciding to build, or choosing the design of, a nuclear power facility on that site. Thus, if granted, an ESP essentially would allow an entity to “bank” a possible site for the future construction of new nuclear power generation facilities. DNNA, a wholly owned subsidiary of retail energy provider Dominion Resources, Inc. (DRI), filed an ESP application on September 25, 2003, that consists of a section on Administrative Information about DNNA, a Site Safety Analysis Report (SSAR), an Environmental Report (ER), an Emergency

Plan (EP), and a Site Redress Plan (SRP). The particular site for which DNNA seeks to obtain an ESP is the North Anna Power Station (NAPS) property, where another subsidiary of DRI has operated two existing nuclear power plants since 1978. *See* [DNNA] North Anna [ESP] Application at 1-1-1 [hereinafter North Anna ESP Application].

Two other companies, Exelon Generation Company, LLC (EGC), and System Energy Resources, Inc. (SERI), recently submitted ESP applications for the sites at the existing Clinton and Grand Gulf nuclear facilities. *See* [EGC ESP] Application (Sept. 25, 2003); [SERI] Grand Gulf Site ESP Application (Oct. 16, 2003). Because of the temporal and substantive similarity of the three applications, and because these Part 52 licensing proceedings are the first of their kind, as is noted below, preliminary matters in the Part 52 licensing process concerning these applications have been afforded joint consideration by the Commission and the Licensing Board for purposes of efficiency and ensuring uniformity among the three proceedings.

B. North Anna Petitioners' Hearing Request and Petition To Intervene

In response to a November 25, 2003 notice of hearing and opportunity to petition for leave to intervene regarding the DNNA ESP application, 68 Fed. Reg. 67,489 (Dec. 2, 2003), on January 2, 2004, the North Anna Petitioners filed a request for hearing and petition to intervene, *see* Hearing Request and Petition To Intervene by [North Anna Petitioners] (Jan. 2, 2004) [hereinafter Hearing Request]. DNNA and the NRC Staff responded to the North Anna Petitioners' hearing request on January 12 and 20, 2004, respectively. *See* [DNNA] Answer to Hearing Request and Petition To Intervene filed by [North Anna Petitioners] (Jan. 12, 2004) [hereinafter DNNA Hearing Request Response]; NRC Staff's Answer to Hearing Request and Petition To Intervene by the [North Anna Petitioners] (Jan. 20, 2004) [hereinafter Staff Hearing Request Response]. Neither DNNA nor the Staff challenged the North Anna Petitioners' representational standing, but emphasizing that the North Anna Petitioners must present at least one litigable contention to be admitted as parties to this proceeding, both challenged the admissibility of one or more of the North Anna Petitioners' issue statements.

C. Commission Application of Revised 10 C.F.R. Part 2 Rules of Practice and Referral of Hearing Petition

On January 16, 2004, DNNA submitted a motion to apply the recently revised version of 10 C.F.R. Part 2, which permits the use of an informal hearing process for ESP applications. *See* [DNNA] Motion To Apply New Adjudicatory Process

(Jan. 16, 2004); *see also* 69 Fed. Reg. 2182, 2188 (Jan. 14, 2004). The North Anna Petitioners opposed DNNA's motion, citing a lack of fairness, effectiveness, and efficiency in applying the new Part 2 procedures to this proceeding, while the Staff supported using the newly adopted procedures. *See* [North Anna] Petitioners' Opposition to [DNNA] Application for New Adjudicatory Process (Jan. 26, 2004); NRC Staff's Answer to [DNNA] Motion To Apply New Adjudicatory Process (Feb. 5, 2004). Ultimately, in a March 2, 2004 issuance, the Commission granted the DNNA motion and found that applying the new Part 2 would not result in any interruption, unwarranted delay, added burden, or unfairness in this or the other two ESP proceedings. *See* CLI-04-8, 59 NRC 113, 118-19 (2004). As part of that decision, the Commission also gave the North Anna Petitioners 60 days within which to file their contentions in the proceeding and referred their hearing petition to the Atomic Safety and Licensing Board Panel for further consideration. *See id.* at 119.

D. Post-Referral Developments

Responding to the Commission's referral, in a March 8, 2004 initial prehearing order, among other things, the Licensing Board Panel Chief Administrative Judge reaffirmed the May 3, 2004 deadline for submitting contentions and requested that each contention be placed in one or more of the following subject matter categories: (1) Administrative, (2) Site Safety Analysis, (3) Environmental, (4) Emergency Planning, or (5) Miscellaneous.¹ *See* Licensing Board Panel Memorandum and Order (Initial Prehearing Order) at 3-4 (Mar. 8, 2004) (unpublished). The initial prehearing order also set a May 28, 2004 deadline for DNNA and Staff responses to the North Anna Petitioners' petition supplement and a June 4, 2004 deadline for the North Anna Petitioners to reply to the DNNA and Staff responses. *See id.* at 4. Thereafter, on March 22, 2004, this Atomic Safety and Licensing Board was established to adjudicate this ESP proceeding.² *See* 69 Fed. Reg. 15,910 (Mar. 26, 2004). In a memorandum and order issued on the same day,

¹ Because section 2.714(a)(3) of the superceded Part 2 rules permitting petitioners to supplement their hearing requests to provide standing-related information did not have an analog in the new Part 2, the North Anna Petitioners were allowed to supplement their petition with standing-related information when they filed their contentions. Further, they were permitted to make any request under section 2.309(g) regarding the selection of hearing procedures other than the Subpart L procedures that otherwise apply under the new Part 2. *See* Licensing Board Panel Memorandum and Order (Initial Prehearing Order) at 2 (Mar. 8, 2004) (unpublished).

² That same day, Board establishment notices were issued for the *Clinton* and *Grand Gulf* ESP proceedings setting up two Boards with the same membership as this Board. *See* 69 Fed. Reg. 15,910 (Mar. 26, 2004) (*Clinton* proceeding); 69 Fed. Reg. 15,911 (Mar. 26, 2004) (*Grand Gulf* proceeding). Although the Board designation notices for these proceedings established three separate licensing boards, for simplicity we will refer to these Boards in the singular when referencing rulings that affected all three proceedings identically.

the Board established a June 21, 2004 date for an initial prehearing conference for this proceeding (as well as the *Clinton* and *Grand Gulf* ESP proceedings) at the NRC's Rockville, Maryland headquarters facility.³ See Licensing Board Memorandum and Order (Scheduling Initial Prehearing Conference) (Mar. 22, 2004) (unpublished).

The North Anna Petitioners timely filed their contentions supplement on May 3, 2004.⁴ See Contentions of [North Anna Petitioners] Regarding [ESP] Application for Site of North Anna Nuclear Power Plant (May 3, 2004) [hereinafter Contentions]. On May 25 and 28, 2004, respectively, DNNA and the Staff filed their answers to the North Anna Petitioners' proposed contentions. See [DNNA] Answer to Petitioners' Contentions (May 25, 2004) [hereinafter DNNA Contentions Response]; NRC Staff Answer to Contentions of [North Anna Petitioners] Regarding the [ESP] Application for the North Anna Site (May 28, 2004) [hereinafter Staff Contentions Response]. Following a June 1, 2004 motion for extension of time to reply to the DNNA and Staff responses to their contentions, which the Licensing Board granted on June 3, the North Anna Petitioners filed their reply to the DNNA and Staff answers on June 9, 2004. See Petitioners' Motion for Extension of Time to Reply to Responses to Contentions (June 1, 2004); [DNNA] Answer to Petitioners' Motion for Extension of Time To Reply to Responses to Contentions (June 2, 2004); Licensing Board Order (Granting Extension Request) (June 3, 2004) (unpublished); Reply by [North Anna Petitioners] to [DNNA] and NRC Staff's Responses (June 9, 2004) [hereinafter North Anna Petitioners' Reply].

On June 21-22, 2004, the Board conducted a 2-day prehearing conference during which it heard oral presentations regarding the standing of each of the ESP Petitioners and the admissibility of their contentions, which were grouped by topic into separate categories.⁵ See Tr. at 1-410.

³The Petitioners in all three ESP proceedings filed a motion on April 1, 2004, to hold separate prehearing conferences in the vicinity of each proposed ESP site, as opposed to one single prehearing conference for all three proceedings at the NRC's Rockville, Maryland headquarters. See Petitioners' Motion for Reconsideration of Memorandum and Order Scheduling Initial Prehearing Conference (Apr. 1, 2004). The Licensing Board denied this motion on the grounds that, given the similarity of the three proceedings and the location of principal counsel for all parties in the Washington, D.C. area, the most efficient and effective means for conducting the prehearing conference was to do so jointly in Rockville. See Licensing Board Memorandum and Order (Denying Motion Requesting Reconsideration of Initial Prehearing Conference Location) at 2-3 (Apr. 5, 2004) (unpublished).

⁴In their supplement, the North Anna Petitioners did not provide any additional information regarding standing matters or address the use of other hearing procedures in this proceeding.

⁵As a result of the Board's concurrent consideration of the three ESP cases, today we also are issuing standing/contentions admission rulings in those cases as well. See *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229 (2004); *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), LBP-04-19, 60 NRC 277 (2004).

II. ANALYSIS

A. North Anna Petitioners' Standing

1. Standards Governing Standing

In determining standing as of right for those seeking party status, the agency has applied contemporaneous judicial standing concepts that require a participant to establish (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. See *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). In this regard, in cases involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been considered sufficient to establish the requisite injury-in-fact. See *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). Further, when an entity seeks to intervene on behalf of its members, that entity must show it has an individual member who can fulfill all the necessary standing elements and who has authorized the organization to represent his or her interests. Moreover, in assessing a petition to determine whether these elements are met, which the Board must do even though there are no objections to a petitioner's standing, the Commission has indicated that we are to "construe the petition in favor of the petitioner." *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

We apply these rules and guidelines in evaluating each of the North Anna Petitioners' standing presentations.

2. BREDL

DISCUSSION: Hearing Request at 2-4, attachments 3, 7, 9, 13; DNNA Hearing Request Response at 1; Staff Hearing Request Response at 1, 5-6; Tr. at 12-13.

RULING: BREDL is a not-for-profit organization whose members oppose the issuance of an ESP to DNNA. Attached to the North Anna Petitioners' hearing request are the affidavits of four BREDL members, each of whom states that BREDL is authorized to represent his or her interests. All four members reside within 50 miles of the North Anna site, one as close as 15.9 miles from the site. These individuals' asserted health, safety, and environmental interests and their agreement to permit BREDL to represent their interests are sufficient to establish BREDL's standing to intervene in this proceeding.

3. NIRS

DISCUSSION: Hearing Request at 2-4, attachments 2, 4, 6, 8, 10-12, 14, 15, 17; DNNA Hearing Request Response at 1; Staff Hearing Request Response at 1, 5-6; Tr. at 12-13.

RULING: NIRS is a not-for-profit corporation whose members oppose the issuance of an ESP to DNNA. Attached to the North Anna Petitioners' hearing request are the affidavits of ten NIRS members, each of whom states that NIRS is authorized to represent his or her interests. All ten members reside within 50 miles of the North Anna site, one as close as 15 miles from the site. These individuals' asserted health, safety, and environmental interests and their agreement to permit NIRS to represent their interests are sufficient to establish NIRS's standing to intervene in this proceeding.

4. PC

DISCUSSION: Hearing Request at 2-4, attachments 5, 16; DNNA Hearing Request Response at 1; Staff Hearing Request Response at 1, 5-6; Tr. at 12-13.

RULING: PC is a not-for-profit organization whose members oppose the issuance of an ESP to DNNA. Attached to the North Anna Petitioners' hearing request are the affidavits of two PC members, each of whom states that PC is authorized to represent his or her interests. Both members reside within 50 miles of the North Anna site, one as close as 35 miles from the site. These individuals' asserted health, safety, and environmental interests and their agreement to permit PC to represent their interests are sufficient to establish PC's standing to intervene in this proceeding.

B. North Anna Petitioners' Contentions

1. Contention Admissibility Standards

Section 2.309(f) of the Commission's rules of practice specifies the requirements that must be met if a contention is to be deemed admissible. Specifically, a contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. *See* 10 C.F.R. § 2.309(f)(1)(i),

(ii), (v), and (vi). In addition, the petitioner must demonstrate that the issue raised in the contention is both “within the scope of the proceeding” and “material to the findings the NRC must make to support the action that is involved in the proceeding.” *Id.* § 2.309(f)(1)(iii)-(iv). Failure to comply with any of these requirements is grounds for dismissing a contention. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *see also Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

NRC case law has further developed these requirements, as is summarized below.

a. Challenges to Statutory Requirements/Regulatory Process/Regulations

An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency’s regulatory process. *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff’d in part on other grounds*, CLI-74-32, 8 AEC 217 (1974). Similarly, a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. *See* 10 C.F.R. § 2.335; *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974); *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff’d in part and rev’d in part on other grounds*, CLI-91-12, 34 NRC 149 (1991). By the same token, a contention that simply states the petitioner’s views about what regulatory policy should be does not present a litigable issue. *See Peach Bottom*, ALAB-216, 8 AEC at 20-21 & n.33.

b. Challenges Outside Scope of Proceeding

All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding

to the Licensing Board. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). As a consequence, any contention that falls outside the specified scope of the proceeding must be rejected. *See Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

c. Need for Adequate Factual Information or Expert Opinion

It is the petitioner's obligation to present factual information and expert opinions necessary to support its contention. *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *and aff'd in part*, CLI-95-12, 42 NRC 111 (1995). Failure to provide such an explanation regarding the bases of a proffered contention requires the contention be rejected. *See Palo Verde*, CLI-91-12, 34 NRC at 155. In this connection, neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner neglects to provide the requisite support for its contentions, it is not within the Board's power to make assumptions of fact that favor the petitioner, nor may the Board supply information that is lacking. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001); *Georgia Tech Research Reactor*, LBP-95-6, 41 NRC at 305.

Likewise, providing any material or document as a basis for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention. *See Fansteel*, CLI-03-13, 58 NRC at 205. Along these lines, any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996). Thus, the material provided in support of a contention will be carefully examined by the Board to confirm that it does indeed supply an adequate basis for the contention. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990).

d. Materiality

In order to be admissible, the regulations require that all contentions assert an issue of law or fact that is material to the outcome of a licensing proceeding,

meaning that the subject matter of the contention must impact the grant or denial of a pending license application. *See* 10 C.F.R. § 2.309(f)(1)(iv). This requirement of materiality often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment. *See Yankee Nuclear*, LBP-96-2, 43 NRC at 75; *see also Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), *petition for review denied*, CLI-03-12, 58 NRC 185, 191 (2003). Agency case law further suggests this requirement of materiality mandates certain showings in specific contexts. For instance, a contention challenging whether an emergency response plan's provisions provide the requisite reasonable assurance based on the adequacy of implementing procedures for those provisions fails to present a material issue. *See Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1107 (1983).

e. Insufficient Challenges to the Application

All properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the application (including the SAR and ER) so as to establish that a genuine dispute exists with the applicant on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(vi). Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

2. Scope of Contentions

Although licensing boards generally are to litigate “contentions” rather than “bases,” it has been recognized that “[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases.” *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002). As outlined below, exercising our authority under 10 C.F.R. §§ 2.316, 2.319, 2.329, we have acted to further define and/or consolidate contentions when the issues sought to be raised by one or more of the Petitioners appear related or when redrafting would clarify the scope of a contention.

3. *Contentions Regarding Site Safety Analysis Report (SSA)*

SSA 2.1 — FAILURE TO PROVIDE ADEQUATE SAFETY ASSESSMENT OF REACTOR INTERACTION

CONTENTION: The ESP application for the North Anna site fails to comply with 10 C.F.R. § 52.17 because its safety assessment does not contain an adequate analysis and evaluation of the major structures, systems, and components of the facility that bear significantly on the acceptability of the site under the radiological consequences evaluation factors identified in 10 C.F.R. § 50.34(a)(1). In particular, the safety assessment does not adequately take into account the potential effects on radiological accident consequences of co-locating new reactors with advanced designs next to an older reactor. The safety assessment should contain a comprehensive evaluation and analysis of the ways in which interaction of the old and new plants under accident conditions may exacerbate the consequences of a radiological accident. Without such an evaluation and analysis, the presiding officer cannot make a finding that, taking into consideration the site criteria in Part 100 of the regulations, the proposed reactors can be operated “without undue risk to the health and safety of the public.” 10 C.F.R. § 52.21.

DISCUSSION: Contentions at 2-7; DNNA Contentions Response at 11-15; Staff Contentions Response at 10-18; North Anna Petitioners’ Reply at 2-8; Tr. at 16-62.

RULING: Inadmissible, in that this contention and its supporting bases raise a matter that is not within the scope of this proceeding and/or impermissibly challenges Commission regulatory requirements. *See* section II.B.1.a, b.

This contention of omission alleges that the SSAR does not contain information relating to the design of the control room and equipment of the not-as-yet selected new plant; however, that information is not required to be specified at the ESP stage, which focuses upon acceptability of the site assuming the new plant falls within the Applicant’s submitted plant parameters envelope (PPE). It is neither possible nor necessary for the Applicant to provide the requested level of detailed information about control room and equipment design at the ESP stage of the licensing process. A challenge to the Applicant’s choice of control room and equipment design, which this contention posits, belongs in a proceeding under either Subparts B or C of the 10 C.F.R. Part 52 licensing process.

SSA 2.2 — FAILURE TO EVALUATE SITE SUITABILITY FOR BELOW-GRADE PLACEMENT OF REACTOR CONTAINMENT

CONTENTION: The Site Safety Analysis Report for the North Anna ESP is inadequate because it does not evaluate the suitability of the site to locate the reactor containment below grade-level. Below-grade construction is advisable and appropriate, if not necessary, in order to maintain an adequate level of security in the post-9/11 threat environment.

DISCUSSION: Contentions at 7-12; DNNA Contentions Response at 16-22; Staff Contentions Response at 18-23; North Anna Petitioners' Reply at 8-12; Tr. at 64-115, 227-33.

RULING: Inadmissible, in that this contention and its supporting bases improperly challenge the Commission's regulatory requirements and/or raise an issue outside the scope of the proceeding. *See* section II.B.1.a, b, above.

Petitioners would have this Board rely upon the provisions of 10 C.F.R. § 100.21(f), which require that site characteristics be such that adequate security plans and measures can be developed, to impose a new regulatory requirement to include analysis of below-grade placement in ESP applications. Because the regulations that govern an ESP application do not impose any requirement upon an applicant to select any particular plant design or surface/subsurface location, this contention improperly challenges Commission regulations.

In fact, this contention does not raise any question of site suitability, which is the focus of the ESP proceeding, but instead essentially raises a "policy" matter, i.e., whether or not a site approval hearing "today" should attempt to project future requirements or needs in the site review process. A contention that attempts to litigate the merits of below-grade reactor placement and requires speculation about the Commission's possible future modification of the review process is not within the scope of this proceeding.

3. *Environmental Contentions (EC)*

EC 3.1 — INADEQUATE DISCUSSION OF SEVERE ACCIDENT IMPACTS

CONTENTION: The ER's discussion of severe accident is inadequate, because it relies on the findings and conclusions of NUREG-1437, Vol. 1, the Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants (1996), without providing specific design information that would justify the applicability of the NUREG.

DISCUSSION: Contentions at 12-15; DNNA Contentions Response at 22; Staff Contentions Response at 23-27; North Anna Petitioners' Reply at 12-13; Tr. at 115-16.

RULING: This contention was withdrawn by North Anna Petitioners during the June 21, 2004 session of the initial prehearing conference. *See* Tr. at 115-16.

EC 3.2.1 — FAILURE TO EVALUATE WHETHER AND IN WHAT TIME FRAME SPENT FUEL GENERATED BY PROPOSED REACTORS CAN BE SAFELY DISPOSED OF

CONTENTION: The ER for the North Anna ESP is deficient because it fails to discuss the environmental implications of the lack of options for permanent disposal

of the irradiated fuel that will be generated by the proposed reactors if they are built and operated. Nor has the NRC made an assessment on which Dominion can rely regarding the degree of assurance now available that radioactive waste generated by the proposed reactors “can be safely disposed of [and] when such disposal or off-site storage will be available.” Final Waste Confidence Decision, 49 Fed. Reg. 34,658 (August 31, 1984), citing *State of Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979). Accordingly, the ER fails to provide a sufficient discussion of the environmental impacts of the proposed new nuclear reactors.

DISCUSSION: Contentions at 15-20; DNNA Contentions Response at 28-32; Staff Contentions Response at 28-30; North Anna Petitioners’ Reply at 13-19; Tr. at 140-80.

RULING: Inadmissible, in that this contention and its supporting bases impermissibly challenge the Commission’s regulatory requirements. See section II.B.1.a, above. The matters the Petitioners seek to raise have been generically addressed by the Commission through the Waste Confidence Rule, the plain language of which states:

[T]he Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of *any* reactor to dispose of the commercial high-level waste and spent fuel originating in such reactor and generated up to that time.

10 C.F.R. § 51.23(a) (emphasis added). Furthermore, when the Commission amended this rule in 1990, it clearly contemplated and intended to include waste produced by a new generation of reactors.⁶

EC 3.2.2 — EVEN IF THE WASTE CONFIDENCE DECISION APPLIES TO THIS PROCEEDING, IT SHOULD BE RECONSIDERED

CONTENTION: Even if the Waste Confidence Decision applies to this proceeding, it should be reconsidered, in light of significant and pertinent unexpected events that raise substantial doubt about its continuing validity, i.e., the increased threat of terrorist attacks against U.S. facilities.

DISCUSSION: Contentions at 20-23; DNNA Contentions Response at 32-37; Staff Contentions Response at 30-32; North Anna Petitioners’ Reply at 19-20; Tr. at 180-85.

⁶ See 55 Fed. Reg. 38,474, 38,504 (Sept. 18, 1990) (“The availability of a second repository would permit spent fuel to be shipped offsite well within 30 years after expiration of [the current fleet of] reactors’ [operating licenses]. The same would be true of the spent fuel discharged from any new generation of reactor designs.”); see also *id.* at 38,501-04.

RULING: Inadmissible, in that the contention and its supporting bases raise a matter that is not within the scope of this proceeding and/or impermissibly seek to challenge a Commission regulatory requirement. *See* section II.B.1.a, b, above. Absent a showing of “special circumstances” under 10 C.F.R. § 2.335(b), which the Petitioners have not made, this matter must be addressed through Commission rulemaking.

EC 3.3.1 — INADEQUATE DISCUSSION OF IMPACTS ON WATER QUANTITY IN LAKE ANNA AND DOWNSTREAM

CONTENTION: The ER does not contain a complete or sufficient assessment of the adequacy of water supplies required for the operation of new units at the North Anna site. In particular, the ER does not sufficiently address the adequacy of water supplies in Lake Anna for the proposed new Units 3 and 4, and fails to identify the supplementary external water source for Unit 4. The ER also fails to account for the impact of an additional unit or units on the river flow downstream.

DISCUSSION: Contentions at 26-32;⁷ DNNA Contentions Response at 37-42; Staff Contentions Response at 32-36; North Anna Petitioners’ Reply at 20-26; Tr. at 234-91.

RULING: Inadmissible, in that this contention and its supporting bases lack adequate factual or expert opinion support and/or fail properly to challenge the ER. *See* section II.B.1.c, e, above. In this regard, the Petitioners failed to acknowledge or discuss a March 31, 2004 DNNA application supplement indicating a fourth unit at the North Anna site would use closed-cycle cooling employing dry towers and, relative to unit 3, failed to provide facts or analysis sufficient to support their assertion that the ER discussions regarding water supply adequacy and impacts upon downstream waterflow are inadequate.

EC 3.3.2 — IMPACTS ON FISH AND OTHER AQUATIC LIFE IN LAKE ANNA AND DOWNSTREAM

CONTENTION: The ER does not adequately address the adverse impact of operating one or two additional reactors on fish and other aquatic life health in Lake Anna and the North Anna River. In particular, the ER does not adequately consider the four primary impacts of the proposed reactors to the fish and other aquatic life at Lake Anna and downstream: increased water temperature, impingement, entrainment, and downstream flow rates.²⁵ In addition, the ER does not address conflicts between Dominion’s proposals for water use and the requirements of the Clean Water Act (“CWA”) and its implementing regulations. Finally, the ER does

⁷ Relative to this contention, as well as contentions EC 3.3.2, EC 3.3.3, and EC 3.3.4, the North Anna Petitioners provided an introductory statement, labeled contention EC 3.3, that provided general information regarding NEPA environmental impact analyses.

not address the cumulative impacts of proposed Units 3 and 4 on the already-stressed aquatic systems in Lake Anna and the North Anna River.

²⁵ Impingement is the accumulation of fish and other aquatic life caught against the cooling water intake screen. Entrainment is the forced influx of aquatic life into the cooling system through the cooling water intake screen, resulting in the death of the aquatic life.

DISCUSSION: Contentions at 32-40; DNNA Contentions Response at 42-52; Staff Contentions Response at 36-44; North Anna Petitioners' Reply at 26-36; Tr. at 234-91.

RULING: Admitted as supported by bases sufficient to raise a genuine issue of material fact adequate to further inquiry as it concerns the adverse thermal impacts on the striped bass population of Lake Anna. Inadmissible, as to the other generalized portions of the contention regarding the failure adequately to address effects on other aquatic life in that they lack adequate factual or expert opinion support, fail properly to challenge the ER, and/or raise matters outside the scope of the proceeding. *See* section II.B.1.b, c, e, above.

In this regard, asserted inadequacies (bases b and c) relative to the DNNA application arising from purported noncompliance with the Federal Water Pollution Control Act, also known as the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.* — the nonradiological regulation and enforcement of which is expressly reserved to the Environmental Protection Agency (EPA) (or state agencies to which it delegates that authority) — are matters outside the scope of this proceeding. *See* 10 C.F.R. § 51.10(c); *see also Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 122 n.3 (1998); *see also Consumers Power Co.* (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 124 (1979). Further, the Petitioners' impingement and entrainment assertions (basis c) fail to identify any deficiency in the application as it reflects the need for consideration of identified mitigation measures at the COL stage, while their downstream impact assertions fail to raise and lack support regarding ESP-related concerns.

A revised version of this contention incorporating this ruling is set forth in Appendix A of this Memorandum and Order.

EC 3.3.3 — IMPACTS ON PUBLIC AND CLASSIFIED USES OF LAKE ANNA

CONTENTION: The ER does not contain a complete or adequate assessment of the potential impacts of the proposed expansion of the NAPS on water-based recreational uses of Lake Anna and on homeowners who live around the lake.

DISCUSSION: Contentions at 41-44; DNNA Contentions Response at 53-56; Staff Contentions Response at 44-47; North Anna Petitioners' Reply at 36-40; Tr. at 234-91.

RULING: Inadmissible, in that the contention and its supporting bases raise matters outside the scope of this proceeding. *See* section II.B.1.b, above. In this regard, asserted inadequacies relative to the DNNA application involving the federal CWA (basis b) or assertions that question the existing easement scheme under which the public is permitted access to Lake Anna (basis c) are matters outside the scope of this proceeding.

EC 3.3.4 — FAILURE TO PROVIDE ADEQUATE CONSIDERATION OF ALTERNATIVES FOR COOLING UNITS 3 AND 4

CONTENTION: The ER fails to satisfy 10 C.F.R. § 51.45(b)(3) because it fails to consider alternatives to the use of Lake Anna water for cooling Units 3 and 4, as well as the no-action alternative.

DISCUSSION: Contentions at 44-45; DNNA Contentions Response at 56-58; Staff Contentions Response at 47-49; North Anna Petitioners' Reply at 40-41; Tr. at 292-309.

RULING: As discussed at the initial prehearing conference, *see* Tr. at 292-93, this contention has been limited to an allegation that the ER fails to examine the no-action alternative with respect to the effects of proposed unit 3 on Lake Anna and, on this basis, is admitted as supported by bases sufficient to raise a genuine issue of material fact adequate to further inquiry.

A revised version of this contention incorporating this ruling is set forth in Appendix A of this Memorandum and Order.

III. PROCEDURAL/ADMINISTRATIVE MATTERS

As indicated above, the North Anna Petitioners are admitted as parties to this proceeding as they each have established standing and have set forth at least one admissible contention. Below is procedural guidance for further litigating the above-admitted contentions.

Unless all parties agree that this proceeding should be conducted pursuant to 10 C.F.R. Part 2, Subpart N, this proceeding will be conducted in accordance with the procedures of 10 C.F.R. Part 2, Subparts C and L. Assuming the parties do not consent to conducting this proceeding under Subpart N, per our discussion at the end of the June 2004 prehearing conference (Tr. at 401), the parties should meet within 10 days of the date of this issuance to discuss their particular claims and defenses and the possibility of settlement or resolution of any part of the

proceeding and make arrangements for the required disclosures under 10 C.F.R. § 2.336(a).⁸

The Board will oversee the discovery process through status reports and/or conferences, and expects that each of the parties will comply with the process

⁸In this regard, among the items to be discussed is whether the Staff's section 2.336(b) hearing file can be provided electronically via the NRC Web site sooner than 30 days from the date of this issuance.

Relative to the Staff's hearing file, in accord with 10 C.F.R. § 2.336(b), in creating and providing the hearing file for this proceeding, the Staff can utilize one of two options:

1. Hard copy file. The hearing file that is submitted to the Licensing Board and the parties in hard copy must contain a chronologically numbered index of each item contained in it and each file item shall be separately tabbed in accordance with the index and be separated from the other file items by a substantial colored sheet of paper that contains the tab(s) for the immediately following item. Additionally, the items shall be housed in hole-punched three-ring binders of no more than 4 inches in thickness.
2. Electronic file. For an electronic hearing file, the Staff shall make available to the parties and the Licensing Board a list that contains the ADAMS accession number, date, and title of each item so as to make the item readily retrievable from the agency's Web site, *www.nrc.gov*, using the ADAMS "Find" function. Additionally, the Staff should create a separate folder in the agency's ADAMS system, which it should label "Dominion North Anna Nuclear — 52-008-ESP Hearing File," and give James Cutchin of ASLBP and the SECY group (Office of the Secretary) viewer rights to that folder. Once created, the Staff should place in that folder copies of the ADAMS files for all the Hearing Docket materials. For documents in ADAMS packages a subfolder should be created into which the package content should be placed. The subfolder should have a title that comports with the title of the package. Thereafter, as part of its notice to the parties and the Licensing Board regarding the availability of the Hearing File materials in ADAMS, the Staff should advise the Licensing Board that this process is complete and the "Hearing File" folder is available for viewing. (As an information matter for the parties, once this notice is received, the contents of the folder will be copied so as to make its contents available to an ASLBP-created ADAMS folder that will be accessible to ASLBP personnel only and into a folder that will be accessible by the parties from the NRC Web site.)

If the Staff thereafter provides any updates to the hearing file, it should place a copy of those items in "Dominion North Anna Nuclear — 52-008-ESP Hearing File" ADAMS folder and indicate it has done so in the notification regarding the update that is then sent to the Licensing Board and the parties. Additionally, if at any juncture the Staff anticipates placing any nonpublic documents into the hearing file for the proceeding, it should notify the Licensing Board of that intent prior to placing those documents into the "Dominion North Anna Nuclear — 52-008-ESP Hearing File" and await further instructions regarding those documents from the Licensing Board. (Questions regarding the electronic hearing file creation process should be addressed to James Cutchin at 301-415-7397 or *jmc3@nrc.gov*.)

If the Staff decides to utilize option 2, as part of the discovery report required under this section it should give notice to the Licensing Board and the parties of that election. If any party objects to this method of providing the hearing file, it shall file a response within 7 days outlining the reasons why access to an electronic hearing file will place an undue burden on that party's ability to participate in this proceeding.

to the maximum extent possible, with failure to do so resulting in appropriate Board sanctions.⁹ In this regard, the Board will conduct a prehearing conference call to discuss initial discovery disclosures, scheduling, and other matters on a date to be established by the Board in a subsequent order. Additionally, during that prehearing conference the parties should be prepared to provide estimates (discussed during their meeting) regarding exactly when this case will be ready to go to hearing and the time necessary to try each of the admitted contentions if they were to go to hearing.¹⁰ They also should be prepared to indicate the status of any settlement negotiations relative to any of the admitted contentions, and whether a “settlement judge” would be helpful in those discussions.

IV. CONCLUSION

For the reasons set forth above, we find that the North Anna Petitioners have established their standing to intervene and have put forth two litigable contentions so as to be entitled to party status in this proceeding. The text of their admitted contentions is set forth in Appendix A to this decision.

For the foregoing reasons, it is, this 6th day of August 2004, ORDERED that:

1. Relative to the contentions specified in paragraph 2 below, the North Anna Petitioners’ hearing request is *granted* and these Petitioners are admitted as parties to this proceeding.

2. The following Petitioner contentions are admitted for litigation in this proceeding: EC-3.3.2 and EC-3.3.4.

3. The following Petitioner contentions are rejected as inadmissible for litigation in this proceeding:¹¹ SAR 2.1, SAR 2.2, EC 3.2.1, EC 3.2.2, EC 3.3.1, and EC 3.3.3.

⁹In this regard, when a party claims privilege and withholds information otherwise discoverable under the rules, the party shall expressly make the claim and describe the nature of what is not being disclosed to the extent that, without revealing what is sought to be protected, other parties will be able to determine the applicability of the privilege or protection. The claim and identification of privileged materials must occur within the time provided for such disclosure of the withheld materials. *See* 10 C.F.R. § 2.336(a)(3), (b)(5).

¹⁰DNNA and the Staff also should be prepared to provide their views on how the Board should proceed relative to the “mandatory hearing” findings required of the Board under the December 2003 hearing notice. *See* 68 Fed. Reg. at 67,489. In this regard, we ask that these parties provide their views on the difference, if any, between what is required under this mandatory hearing proceeding and that involving the proposed Louisiana Energy Services, L.P. uranium enrichment facility relative to matters that are not the subject of admitted contentions. *Compare Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-3, 59 NRC 10, 12-13 (2004).

¹¹Contention EC 3.1 was withdrawn by the North Anna Petitioners.

4. The parties are to take the actions required by section III, above, in accordance with the schedule established herein.

5. In accordance with the provisions of 10 C.F.R. § 2.311, as it rules upon intervention petitions, any appeal to the Commission from this Memorandum and Order must be taken within ten (10) days after it is served.

THE ATOMIC SAFETY AND
LICENSING BOARD¹²

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Paul B. Abramson
ADMINISTRATIVE JUDGE

Anthony J. Baratta
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 6, 2004

¹²Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant DNNA, (2) the North Anna Petitioners, and (3) the Staff.

APPENDIX A. ADMITTED CONTENTIONS

EC 3.3.2 — IMPACTS ON STRIPED BASS IN LAKE ANNA

CONTENTION: The ER does not adequately address the adverse impact of operating one or two additional reactors on the striped bass in Lake Anna and the North Anna River. In particular, the ER does not adequately consider the impacts of the proposed reactors on the striped bass at Lake Anna and downstream arising from increased water temperature.

EC 3.3.4 — FAILURE TO PROVIDE ADEQUATE CONSIDERATION OF ALTERNATIVES FOR COOLING UNITS 3 AND 4

CONTENTION: The ER fails to satisfy 10 C.F.R. § 51.45(b)(3) because it fails to consider the no-action alternative to the use of Lake Anna water for cooling Unit 3.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

G. Paul Bollwerk, III, Chairman
Dr. Paul B. Abramson
Dr. Anthony J. Baratta

In the Matter of

Docket No. 52-009-ESP
(ASLBP No. 04-823-03-ESP)

SYSTEM ENERGY RESOURCES, INC.
(Early Site Permit for Grand Gulf
ESP Site)

August 6, 2004

Ruling on a petition submitted by several public interest organizations seeking to intervene in this proceeding regarding the application of System Energy Resources, Inc., for a 10 C.F.R. Part 52 early site permit to construct one or more new nuclear reactors on the site of the existing Grand Gulf nuclear power station, the Licensing Board concludes that, having established the requisite standing but having failed to proffer at least one admissible contention, the petition must be dismissed, although the Board will conduct an uncontested, mandatory hearing in accordance with Part 52.

RULES OF PRACTICE: STANDING TO INTERVENE

In determining standing as of right for those seeking party status, the agency has applied contemporaneous judicial standing concepts that require a participant to establish (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury is fairly traceable to

the challenged action; and (3) the injury is likely to be redressed by a favorable decision. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). In this regard, in cases involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been considered sufficient to establish the requisite injury-in-fact. *See Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

RULES OF PRACTICE: INTERVENTION PETITION (PLEADING REQUIREMENTS); STANDING TO INTERVENE (AUTHORIZATION)

When an entity seeks to intervene on behalf of its members, that entity must show it has an individual member who can fulfill all the necessary standing elements and who has authorized the organization to represent his or her interests.

RULES OF PRACTICE: STANDING TO INTERVENE (UNCONTESTED; CONSTRUCTION OF PETITION)

In assessing a petition to determine whether the necessary standing elements are met, which the Board must do even though there are no objections to a petitioner's standing, the Commission has indicated that the Board is to "construe the petition in favor of the petitioner." *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

RULES OF PRACTICE: CONTENTIONS (ADMISSIBILITY; MATERIALITY; SCOPE OF THE PROCEEDING; SPECIFICITY AND BASIS)

A contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. *See* 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), and (vi). In addition, the petitioner must demonstrate that the issue raised in the contention is both "within the scope of the proceeding" and "material to the findings the NRC must make to support the action that is involved in the proceeding." *Id.* § 2.309(f)(1)(iii)-(iv). Failure to comply with any of these

requirements is grounds for dismissing a contention. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

RULES OF PRACTICE: CONTENTIONS (CHALLENGES TO STATUTORY REQUIREMENTS/REGULATORY PROCESS/COMMISSION RULE)

An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process. *See Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974). Similarly, a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible. *See* 10 C.F.R. § 2.335; *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974); *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff'd in part and rev'd in part on other grounds*, CLI-91-12, 34 NRC 149 (1991). By the same token, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue. *See Peach Bottom*, ALAB-216, 8 AEC at 20-21 & n.33.

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)

All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785,

790-91 (1985). As a consequence, any contention that falls outside the specified scope of the proceeding must be rejected. *See Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

It is the petitioner's obligation to present the factual information and expert opinions necessary to support its contention. *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *and aff'd in part*, CLI-95-12, 42 NRC 111 (1995). Failure to provide such an explanation regarding the bases of a proffered contention requires the contention be rejected. *See Palo Verde*, CLI-91-12, 34 NRC at 155. In this connection, neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

If a petitioner neglects to provide the requisite support for its contentions, it is not within the Board's power to make assumptions of fact that favor the petitioner, nor may the Board supply information that is lacking. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001); *Georgia Tech Research Reactor*, LBP-95-6, 41 NRC at 305.

RULES OF PRACTICE: CONTENTIONS (SUPPORTING INFORMATION OR EXPERT OPINION)

Providing any material or document as a basis for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention. *See Fansteel*, CLI-03-13, 58 NRC at 205. Along these lines, any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996). Thus, the material provided in support of a contention will be carefully examined by the Board to confirm that it does indeed supply an adequate basis for the contention.

See Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990).

RULES OF PRACTICE: CONTENTIONS (MATERIALITY)

In order to be admissible, all contentions must assert an issue of law or fact that is material to the outcome of a licensing proceeding, meaning that the subject matter of the contention must impact the grant or denial of a pending license application. *See* 10 C.F.R. § 2.309(f)(1)(iv). This requirement of materiality often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment. *See Yankee Nuclear*, LBP-96-2, 43 NRC at 75; *see also Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), *petition for review denied*, CLI-03-12, 58 NRC 185, 191 (2003). Agency case law further suggests this requirement of materiality mandates certain showings in specific contexts. For instance, a contention challenging whether an emergency response plan's provisions provide the requisite reasonable assurance based on the adequacy of implementing procedures for those provisions fails to present a material issue. *See Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1107 (1983).

RULES OF PRACTICE: CONTENTIONS (CHALLENGE TO LICENSE APPLICATION)

All properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the application (including the SAR and ER) so as to establish that a genuine dispute exists with the applicant on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(vi). Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

RULES OF PRACTICE: CONTENTIONS (SCOPE)

Although licensing boards generally are to litigate “contentions” rather than “bases,” it has been recognized that “[t]he reach of a contention necessarily

hinges upon its terms coupled with its stated bases.’’ *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002).

MEMORANDUM AND ORDER **(Ruling on Standing and Contentions)**

Before the Licensing Board is the request of the National Association for the Advancement of Colored People (Claiborne County, Mississippi Branch) (NAACP), Nuclear Information and Resource Service (NIRS), Public Citizen (PC), and the Mississippi Chapter of the Sierra Club (Sierra Club) (collectively, Grand Gulf Petitioners) seeking to intervene in this proceeding to challenge the application of System Energy Resources, Inc. (SERI), for a 10 C.F.R. Part 52 early site permit (ESP). The ESP application seeks approval of the site of the existing Grand Gulf nuclear power station in Claiborne County, Mississippi, for the possible construction of one or more new nuclear reactors. For the reasons set forth below, we find that while the Grand Gulf Petitioners have established the requisite standing to intervene in this proceeding, they have failed to submit at least one admissible contention concerning the SERI application. Accordingly, we deny the Grand Gulf Petitioners’ request to be admitted as a party to this proceeding. Further, although this ruling terminates the “contested” portion of this proceeding, because of the “mandatory” hearing aspect of this proceeding, we request additional procedural information from SERI and the NRC Staff regarding the conduct of the “uncontested” portion of this proceeding.

I. BACKGROUND

A. SERI Early Site Permit Application

Under the Part 52 licensing process, an entity may apply for an ESP, which would allow it to resolve key site-related environmental, safety, and emergency planning issues before deciding to build, or choosing the design of, a nuclear power facility on that site. Thus, if granted, an ESP essentially would allow an entity to “bank” a possible site for the future construction of new nuclear power generation facilities. SERI, a subsidiary of Entergy Corporation, filed an ESP application on October 16, 2003, that consists of a section on Administrative Information about SERI, a Site Safety Analysis Report (SSAR), an Environmental Report (ER),

an Emergency Plan (EP), and a Site Redress Plan (SRP). The particular site for which SERI seeks to obtain an ESP is the Grand Gulf Nuclear Station property (Grand Gulf), where SERI owns a 90% aggregate interest in an existing nuclear power plant that has been producing electricity since 1985. *See* [SERI] Grand Gulf Site [ESP] Application (Oct. 2003) at 1.1-2 [hereinafter Grand Gulf ESP Application].

Two other companies, Dominion Nuclear North Anna, LLC (DNNA), and Exelon Generation Company, LLC (EGC), recently submitted ESP applications for the sites at the existing North Anna and Clinton nuclear facilities. *See* [DNNA] North Anna [ESP] Application (Sept. 25, 2003); [EGC ESP] Application (Sept. 25, 2003). Because of the temporal and substantive similarity of the three applications, and because these Part 52 licensing proceedings are the first of their kind, as is noted below, preliminary matters in the Part 52 licensing process concerning these applications have been afforded joint consideration by the Commission and the Licensing Board for purposes of efficiency and ensuring uniformity among the three proceedings.

B. Grand Gulf Petitioners' Hearing Request and Petition To Intervene

In response to a January 7, 2004 notice of hearing and opportunity to petition for leave to intervene regarding the SERI ESP application, 69 Fed. Reg. 2636 (Jan. 16, 2004), on February 12, 2004, the Grand Gulf Petitioners filed a request for hearing and petition to intervene, which they supplemented on February 17, 2004. *See* Hearing Request and Petition To Intervene by [Grand Gulf Petitioners] (Feb. 12, 2004) [hereinafter Hearing Request]; Amended Hearing Request and Petition To Intervene by [Grand Gulf Petitioners] (Feb. 17, 2004) [hereinafter Amended Hearing Request]. SERI and the Staff responded to the Grand Gulf Petitioners' request on February 24 and February 27, 2004, respectively. *See* Answer by [SERI] to Petition To Intervene (Feb. 24, 2004) [hereinafter SERI Hearing Request Response]; NRC Staff's Answer to Hearing Request and Petition To Intervene by the [Grand Gulf Petitioners] (Feb. 27, 2004) [hereinafter Staff Hearing Request Response]. Neither SERI nor the Staff challenged the Grand Gulf Petitioners' representational standing, but explaining that the Grand Gulf Petitioners must present at least one litigable contention in order to be admitted as parties to this proceeding, both challenged the admissibility of one or more of the Grand Gulf Petitioners' issue statements.

C. Commission Application of Revised 10 C.F.R. Part 2 Rules of Practice and Referral of Hearing Petition

On February 19, 2004, SERI submitted a motion to apply the recently revised version of 10 C.F.R. Part 2, which permits the use of an informal hearing process

for ESP applications. *See* Motion of [SERI] To Apply Revised Rules of Practice (Feb. 19, 2004); *see also* 69 Fed. Reg. 2182, 2188 (Jan. 14, 2004). The Grand Gulf Petitioners opposed SERI's motion, citing a lack of fairness, effectiveness, and efficiency applying the new Part 2 to this proceeding. *See* [Grand Gulf Petitioners'] Response to [SERI] Motion To Apply Revised Rules of Practice (Mar. 1, 2004). Ultimately, in a March 2, 2004 issuance, the Commission granted the SERI motion and found that applying the new Part 2 would not result in any interruption, unwarranted delay, added burden, or unfairness in this or the other two ESP proceedings. *See* CLI-04-8, 59 NRC 113, 118-19 (2004). As part of that decision, the Commission also gave the Grand Gulf Petitioners 60 days within which to file their contentions in the proceeding and referred their hearing petition to the Atomic Safety and Licensing Board Panel for further consideration. *See id.* at 119.

D. Post-Referral Developments

Responding to the Commission's referral, in a March 8, 2004 initial prehearing order, among other things, the Licensing Board Panel Chief Administrative Judge reaffirmed the May 3, 2004 deadline for submitting contentions and requested that each contention be placed in one or more of the following subject matter categories: (1) Administrative, (2) Site Safety Analysis, (3) Environmental, (4) Emergency Planning, or (5) Miscellaneous.¹ *See* Licensing Board Panel Memorandum and Order (Initial Prehearing Order) at 3-4 (Mar. 8, 2004) (unpublished). The initial prehearing order also set a May 28, 2004 deadline for SERI and Staff responses to the Grand Gulf Petitioners' petition supplement and a June 4, 2004 deadline for the Grand Gulf Petitioners to reply to the SERI and Staff responses. *See id.* at 4. Thereafter, on March 22, 2004, this Atomic Safety and Licensing Board was established to adjudicate this ESP proceeding.² *See* 69 Fed. Reg. 15,911 (Mar. 26, 2004). In a memorandum and order issued on the same day,

¹Because section 2.714(a)(3) of the superceded Part 2 rules permitting petitioners to supplement their hearing requests to provide standing-related information did not have an analog in the new Part 2, the Grand Gulf Petitioners were allowed to supplement their petition with standing-related information when they filed their contentions. Further, they were permitted to make any request under section 2.309(g) regarding the selection of hearing procedures other than the Subpart L procedures that otherwise apply under the new Part 2. *See* Licensing Board Panel Memorandum and Order (Initial Prehearing Order) at 2 (Mar. 8, 2004) (unpublished).

²That same day, Board establishment notices were issued for the *North Anna* and *Clinton* ESP proceedings setting up two Boards with the same membership as this Board. *See* 69 Fed. Reg. 15,910 (Mar. 26, 2004) (*North Anna* proceeding); 69 Fed. Reg. 15,910 (Mar. 26, 2004) (*Clinton* proceeding). Although the Board designation notices for these proceedings established three separate licensing boards, for simplicity we will refer to these Boards in the singular when referencing rulings that affected all three proceedings identically.

the Board established a June 21, 2004 date for an initial prehearing conference for this proceeding (as well as the *North Anna* and *Clinton* ESP proceedings) at the NRC's Rockville, Maryland headquarters facility.³ See Licensing Board Memorandum and Order (Scheduling Initial Prehearing Conference) (Mar. 22, 2004) (unpublished).

The Grand Gulf Petitioners timely filed their contention supplements on May 3, 2004.⁴ See Contentions of [Grand Gulf Petitioners] Regarding [ESP] Application for Site of Grand Gulf Nuclear Power Plant (May 3, 2004) [hereinafter Contentions]; Waste Confidence Contentions of [Grand Gulf Petitioners] Regarding [ESP] Application for Site of Grand Gulf Nuclear Power Plant (May 3, 2004) [hereinafter Waste Confidence Contentions]. On May 28, 2004, SERI and the Staff filed their answers to the Clinton Petitioners' proposed contentions. See Answer by [SERI] to Proposed Contentions (May 28, 2004) [hereinafter SERI Contentions Response]; NRC Staff's Response to Petitioners' Contentions Regarding the [ESP] Application for the Grand Gulf Site (May 28, 2004) [hereinafter Staff Contentions Response]. Following a June 1, 2004 motion for extension of time to reply to the SERI and Staff responses to their contentions, which the Licensing Board granted on June 3, the Grand Gulf Petitioners filed their reply to the SERI and Staff answers on June 9, 2004. See Petitioners' Motion for Extension of Time To Reply to Responses to Contentions (June 1, 2004); [EGC] Answer in Opposition to Petitioners' Motion for Extension of Time To Reply to Response to Contentions (June 2, 2004); Licensing Board Order (Granting Extension Request) (June 3, 2004); Reply by [Grand Gulf Petitioners] to [SERI's] and NRC Staff's Responses to Petitioners' [Contentions] (June 9, 2004) [hereinafter Grand Gulf Petitioners' Reply].

On June 21-22, 2004, the Board conducted a 2-day prehearing conference during which it heard oral presentations regarding the standing of each of the

³The Petitioners in all three ESP proceedings filed a motion on April 1, 2004, to hold separate prehearing conferences in the vicinity of each proposed ESP site, as opposed to one single prehearing conference for all three proceedings at the NRC's Rockville, Maryland headquarters. See Petitioners' Motion for Reconsideration of Memorandum and Order Scheduling Initial Prehearing Conference (Apr. 1, 2004). The Licensing Board denied this motion on the grounds that, given the similarity of the three proceedings and the location of principal counsel for all parties in the Washington, D.C. area, the most efficient and effective means for conducting the prehearing conference was to do so jointly in Rockville. See Licensing Board Memorandum and Order (Denying Motion Requesting Reconsideration of Initial Prehearing Conference Location) at 3-4 (Apr. 5, 2004) (unpublished).

⁴In their supplements, the Grand Gulf Petitioners did not provide any additional information regarding standing matters or address the use of other hearing procedures in this proceeding.

ESP Petitioners and the admissibility of their contentions, which were grouped by topic into separate categories.⁵ *See* Tr. at 1-410.

II. ANALYSIS

A. Grand Gulf Petitioners' Standing

1. Standards Governing Standing

In determining standing as of right for those seeking party status, the agency has applied contemporaneous judicial standing concepts that require a participant to establish (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the governing statutes (e.g., the Atomic Energy Act of 1954 (AEA), the National Environmental Policy Act of 1969 (NEPA)); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). In this regard, in cases involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been considered sufficient to establish the requisite injury-in-fact. *See Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). Further, when an entity seeks to intervene on behalf of its members, that entity must show it has an individual member who can fulfill all the necessary standing elements and who has authorized the organization to represent his or her interests. Moreover, in assessing a petition to determine whether these elements are met, which the Board must do even though there are no objections to a petitioner's standing, the Commission has indicated that we are to "construe the petition in favor of the petitioner." *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

We apply these rules and guidelines in evaluating each of the Grand Gulf Petitioners' standing presentations.

2. NAACP

DISCUSSION: Hearing Request at 2-5, attachments 1-4; SERI Hearing Request Response at 1-3; Staff Hearing Request Response at 5-7.

⁵ As a result of the Board's concurrent consideration of the three ESP cases, today we also are issuing standing/contentions admission rulings in those cases as well. *See Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), LBP-04-17, 60 NRC 229 (2004); *Dominion Nuclear North Anna, LLC* (Early Site Permit for North Anna ESP Site), LBP-04-18, 60 NRC 253 (2004).

RULING: NAACP is a not-for-profit organization whose members oppose the issuance of an ESP to SERI. Attached to the Grand Gulf Petitioners' hearing request are the affidavits of four NAACP members, each of whom states that NAACP is authorized to represent his or her interests. All four members reside within 50 miles of the Grand Gulf site, one as close as 6 miles from the site. These individuals' asserted health, safety, and environmental interests and their agreement to permit NAACP to represent their interests are sufficient to establish NAACP's standing to intervene in this proceeding.

3. NIRS

DISCUSSION: Hearing Request at 2-5, attachments 5-7; SERI Hearing Request Response at 1-3; Staff Hearing Request Response at 5-7.

RULING: NIRS is a not-for-profit corporation whose members oppose the issuance of an ESP to SERI. Attached to the Grand Gulf Petitioners' hearing request are the affidavits of three NIRS members, each of whom states that NIRS is authorized to represent his or her interests. All three members reside within 50 miles of the Grand Gulf site, one as close as 5 miles from the site. These individuals' asserted health, safety, and environmental interests and their agreement to permit NIRS to represent their interests are sufficient to establish NIRS's standing to intervene in this proceeding.

4. PC

DISCUSSION: Hearing Request at 2-5, attachments 8-10; SERI Hearing Request Response at 1-3; Staff Hearing Request Response at 5-7.

RULING: PC is a not-for-profit organization whose members oppose the issuance of an ESP to SERI. Attached to the Grand Gulf hearing request are the affidavits of three PC members, each of whom states that PC is authorized to represent his or her interests. All three members reside within 50 miles of the Grand Gulf site, one as close as 35 miles from the site. These individuals' asserted health, safety, and environmental interests and their agreement to permit PC to represent their interests are sufficient to establish PC's standing to intervene in this proceeding.

5. Mississippi Chapter of the Sierra Club

DISCUSSION: Hearing Request at 2-5, attachments 11-14; SERI Hearing Request Response at 1-3; Staff Hearing Request Response at 5-7.

RULING: The Mississippi Chapter of the Sierra Club is an affiliate of the Sierra Club, a not-for-profit organization whose members oppose the issuance

of an ESP to SERI. Attached to the Grand Gulf Petitioners' hearing request are the affidavits of four Sierra Club members, each of whom states that the Sierra Club is authorized to represent his or her interests. All four members reside within 50 miles of the Grand Gulf site, one as close as 20 miles from the site. These individuals' asserted health, safety, and environmental interests and their agreement to permit the Sierra Club to represent their interests are sufficient to establish the Sierra Club's standing to intervene in this proceeding.

B. Grand Gulf Petitioners' Contentions

1. Contention Admissibility Standards

Section 2.309(f) of the Commission's rules of practice specifies the requirements that must be met if a contention is to be deemed admissible. Specifically, a contention must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists with regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. *See* 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), and (vi). In addition, the petitioner must demonstrate that the issue raised in the contention is both "within the scope of the proceeding" and "material to the findings the NRC must make to support the action that is involved in the proceeding." *Id.* § 2.309(f)(1)(iii)-(iv). Failure to comply with any of these requirements is grounds for dismissing a contention. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *see also Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

NRC case law has further developed these requirements, as is summarized below.

a. Challenges to Statutory Requirements/Regulatory Process/Regulations

An adjudication is not the proper forum for challenging applicable statutory requirements or the basic structure of the agency's regulatory process. *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974). Similarly, a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking,

is inadmissible. See 10 C.F.R. § 2.335; *Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974); see also *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003). This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking. See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993); *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982); see also *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff'd in part and rev'd in part on other grounds*, CLI-91-12, 34 NRC 149 (1991). By the same token, a contention that simply states the petitioner's views about what regulatory policy should be does not present a litigable issue. See *Peach Bottom*, ALAB-216, 8 AEC at 20-21 & n.33.

b. Challenges Outside Scope of Proceeding

All proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board. See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). As a consequence, any contention that falls outside the specified scope of the proceeding must be rejected. See *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

c. Need for Adequate Factual Information or Expert Opinion

It is the petitioner's obligation to present the factual information and expert opinions necessary to support its contention. See *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, and *aff'd in part*, CLI-95-12, 42 NRC 111 (1995). Failure to provide such an explanation regarding the bases of a proffered contention requires the contention be rejected. See *Palo Verde*, CLI-91-12, 34 NRC at 155. In this connection, neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention. See *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC

195, 203 (2003). If a petitioner neglects to provide the requisite support for its contentions, it is not within the Board's power to make assumptions of fact that favor the petitioner, nor may the Board supply information that is lacking. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001); *Georgia Tech Research Reactor*, LBP-95-6, 41 NRC at 305.

Likewise, providing any material or document as a basis for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention. *See Fansteel*, CLI-03-13, 58 NRC at 205. Along these lines, any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996). Thus, the material provided in support of a contention will be carefully examined by the Board to confirm that it does indeed supply an adequate basis for the contention. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990).

d. Materiality

In order to be admissible, the regulations require that all contentions assert an issue of law or fact that is material to the outcome of a licensing proceeding, meaning that the subject matter of the contention must impact the grant or denial of a pending license application. *See* 10 C.F.R. § 2.309(f)(1)(iv). This requirement of materiality often dictates that any contention alleging deficiencies or errors in an application also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment. *See Yankee Nuclear*, LBP-96-2, 43 NRC at 75; *see also Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), *petition for review denied*, CLI-03-12, 58 NRC 185, 191 (2003). Agency case law further suggests this requirement of materiality mandates certain showings in specific contexts. For instance, a contention challenging whether an emergency response plan's provisions provide the requisite reasonable assurance based on the adequacy of implementing procedures for those provisions fails to present a material issue. *See Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1107 (1983).

e. Insufficient Challenges to Application

All properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the

application (including the SAR and ER) so as to establish that a genuine dispute exists with the applicant on a material issue of law or fact. *See* 10 C.F.R. § 2.309(f)(1)(vi). Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

2. Scope of Contentions

Although licensing boards generally are to litigate “contentions” rather than “bases,” it has been recognized that “[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases.” *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002). As outlined below, exercising our authority under 10 C.F.R. §§ 2.316, 2.319, 2.329, we have acted to further define and/or consolidate contentions when the issues sought to be raised by one or more of the Petitioners appear related or when redrafting would clarify the scope of a contention.

3. Contentions Regarding Site Safety Analysis (SSA) Report

SSA 2.1 — FAILURE TO PROVIDE ADEQUATE SAFETY ASSESSMENT OF REACTOR INTERACTION

CONTENTION: The ESP application for Grand Gulf Unit 1 fails to comply with 10 C.F.R. § 52.17 because its safety assessment does not contain an adequate analysis and evaluation of the major structures, systems, and components of the facility that bear significantly on the acceptability of the site under the radiological consequences evaluation factors identified in 10 C.F.R. § 50.34(a)(1). In particular, the safety assessment does not adequately take into account the potential effects on radiological accident consequences of co-locating new reactors with advanced designs next to an older reactor. The safety assessment should contain a comprehensive evaluation and analysis of the ways in which interaction of the old and new plants under accident conditions may exacerbate the consequences of a radiological accident.

DISCUSSION: Contentions at 2-7; SERI Contentions Response at 9-12; Staff Contentions Response at 9-18; Grand Gulf Petitioners’ Reply at 2-6; Tr. at 16-62.

RULING: Inadmissible, in that this contention and its supporting bases raise a matter that is not within the scope of this proceeding and/or impermissibly challenges Commission regulatory requirements. *See* section II.B.1.a, b.

This contention of omission alleges that the SSAR does not contain information relating to the design of the control room and equipment of the not-as-yet selected new plant; however, that information is not required to be specified at the ESP stage, which focuses upon acceptability of the site assuming the new plant falls within the Applicant's submitted plant parameters envelope (PPE). It is neither possible nor necessary for the Applicant to provide the requested level of detailed information about control room and equipment design at the ESP stage of the licensing process. A challenge to the applicant's choice of control room and equipment design, which this contention posits, belongs in a proceeding under either Subparts B or C of the 10 C.F.R. Part 52 licensing process.

SSA 2.2 — FAILURE TO EVALUATE SITE SUITABILITY FOR BELOW-GRADE PLACEMENT OF REACTOR CONTAINMENT

CONTENTION: The Site Safety Analysis Report for the Grand Gulf ESP application is inadequate because it does not evaluate the suitability of the site to locate the reactor containment below grade-level. Below-grade construction is advisable and appropriate, if not necessary, in order to maintain an adequate level of security in the post-9/11 threat environment.

DISCUSSION: Contentions at 7-12; SERI Contentions Response at 13-14; Staff Contentions Response at 18-21; Grand Gulf Petitioners' Reply at 6-9; Tr. at 64-115, 227-33.

RULING: Inadmissible, in that this contention and its supporting bases improperly challenge the Commission's regulatory requirements and/or raise an issue outside the scope of the proceeding. *See* section II.B.1.a, b, above.

Petitioners would have this Board rely upon the provisions of 10 C.F.R. § 100.21(f), which require that site characteristics be such that adequate security plans and measures can be developed, to impose a new regulatory requirement to include analysis of below-grade placement in ESP applications. Because the regulations that govern an ESP application do not impose any requirement upon an applicant to select any particular plant design or surface/subsurface location, this contention improperly challenges Commission regulations.

In fact, this contention does not raise any question of site suitability, which is the focus of the ESP proceeding, but instead essentially raises a "policy" matter, i.e., whether or not a site approval hearing "today" should attempt to project future requirements or needs in the site review process. A contention that attempts to litigate the merits of below-grade reactor placement and requires speculation about the Commission's possible future modification of the review process is not within the scope of this proceeding.

3. *Environmental Contentions (EC)*

EC 3.1 — INADEQUATE CONSIDERATION OF DISPROPORTIONATE ADVERSE IMPACTS ON MINORITY AND LOW-INCOME COMMUNITY

CONTENTION: SERI's Environmental Report, prepared in support of its Early Site Permit application, does not comply with the National Environmental Policy Act because it does not adequately consider the adverse and disparate environmental impacts of the proposed nuclear facilities on the predominately African American and low-income community of Claiborne County.

At the outset, while the ER acknowledges the existence of minority and low-income populations within a 50-mile radius around the Grand Gulf site, *see* ER § 2.5.4, the ER understates the levels of minority representation and poverty in Claiborne County, which hosts the Grand Gulf site and which takes up much of the area in the portion of Grand Gulf's 10-mile-radius emergency planning zone that lies on the east side of the Mississippi River. As a result, the ER falsely minimizes the disparity of the adverse impacts on the minority and low-income community of Claiborne County.

The ER also fails to address the environmental impacts of the proposed reactor(s) in light of the "factors peculiar to" the minority and low-income community Claiborne County. *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 100 (1998). For instance, the ER fails to address the fact that, by virtue of the simple factor of its close proximity to the proposed reactor(s), the minority and low-income community bears the highest risk of injury and illness as a result of severe accidents at the proposed facility. Moreover, the ER fails to address the fact that the Claiborne County government is particularly unprepared to respond to a radiological emergency or a security threat at the proposed reactor(s), as a result of the high level of poverty in the county and the effects of a discriminatory tax policy that sends most of the tax revenue from Grand Gulf out of Claiborne County.

The ER also fails to consider the effect of adding two reactors to the Grand Gulf site on property values and the overall economic health of Claiborne County. By concentrating three nuclear power plants on one site, SERI proposes to create a nuclear sacrifice zone in Claiborne County. The ER should consider the predictable decline in property values and the economic health of the area.

The ER is also deficient because it makes no attempt to evaluate the disparity in distribution of the economic benefits yielded by the proposed reactors. For instance, under current tax law, most of the tax revenue generated by the new reactors will go to the State of Mississippi and county governments other than Claiborne County. Most of the jobs generated by the new reactor(s) will go to people who live outside Claiborne County.

Finally, the ER fails to weigh the costs of the proposed reactor(s) to the minority and low-income community against the benefits to the community, or to examine alternatives that would lessen the impact of the facility and/or distribute the costs

and benefits more equitably. These alternatives could include consideration of other sites whose surrounding populations are in a better financial position to absorb the costs of mounting an effective response to a radiological emergency at the nuclear plant, or arrangements to more equitably distribute the wealth that is generated by the facility.

DISCUSSION: Contentions at 12-27; SERI Contentions Response at 14-37; Staff Contentions Response at 21-35; Grand Gulf Petitioners' Reply at 9-13; Tr. at 311-57.

RULING: Inadmissible, in that this contention and its supporting bases fail to raise a material legal or factual dispute and/or fall outside the scope of this proceeding. *See* section II.B.1.b, d, above.

In its November 5, 2003 draft policy statement on the treatment of environmental justice (EJ) matters in agency regulatory and licensing actions, the Commission declared "EJ *per se* is not a litigable issue in our proceedings," and "EJ issues are only considered [in our proceedings] when and to the extent required by NEPA." 68 Fed. Reg. 62,642, 62,643-44 (Nov. 5, 2003). In particular, the policy statement provides the following guidance:

In evaluating the human and physical environment under NEPA, effects on low-income and minority communities may only be apparent by considering factors peculiar to those communities. Thus, the goal of an EJ portion of the NEPA analysis is (1) to identify and assess environmental effects on low-income and minority communities by assessing impacts peculiar to those communities; and (2) to identify significant impacts, if any, that will fall disproportionately on minority and low-income communities. It is not a broad ranging review of racial or economic discrimination.

Id. at 62,645. While this contention does adequately indicate the presence of a low-income and minority family concentration near the proposed site, it fails to identify any significant and disproportional environmental impact on the minority or low-income population relative to the general population arising from the proposed siting of additional reactors on the site at issue so as to raise a genuine dispute on a material issue of fact or law. Further, putting aside the fact that the Grand Gulf Petitioners' arguments that these particular communities are disadvantaged with respect to their ability to deal with emergency planning and responses to a potential accident at the facility — whether by State taxation laws or otherwise — are belied by the correspondence with the local emergency planning authorities contained in the SERI application, it is apparent such matters are beyond the scope of this proceeding.

EC 3.2 — INADEQUATE DISCUSSION OF SEVERE ACCIDENT IMPACTS

CONTENTION: The ER's discussion of severe accident is inadequate, because it relies on the findings and conclusions of NUREG-1437, Vol. 1, the Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants (1996), without providing specific design information that would justify the applicability of the NUREG.

DISCUSSION: Contentions at 27-30; SERI Contentions Response at 37-42; Staff Contentions Response at 35-39; Grand Gulf Petitioners' Reply at 14-15; Tr. at 116-40.

RULING: Inadmissible, in that this contention and its supporting bases impermissibly challenge an agency regulatory requirement, fall outside the scope of this proceeding; and/or lack adequate factual or expert opinion support. *See* section II.B.1.a, b, c, above.

Misconstruing 10 C.F.R. § 52.17(a)(2), which, in relevant part, requires that the ER "must focus upon the environmental effects of construction and operation of a reactor, or reactors, which have characteristics that fall within the postulated site parameters," the Grand Gulf Petitioners would have the Board require that an ESP applicant consider the potential severe accident consequences associated with a specific reactor design. As it is permitted to do, SERI has elected to develop and employ a "Plant Parameters Envelope" (PPE) to establish the bounding severe accident consequences that would be associated with the reactor or reactors it eventually elects to construct on the site under consideration in this ESP case. *See* 10 C.F.R. § 52.17(a)(2). From an environmental perspective, if the site is acceptable when subjected to those consequences, then the requirements of section 52.17 are satisfied. If at some future date the Applicant elects a specific reactor design whose severe accident consequences do not fall within the PPE employed in this proceeding, the environmental matters may then be litigated under the provisions of section 52.39. However, for the purposes of an ESP, there is no requirement that the Applicant develop and examine a specific reactor design and study its theoretical severe accident consequences.

Nor do we find persuasive as basis for admission the Grand Gulf Petitioners' argument, based on Staff guidance letters, that the Applicant is required to justify its use of findings and conclusions based on NUREG-1437, Vol. 1, "Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants" (1996) [hereinafter NUREG-1437]. *See* Letter from Dr. Ronald L. Simard, NEI, to James E. Lyons, re: Resolution of Generic Topic ESP-10 (Use of License Renewal Generic Environmental Impact Statement (NUREG-1437) for Early Site Permits) (Feb, 6, 2003). Putting aside the fact that the guidance provided in such Staff letters merely describes one method of complying with NRC requirements, and is not binding on an applicant, *see Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264

(2001), nothing submitted by the Grand Gulf Petitioners indicates that reliance on the severe accident consequence information contained in NUREG-1437 with respect to earlier reactor designs is not suitable for use in development of the PPE parameters.

EC 3.2.1 — FAILURE TO EVALUATE WHETHER AND IN WHAT TIME
FRAME SPENT FUEL GENERATED BY PROPOSED REACTORS CAN BE SAFELY
DISPOSED OF

CONTENTION: The ER for the Grand Gulf ESP is deficient because it fails to discuss the environmental implications of the lack of options for permanent disposal of the irradiated fuel that will be generated by the proposed reactors if they are built and operated. Nor has the NRC made an assessment on which SERI can rely regarding the degree of assurance now available that radioactive waste generated by the proposed reactors “can be safely disposed of [and] when such disposal or off-site storage will be available.” Final Waste Confidence Decision, 49 Fed. Reg. 34,658 (August 31, 1984), citing *State of Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979). Accordingly, the ER fails to provide a sufficient discussion of the environmental impacts of the proposed new nuclear reactors.

DISCUSSION: Waste Confidence Contentions at 2-6; SERI Contentions Response at 43-47; Staff Contentions Response at 39-44; Grand Gulf Petitioners’ Reply at 15-21; Tr. at 140-80.

RULING: Inadmissible, in that this contention and its supporting bases impermissibly challenge the Commission’s regulatory requirements. *See* section II.B.1.a, above. The matters the Petitioners seek to raise have been generically addressed by the Commission through the Waste Confidence Rule, the plain language of which states:

[T]he Commission believes there is reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and sufficient repository capacity will be available within 30 years beyond the licensed life for operation of *any* reactor to dispose of the commercial high-level waste and spent fuel originating in such reactor and generated up to that time.

10 C.F.R. § 51.23(a) (emphasis added). Furthermore, when the Commission amended this rule in 1990, it clearly contemplated and intended to include waste produced by a new generation of reactors.⁶

⁶ *See* 55 Fed. Reg. 38,474, 38,504 (Sept. 18, 1990) (“The availability of a second repository would permit spent fuel to be shipped offsite well within 30 years after expiration of [the current fleet of] reactors’ [operating licenses]. The same would be true of the spent fuel discharged from any new generation of reactor designs.”); *see also id.* at 38,501-04.

EC 3.2.2 — EVEN IF THE WASTE CONFIDENCE DECISION APPLIES TO THIS PROCEEDING, IT SHOULD BE RECONSIDERED

CONTENTION: Even if the Waste Confidence Decision applies to this proceeding, it should be reconsidered, in light of significant and pertinent unexpected events that raise substantial doubt about its continuing validity, i.e., the increased threat of terrorist attacks against U.S. facilities.

DISCUSSION: Waste Confidence Contentions at 6-9; SERI Contentions Response at 47-50; Staff Contentions Response at 39-44; Grand Gulf Petitioners' Reply at 21; Tr. at 180-85.

RULING: Inadmissible, in that the contention and its supporting bases raise a matter that is not within the scope of this proceeding and/or impermissibly seek to challenge a Commission regulatory requirement. *See* section II.B.1.a, b, above. Absent a showing of "special circumstances" under 10 C.F.R. § 2.335(b), which the Petitioners have not made, this matter must be addressed through Commission rulemaking.

4. *Emergency Planning Contention (EPC)*

EPC 4.1 — EMERGENCY PLANNING DEFICIENCIES

CONTENTION: SERI's ESP application is inadequate because it fails fully to identify "physical characteristics unique to the proposed site, such as egress limitations from the area surrounding the site that could pose a significant impediment to the development of emergency plans." 10 C.F.R. § 52.17(b)(1). In particular, Part 4 of the ESP application, entitled "Emergency Planning Information," fails to identify the significant impediment to the development of emergency plans posed by the gross inadequacies in offsite emergency response facilities, including the Claiborne County Sheriff's Department, the Claiborne County Fire Department, and the Claiborne County Hospital.

DISCUSSION: Contentions at 31-32; SERI Contentions Response at 50-52; Staff Contentions Response at 45-47; Grand Gulf Petitioners' Reply at 22; Tr. at 359-79.

RULING: Inadmissible, in that this contention and its supporting bases raise matters falling outside the scope of this proceeding. *See* section II.B.1.b, above. An ESP applicant must address unique "physical characteristics" of the site in its EP under 10 C.F.R. § 52.17(b)(1), but the financial capabilities of organizations responsible for operation and maintenance of local infrastructure are not "physical characteristics" within the meaning of section 52.17(b)(1); *see also* 10 C.F.R. § 100.20(c). Indeed, with this contention what the Grand Gulf Petitioners ultimately seek to challenge is the practicability of the emergency plan, which

is a determination that would properly be made at the combined construction permit/operating license stage of the Part 52 licensing process.

III. PROCEDURAL/ADMINISTRATIVE MATTERS

As indicated above, the Grand Gulf Petitioners have failed to proffer an admissible contention so as to establish their right to be admitted as parties to this proceeding. That, however, does not end this Licensing Board's responsibilities relative to this ESP proceeding. While it does terminate the "contested" portion of this proceeding, there remains, consistent with the statutory and regulatory requirements that govern this proceeding, an "uncontested" portion of the case that must be addressed by this Board. To that end, we request that SERI and the Staff provide their views on how the Board should proceed relative to the "mandatory hearing" findings required of the Board under the December 2003 hearing notice. *See* 68 Fed. Reg. at 69,427. In this regard, we ask that within 30 days of the date of this issuance, SERI and the Staff provide the Board with a joint filing outlining how they would propose the Board proceed regarding the "uncontested" portion of this proceeding, both as to the substance and timing of any further party submissions and any evidentiary hearing that is required.⁷ Additionally, we note that the Board currently intends at some appropriate future date to conduct limited appearance sessions in the vicinity of the Grand Gulf facility. *See* 10 C.F.R. § 2.315(a).

IV. CONCLUSION

For the reasons set forth above, we find that the Grand Gulf Petitioners have established their standing to intervene, but their request for hearing must be denied for failing to put forth a litigable contention pursuant to 10 C.F.R. § 2.309(f).

For the foregoing reasons, it is, this 6th day of August, ORDERED that:

1. The Grand Gulf Petitioners' hearing request is *denied*.
2. The following Petitioner contentions are rejected as inadmissible for litigation in this proceeding: SAR 2.1, SAR 2.2, EC 3.1, EC 3.2, EC 3.2.1, EC 3.2.2, and EP 5.1.

⁷In this regard, we ask that these parties also provide their views on the difference, if any, between what is required under this mandatory hearing proceeding and that involved with the proposed Louisiana Energy Services, L.P. uranium enrichment facility relative to matters that are not the subject of admitted contentions. *Compare Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-3, 59 NRC 10, 12-13 (2004).

3. SERI and the Staff are to take the actions required by section III, above, in accordance with the schedule established herein.

4. In accordance with the provisions of 10 C.F.R. § 2.311, as it rules upon intervention petitions, any appeal to the Commission from this Memorandum and Order must be taken within ten (10) days after it is served.

THE ATOMIC SAFETY AND
LICENSING BOARD⁸

G. Paul Bollwerk, III, Chairman
ADMINISTRATIVE JUDGE

Paul B. Abramson
ADMINISTRATIVE JUDGE

Anthony J. Baratta
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 6, 2004

⁸Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Applicant SERI, (2) the Grand Gulf Petitioners, and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Alex S. Karlin
Alan S. Rosenthal

In the Matter of

Docket No. PAPO-00
(ASLBP No. 04-829-01-PAPO)
(NEV-01)
(Pre-application Matters)

U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository)

August 31, 2004

In this proceeding concerning the pre-license application phase of the United States Department of Energy's (DOE's) planned application for a license to construct a repository for high-level radioactive waste at Yucca Mountain, Nevada, the Pre-license Application Presiding Officer (PAPO) Board grants the State of Nevada's motion to strike DOE's June 30, 2004, certification regarding the availability of its documentary material.

LICENSING BOARDS: AUTHORITY

It is equally clear that the PAPO Board has the authority to regulate the conduct of the proceeding and the parties and to dispose of motions, as well as all the other general powers granted by 10 C.F.R. §§ 2.1010, 2.319, and 2.321(c), including the authority to strike a participant's certification to the extent that it triggers other actions during this prehearing process.

RULES OF PRACTICE: HLW REPOSITORY (PRE-APPLICATION PHASE, CERTIFICATION)

The regulations do not prescribe any particular wording for a participant's certification. The regulations simply require each potential party to "[e]stablish procedures to implement the requirements in § 2.1003," and to have a "responsible official . . . certify to the [PAPO] [1] that the procedures . . . have been implemented, and [2] that to the best of his or her knowledge, the documentary material specified in § 2.1003 has been identified and made electronically available." 10 C.F.R. § 2.1009(a)(2), (b).

RULES OF PRACTICE: HLW REPOSITORY (PRE-APPLICATION PHASE, PRODUCTION OF DOCUMENTARY MATERIAL)

A good faith standard must be applied to each participant's document production. Thus, a participant must make, in good faith, every reasonable effort to make all of its documentary material available. In this context, good faith involves at least several factors, including the amount of time the participant has had to comply with the regulations, the participant's control over the timing of the initial document production, the purpose and importance of the participant's obligation to produce all documents, and the participant's status and financial ability.

RULES OF PRACTICE: HLW REPOSITORY (PRE-APPLICATION PHASE, PRODUCTION OF DOCUMENTARY MATERIAL)

The regulations call upon participants to supplement their initial document production in only two situations. First, 10 C.F.R. § 2.1003(e) states that each party "shall continue to supplement its documentary material . . . with any additional material *created after* the time of its initial certification." 69 Fed. Reg. at 32,848 (emphasis added). Documents created *before* a party's initial certification are not covered by this duty to supplement. The second mandatory supplementation is detailed in 10 C.F.R. § 2.1009(b), which requires DOE to "update [its] certification at the time DOE submits the license application."

**STATUTORY CONSTRUCTION OR INTERPRETATIONS:
GENERAL RULES**

The "language and structure" of the regulations is our starting point in construing their meaning. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 299 (1997) (quoting *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988)).

**STATUTORY CONSTRUCTION OR INTERPRETATIONS:
GENERAL RULES**

Because the regulations at issue do not answer the question as to how documents are to be made available, we must, as counseled by the Commission, “examine the agency’s entire regulatory scheme.” *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 366 (2001); *see also* 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.05 (6th ed. 2000) (“A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.”).

**STATUTORY CONSTRUCTION OR INTERPRETATIONS:
GENERAL RULES**

Read as a whole, it is clear that Subpart J requires participants to make their documentary material electronically available in or via the LSN. But because the plain language of the regulations is ambiguous as to what it means to be “electronically available” and what it means to be “in the LSN,” the Board looks to the regulatory history to resolve this ambiguity and to ascertain the Commission’s intent. *See Shoreham*, ALAB-900, 28 NRC at 288; *see also Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1269 (D.C. Cir. 2004) (referring to statute’s legislative history because the provision at issue did not “clearly and unambiguously answer[] the precise question” before the court).

STATUTORY CONSTRUCTION OR INTERPRETATIONS: WEIGHT

While guidance found in regulatory guides and Statements of Considerations that conflict with or are inconsistent with a regulation cannot of course trump the plain meaning of the regulation, “guidance consistent with the regulations and at least implicitly endorsed by the Commission is entitled to correspondingly special weight.” *See Shoreham*, ALAB-900, 28 NRC at 290.

**RULES OF PRACTICE: HLW REPOSITORY (PRE-APPLICATION
PHASE, CERTIFICATION)**

The regulations require that each participant “[e]stablish procedures to implement the requirements in § 2.1003,” 10 C.F.R. § 2.1009(a)(2) (emphasis added), and to certify, *inter alia*, that these procedures “have been implemented.” 10 C.F.R. § 2.1009(b) (emphasis added). The procedures are to precede the implementation and the certification is to assure that the procedures were implemented.

MEMORANDUM AND ORDER
(Ruling on State of Nevada's July 12, 2004 Motion To Strike)

This proceeding concerns the pre-license application phase of the United States Department of Energy's (DOE) planned application for a license to construct a repository for high-level radioactive waste (HLW) at Yucca Mountain, Nevada.¹ Before this Board is a motion by the State of Nevada (the State) challenging the sufficiency of DOE's production of documentary material under 10 C.F.R. § 2.1003(a) and seeking to strike DOE's June 30, 2004, certification regarding the availability of its documentary material.² After due consideration of the written presentations and the representations at an extended oral argument, we conclude that DOE did not meet its regulatory obligation to make all of its documentary material available and grant the motion to strike DOE's certification.

I. BACKGROUND

A. Statutory and Regulatory Background

Twenty-one years ago, Congress enacted the Nuclear Waste Policy Act (NWPA), establishing a comprehensive program for the identification, licensing, construction, operation, and regulation of geologic repositories for the disposal of HLW. *See* Pub. L. No. 97-425, 96 Stat. 2202 (1983) (codified as amended at 42 U.S.C. §§ 10101-10270). The purpose of NWPA was "to establish a *schedule* for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by [HLW]." 42 U.S.C. § 10131(b) (emphasis added). NWPA charges DOE with the responsibility of constructing and operating any such repositories, and preparing and submitting any license applications for them. *See id.* §§ 10132-10134. The Commission is assigned the responsibility of deciding whether licenses should be issued and of regulating any such repositories. *See id.* §§ 10134(d), 10141(b). More specifically, NWPA mandates that the Commission issue a final decision not later than 3 years after DOE submits the license application. *See id.* § 10134(d).

¹In our July 9, 2004 Initial Pre-License Application Phase Order, 69 Fed. Reg. 42,465, 42,467 n.3 (July 15, 2004), we directed the participants to use the participant codes specified in Appendix II to the Order for all filings in this proceeding. Upon further consideration, we rescind that portion of the July 9, 2004 Order, but note that in the future such participant codes likely will have to be used for the identification of exhibits.

²Motion To Strike the Department of Energy's LSN Certification and for Related Relief (July 12, 2004) [hereinafter State Motion].

In 1987, the Nuclear Waste Policy Amendments Act (NWPAA) was enacted, Pub. L. No. 100-203, §§ 5001-5065, 101 Stat. 1330, 1330-227 to 1330-255 (1987) (codified in scattered sections of 42 U.S.C.), making Yucca Mountain, Nevada, the sole focus of the nation's HLW geologic repository program and the only site that DOE could lawfully consider. *See id.* § 10133(a). Since that time, the federal government, the State of Nevada, interested members of the public, and the nuclear industry have focused much attention on this designated location approximately 90 miles northwest of Las Vegas, Nevada. DOE has already spent 7 billion dollars on characterization and other related activities at Yucca Mountain and estimates that a total of \$50 billion will be spent during the lifetime of the project. *See* H.R. Rep. No. 108-594, at 3 (2004). DOE has generated reams of scientific and technical studies and data in preparation for its forthcoming license application for this site.³ Meanwhile, the Environmental Protection Agency (EPA) and the Commission both issued regulations establishing the criteria that DOE must meet to obtain a license, and the Commission issued 10 C.F.R. Part 2, Subpart J, the procedural regulations governing the conduct of the licensing proceedings.⁴

Recognizing the enormous amount of documentary material related to the site, and the substantial national, state, and local interest in this matter, Subpart J includes several provisions designed to expedite and to assist the Commission in achieving the 3-year deadline for the Yucca Mountain licensing proceeding. These include the creation of the Licensing Support Network (LSN), a Web-based system for making documents electronically available to all participants, *see* 10 C.F.R. §§ 2.1001 and 2.1011, and the establishment of a detailed sequence of events that must occur within the 3-year period, *see* 10 C.F.R. Part 2, Appendix D.

Perhaps one of the Commission's most important mechanisms for meeting the 3-year licensing deadline is its requirement that DOE and any other person concerned with Yucca Mountain participate in a document discovery phase lasting at least 6 months and preceding DOE's license application. *See* 10 C.F.R. § 2.1012. Because the 3-year deadline does not begin until after DOE submits its license application, this "pre-license application phase" adds at least 6 months to the front end of the proceeding. The 6-month document discovery phase is enforced by the regulations stating that the Commission "will not docket the application

³Six months ago John Arthur, Deputy Director of DOE's Office of Repository Development indicated that "[t]he DOE input to LSN is projected to contain approximately 30 million pages, comprising about 3 million documents." State Motion, Exh. 1, Summary of the [NRC]/[DOE] Quarterly Management Meeting in Rockville, Maryland, on February 19, 2004, at 3.

⁴EPA issued 40 C.F.R. Part 197, Public Health and Environmental Radiation Protection Standards for Yucca Mountain, Nevada. *See* 66 Fed. Reg. 32,074 (June 13, 2001). The Commission issued Yucca Mountain specific licensing standards in 10 C.F.R. Part 63, Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada. *See* 66 Fed. Reg. 55,732 (Nov. 2, 2001).

until at least six months have elapsed from the time of [DOE's] certification" that it has made all of its documentary materials electronically available. 10 C.F.R. § 2.1012(a).

From the outset, DOE fully endorsed and supported the 6-month document discovery phase in its comments on the Commission's proposed rule: "[DOE is] committed to ensuring that interested members of the public have a full six months in advance of its submission of the license application to review the Department's documentary material."⁵ All parties before us supported the 6-month period.⁶

Closely related to the 6-month pre-application phase is the LSN, which is "the . . . system that makes documentary material available electronically to parties." 10 C.F.R. § 2.1001. It is a computer-based electronic system designed to streamline the document discovery process and to coordinate the massive amount of documentary material pertaining to Yucca Mountain. The purpose of the LSN, initially referred to as the Licensing Support System (LSS), was made clear at the outset:

The LSS is intended to provide for the entry of, and access to, potentially relevant licensing information as early as practicable before DOE submits the license application All parties would then have access to this system well before the proceeding begins. Access to these documents will be provided through electronic full text search capability. This provides the flexibility of searching on any word or word combinations within a document and thus facilitates the rapid identification of relevant documents and issues. Because the relevant information would be readily available through access to the LSS, the initial time-consuming discovery process,

⁵ 66 Fed. Reg. 29,453, 29,459 (May 31, 2001) (*quoting* Letter from Ivan Itkin, Director, DOE Office of Civilian Radioactive Waste Management to A.L. Vietti-Cook, NRC Secretary, enclosing comments on proposed rule (Oct. 6, 2000) at 2, ADAMS Accession No. ML003759117 [hereinafter DOE Proposed Rule Comments Cover Letter]). Further, DOE stated that it "fully supports the objective of ensuring that interested members of the public have comprehensive and early access to relevant documentary material, so as to facilitate early identification and resolution of licensing issues, as well as preparation for the NRC's formal licensing proceeding. Indeed, this basic objective has been at the heart of the NRC's deliberations since 1988 over how best to structure an efficient, effective document retrieval system to support its formal licensing proceeding for a geologic repository, so as to permit the NRC to meet its statutory obligation to complete its licensing proceeding in three years." [DOE] Comments on Proposed Revisions to the 10 CFR Part 2 [LSN] Design Standards for Participating Websites (Oct. 6, 2000) at 1, ADAMS Accession No. ML 003759117 [hereinafter DOE Proposed Rule Comments].

⁶ *See* 66 Fed. Reg. at 29,458 (discussing comments on the timing of participant compliance and noting that all commenters, including the State and the Nuclear Energy Institute (NEI), recommended that the timing of DOE's initial certification be specified as 6 months in advance of the application submission).

including the physical production and on-site review of documents by parties to the HLW licensing proceeding, will be substantially reduced.

54 Fed. Reg. 14,925, 14,926 (Apr. 14, 1989).⁷

Additionally, in 1987 the Commission established a federal advisory panel, now known as the LSN Advisory Review Panel (LSNARP). Its task is to assist in the implementation of the LSN and to help “develop the essential features of the procedural rules for effective Commission review of the [DOE] license application within the 3-year time period required by section 114(d) of the [NWPA].” *Id.* at 14,926. LSNARP members include DOE, the State, the NRC, local and tribal governments, and members of the public.

As explained in more detail in Part III.B, the timing of DOE’s document production is substantially within its control. As far as Subpart J is concerned, DOE can produce its documents whenever it is ready. When it does, however, DOE must simultaneously certify that it has made its documents available. *See* 10 C.F.R. § 2.1009(b). DOE’s document production and certification are the trigger, obliging (a) the Commission to designate a pre-license application presiding officer (PAPO), *see id.* § 2.1010(a)(2); (b) the NRC to make its documents available within 30 days thereafter, *see id.* § 2.1003(a); and (c) the State and any other interested parties to make their documentary material available within 90 days, *id.* DOE’s action also has an extremely important practical impact on the overall licensing schedule, in that it starts the 6-month clock for the earliest date when DOE’s Yucca Mountain license application can be docketed. *See id.* § 2.1012(a). Thus, DOE’s document production and certification, if compliant, initiate the agency’s Yucca Mountain administrative proceedings.

B. The State’s Motion

Turning to the matter before us, on June 30, 2004, DOE announced that it had placed 1.2 million Yucca Mountain-related documents on a DOE Web site accessible to NRC and the public⁸ and certified to the Secretary of the Commission that it had made its documentary material electronically available as specified

⁷ *See also* DOE Proposed Rule Comments at 2 (internal citations omitted) (“[I]t is important to recall that the fundamental purpose of the LSN, as well as the predecessor Licensing Support System (LSS), is to ensure that potential parties have timely access to documentary material sufficiently in advance of the NRC’s formal licensing proceeding so as to permit the earlier submission of better focused contentions, resulting in a substantial saving of time during the proceeding”).

⁸ *See* DOE, Yucca Mountain Documents Made Available for Licensing Proceeding (last modified June 30, 2004) [http://www.doe.gov/engine/content.do?PUBLIC_ID=16120&BT_CODE=PR_PRESSRELEASES&TT_CODE=PRESSRELEASE].

in 10 C.F.R. §§ 2.1003(a)(1) and 2.1009(b).⁹ Thereafter, this Atomic Safety and Licensing Board was designated as the PAPO.¹⁰

On July 12, 2004, the State filed a motion challenging DOE's document production and seeking to strike its June 30, 2004, certification, asserting that DOE had failed to comply with the requirements of 10 C.F.R. §§ 2.1003 and 2.1009 in three respects. First, the State claims that DOE failed to make *all* of its documentary material available as required by the regulations. *See* State Motion at 11. The State motion was accompanied by an affidavit by Robert R. Loux, Executive Director of the Nevada Agency for Nuclear Project,¹¹ in which Mr. Loux asserted, *inter alia*, that DOE's Web site failed to provide the 30 million pages of documents that had been projected by DOE 4 months earlier, excluded 3.4 million DOE e-mails, and failed to provide the text for "innumerable documents." Loux Aff. ¶¶ 2, 4, 6. Mr. Loux's affidavit also included a "very partial" list of twelve DOE documents identified by the State as "extremely relevant" that were missing from the DOE Web site. *Id.* ¶ 12; *see also* State Motion, Exh. 7.

Second, the State asserts that DOE failed to make its documents available via the central LSN Web portal and thus did not meet the regulatory requirements. *See* State Motion at 14-17. The State argues that the LSN portal is the only way to assure the integrity of DOE's documentary material and that simply placing the documents on DOE's server is insufficient. *See id.* at 15.

Third, the State insists that DOE's certification was unlawful on its face because 10 C.F.R. § 2.1003(a)(1) makes it clear that *all* documentary material must be provided, whereas the certification states that it only covers "the documentary material . . . identified from those documents submitted to CACI [DOE's litigation

⁹ *See* Letter from W. John Arthur, III, Deputy Director of DOE Office of Civilian Radioactive Waste Management (OCRWM), to Annette L. Vietti-Cook, Secretary of the Commission (June 30, 2004) [hereinafter Arthur Certification Letter] at Appendix D [hereinafter DOE Certification]. The DOE Certification states (at D-1), in pertinent part:

Based on the procedures referenced in the Office of Civilian Radioactive Waste Management Licensing Support Network Certification Plan for Initial Certification (OCRWM, June 2004), I certify that (i) DOE has implemented procedures as required by 10 CFR 2.1009(a)(2) and (ii) to the best of my knowledge, the documentary material specified in 10 CFR 2.1003 has been identified from those documents submitted to CACI by April 15, 2004 and made electronically available.

Although 10 C.F.R. § 2.1009(b) states that the certification is to be made to the PAPO, no PAPO had yet been appointed, and thus DOE appropriately directed its letter to the Secretary.

¹⁰ On July 7, 2004, the Commission designated, pursuant to 10 C.F.R. § 2.1010(a)(2), the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel as the PAPO for this proceeding, and authorized him to delegate that authority. *See* 69 Fed. Reg. 42,073 (July 13, 2004). On July 8, 2004, the Chief Judge appointed this Board as the PAPO. *See* 69 Fed. Reg. 42,218 (July 14, 2004).

¹¹ Affidavit of Robert L. Loux (July 8, 2004) [hereinafter Loux Aff.].

support contractor] by April 15, 2004.” *Id.* at 11-13 (*quoting* DOE Certification at 1).

On July 14, 2004, the Board issued a memorandum and order setting the State’s motion for oral argument on July 27, 2004, and directing DOE to answer nine questions concerning the nature and extent of DOE’s June 30, 2004, document production.¹² On July 19, 2004, the Board issued a further memorandum and order directing the LSN Administrator (LSNA) to answer fourteen questions concerning the nature and structure of the LSN, his coordination with DOE, and certain technical aspects of the DOE Web site and its documentary content.¹³ Pursuant to 10 C.F.R. § 2.1011(c)(4), the LSNA is tasked with coordinating the LSN, identifying any problems regarding the “integrity of the documentary material certified in accordance with § 2.1009(b) by the participants to be in the LSN,” and providing the PAPO with recommendations to resolve disputes regarding the integrity of the documents.

DOE filed its answer to the State motion on July 22, 2004, asserting that its certification and documentary production fully complied with the regulations and answering the nine questions posed by the Board.¹⁴ NEI also filed an answer supporting the validity of DOE’s actions.¹⁵ On that same date, a group consisting of Public Citizen, Nevada Nuclear Waste Task Force, and Nuclear Information and Resource Service filed an answer supporting the State motion.¹⁶ Likewise, on July 22, the NRC Staff filed an answer¹⁷ opposing the State motion to the extent that it requests that the DOE certification be declared inadequate because of the alleged failure to make the documentary material available “via the LSN,” NRC Answer at 6, but otherwise taking no position as to the adequacy of DOE’s document production, *see id.* at 2-3. The Staff also proffered some criteria for evaluating the sufficiency of a document production under the Commission’s regulations. *See id.* at 10-14. Finally, on July 23, 2004, the LSNA filed his

¹² PAPO Board Memorandum and Order (Regarding State of Nevada’s July 12, 2004 Motion) (July 14, 2004) (unpublished) [hereinafter July 14 Order].

¹³ PAPO Board Memorandum and Order (Directing the [LSNA] To Respond to Questions) (July 19, 2004) (unpublished) [hereinafter July 19 Order].

¹⁴ Answer of the Department of Energy to the State of Nevada’s Motion To Strike (July 22, 2004) [hereinafter DOE Answer].

¹⁵ Answer to Nevada’s Motion To Strike the Department of Energy’s LSN Certification (July 22, 2004).

¹⁶ Answer of Public Citizen, Nevada Nuclear Waste Task Force, and Nuclear Information and Resource Service in Support of the State of Nevada’s Motion To Strike the Department of Energy’s LSN Certification (July 22, 2004).

¹⁷ NRC Response to Nevada Motion To Strike Department of Energy LSN Certification and for Related Relief (July 22, 2004) [hereinafter NRC Answer].

answers to the fourteen questions posed by the Board.¹⁸ On July 27, 2004, the Board heard oral argument on the State motion. We also took the testimony of Daniel J. Graser, the LSNA.

II. JURISDICTION AND AUTHORITY

The jurisdiction and authority of this Board is founded on the Commission's July 7, 2004, order (CLI-04-20, 60 NRC 15, 18 (2004)) establishing the PAPO:

Pursuant to 10 C.F.R. § 2.1010(e), the PAPO possesses all the general powers specified in 10 C.F.R. §§ 2.319 and 2.321(c) that the PAPO requires to carry out its responsibilities. As provided by 10 C.F.R. § 2.1010(a)(1) and (b), the PAPO is granted this authority *solely* for the purpose of *ruling on disputes over the electronic availability of documents*, including disputes relating to claims of privilege and those relating to the implementation of recommendations of the Advisory Review Panel established under 10 C.F.R. § 2.1011(d). Pursuant to § 2.1010(b), the PAPO shall rule on any claim of document withholding except as otherwise provided in this Order or subsequent order of the Commission. . . . No issue lacking a direct relation to the LSN is to be entertained by the PAPO.

69 Fed. Reg. at 42,073-74 (first emphasis in original, second emphasis added).

The issues contested in this proceeding concern whether DOE has complied with the requirement of 10 C.F.R. § 2.1003 to make “all” of its documents “available.” The proceeding also involves the closely related issue as to whether DOE's certification that it has complied with section 2.1003 is facially invalid.

DOE challenges the Board's jurisdiction and authority to strike its certificate of compliance with 10 C.F.R. § 2.1003. *See* DOE Answer at 11. DOE argues that the Board's authority is limited to the six areas listed in 10 C.F.R. § 2.1010(b)(1)-(6), and that any dispute concerning the docketing of DOE's license application is premature and solely within the authority of the Director of NRC's Office of Nuclear Material Safety and Safeguards (NMSS). *See id.* at 11-12. DOE also cites two rulemaking statements by the Commission for the proposition that the PAPO should not consider disputes over the adequacy or completeness of the production of documents because such disputes should be heard only after contentions are filed.¹⁹

DOE's arguments are without merit. The gravamen of the State's motion is that DOE has failed to make all of its documentary material available and that, until it

¹⁸ Response of Licensing Support Network Administrator to July 19, 2004 Questions from Pre-License Application Presiding Officer Licensing Board (July 23, 2004) [hereinafter LSNA Answers].

¹⁹ *See id.* at 12-13 (*citing* 68 Fed. Reg. 66,373, 66,376 (Nov. 26, 2003); 69 Fed. Reg. 32,836, 32,843-44 (June 14, 2004)).

does, the State is not obliged to make its documentary material available 90 days later as specified in 10 C.F.R. § 2.1003. Clearly, this is within our jurisdiction — “ruling on disputes over the electronic availability of documents.” It is equally clear that we have the authority to regulate the conduct of the proceeding and the parties and to dispose of motions, as well as all the other general powers granted by 10 C.F.R. §§ 2.1010, 2.319, and 2.321(c). In this regard, “[a] presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order. The presiding officer has all the powers necessary to those ends.” 10 C.F.R. § 2.319. This includes the authority to strike DOE’s certification to the extent that it triggers other actions during this prehearing process, including the obligation on the part of other participants to make their documents electronically available. DOE’s quotations from the Commission’s statements are taken out of context and are inapposite because they clearly relate only to disputes over the *classification* of documents (Class 1 and Class 2) rather than to disputes as to their *availability*. See 69 Fed. Reg. at 32,843-44. Likewise, while we recognize that the Director of NMSS, not this Board, will make the ultimate determination as to the docketing of DOE’s license application pursuant to 10 C.F.R. § 2.1012(a), availability of documents, not docketing, is the issue before us.

III. ANALYSIS

For the reasons set forth in more detail below, we conclude that because of the incompleteness of its document review and production, the many years in which DOE has had to gather and produce its documents, and the fact that the date of production was effectively within DOE’s control, DOE’s document production on June 30, 2004, did not satisfy its obligation to make, in good faith, all of its documentary material available pursuant to 10 C.F.R. §§ 2.1003 and 2.1009. It is clear from DOE’s answer, as well as its representations during oral argument, that DOE has not completed its duty of producing all known and reasonably available documents. We also find that DOE’s method of making its documentary material available (i.e., putting the documents on its own server) fails to provide the needed assurance of the integrity and electronic stability of the documents for the required 6-month document discovery period and does not comply with 10 C.F.R. §§ 2.1003 and 2.1009. The LSN is “the . . . system that makes documentary material available,” 10 C.F.R. § 2.1001, and until documents are indexed and secure in the LSN they are not “available” for purposes of the NRC licensing proceeding. Finally, the Board notes that DOE’s certification appears to be facially invalid because its plain language and express limitations make clear that DOE is not certifying that it has made all of its documents available.

This case presents three broad issues relating to whether DOE's June 30, 2004, document production and certification complied with 10 C.F.R. §§ 2.1003 and 2.1009. The first concerns the completeness of the document production — whether DOE made “all” of its documentary material available. The second issue concerns the meaning of the regulatory phrase “make available” and whether documentary material must be indexed and secure on the LSN before it is deemed available. The third issue focuses on the actual wording of DOE's certification and whether it facially fails to meet the regulatory requirements. Our analysis begins with Section A, which reviews the applicable regulatory structure and requirements. Section B addresses the standards we use in applying the regulations. Sections C, D, and E, respectively, deal with the three issues in this case — completeness, availability, and facial validity.

A. Regulatory Structure

The first step in assessing the completeness and adequacy of DOE's document production is to understand the regulatory requirements and definitions.

With respect to the completeness issue, it is clear at the outset that the regulations specify that DOE must make “all documentary material” available. 10 C.F.R. § 2.1003(a)(1). The general rule is that the full text or image of each document, together with an electronic bibliographic header (header)²⁰ must be made available for every document. *See id.* § 2.1003(a)(1) and (2). If it is technically infeasible to make the full text or image electronically available, or if the participant claims that a document is privileged, only a header need be provided. *See id.* § 2.1003(a)(3) and (4).²¹

The term “documentary material” is broadly defined in 10 C.F.R. § 2.1001 and covers three categories of information. First, it includes “any information upon which a party . . . intends to rely and/or to cite in support of its position in the proceeding” (Class 1 or “reliance” documentary material). *Id.* § 2.1001. Second, it embraces “any information that is known to, and in the possession of, or developed by the party that is relevant to, but does not support, that information or

²⁰Pursuant to 10 C.F.R. § 2.1001, a “bibliographic header” means “the minimum series of descriptive fields that a potential party . . . must submit with a document or other material.”

²¹Under section 2.1003(a)(4), a participant need provide only the header, but not the text, of “documentary material (i) [f]or which a claim of privilege is asserted; (ii) [w]hich constitutes confidential financial or commercial information; or (iii) [w]hich constitutes safeguards information.” Section 2.1006 further defines the scope of the privileged documents and incorporates the exceptions specified in 10 C.F.R. § 2.390, including certain protections under the Privacy Act (*see* 5 U.S.C. § 552a). For purposes of this Memorandum and Order, the term “privilege” includes all of these privileges.

that party's position'' (Class 2 or 'nonsupporting'' documentary material). *Id.*²² The third class of documentary material encompasses "[a]ll reports and studies, prepared by or on behalf of the . . . party, including all related 'circulated drafts,' relevant to both the license application and the issues set forth in the Topical Guidelines in Regulatory Guide 3.69, regardless of whether they will be relied upon and/or cited by a party'' (Class 3 or 'relevant'' documentary material). *Id.* The regulations make clear that documentary material excludes reference books, financial and procurement material, copyrighted material and other similar material. *See id.* § 2.1005.

Turning to the question of "availability" — how and to whom documentary material is to be made available — the regulations are not a model of clarity. The first sentence of section 2.1003 simply states that DOE and other participants shall "make available" their documentary material. Subsection (e) of 2.1003, added on June 14, 2004, and dealing with the participants' duty to supplement certain materials, provides more guidance, stating that a participant shall "continue to supplement its documentary material made available to other participants *via the LSN.*" 69 Fed. Reg. at 32,848 (emphasis added). Section 2.1009(b) merely states that a participant must certify that "the documentary material specified in § 2.1003 has been identified and made electronically available."

Several other Subpart J provisions appear to assume that the LSN is the method for making documentary material available. Section 2.1011 directs the LSNA, *inter alia*, to "[i]dentify any problems regarding the integrity of documentary material certified in accordance with § 2.1009(b) by the participants to be *in the LSN.*" 10 C.F.R. § 2.1011(c)(4) (emphasis added). In addition, the LSNARP is tasked with providing advice on format standards for access to "the documentary material certified by each participant to be made available *in the LSN* to the other parties." *Id.* § 2.1011(e)(2)(i) (emphasis added). Section 2.1011 also establishes a significant list of computer, Web, and database technical standards that participants must follow when making their documents available, including, for example, the requirement that "participants . . . make . . . their documents available on a web accessible server which is able to be canvassed by web indexing software (i.e., a 'robot', 'spider', 'crawler')." *Id.* § 2.1011(b)(2)(i).

The definition of "documentary material" also includes an indirect reference to the LSN because documentary material is defined, in part, as documents "relevant to . . . issues set forth in the Topical Guidelines in Regulatory Guide

²² Nonsupporting documentary material includes both (a) documentary material that does not support a party's *position* and (b) documentary material that does not support the party's *information*. The former may be dependent on the contentions; the latter is not.

3.69.’’ *Id.* § 2.1001.²³ Reg. Guide 3.69 repeatedly refers to making documents available “via the LSN.”²⁴

Finally, the meaning of availability “via the LSN” depends in key part on the definition of the “LSN,” which is: “the combined system that makes documentary material available electronically to parties, potential parties and interested governmental participants.” 10 C.F.R. § 2.1001. Thus, the LSN is “the” system for making documentary material available. The phrase “combined system” is not defined.

As to the issue of the facial validity of DOE’s certification, the regulations do not prescribe any particular wording for the certification. The regulations simply require each potential party to “[e]stablish procedures to implement the requirements in § 2.1003,” and to have a “responsible official . . . certify to the [PAPO] [1] that the procedures . . . have been implemented, and [2] that to the best of his or her knowledge, the documentary material specified in § 2.1003 has been identified and made electronically available.” *Id.* § 2.1009(a)(2), (b).

B. Applicable Standard for Document Production

Given the clear edict that DOE (and all other participants) make “all” documentary material available, *id.* § 2.1003(a)(1), we initially must determine how to apply this regulatory mandate to DOE’s conduct.²⁵ We recognize that DOE has expended substantial effort and produced over 1 million full-text documents. The adequacy of DOE’s effort, however, must be assessed against the magnitude and importance of the task and the more than 15 years that DOE has had to fulfill its regulatory obligation. We agree that perfection is not required²⁶ and that, as with any “multi-year production effort involving millions of documents, thousands of persons, and complicated information systems,” any production is bound to have some “human mistakes.” DOE Answer at 2. Likewise, we understand that some

²³Regulatory Guide 3.69, Topical Guidelines for the Licensing Support Network (rev. 1 June 2004). *See also* 69 Fed. Reg. 40,681 (July 6, 2004) [hereinafter Reg. Guide 3.69]. Reg. Guide 3.69 was originally published in 1996. *See* 61 Fed. Reg. 49,363 (Sept. 19, 1996). A proposed revision was published in 2002, *see* 67 Fed. Reg. 44,478 (July 2, 2002), as Draft Guide 3022 [hereinafter DG-3022].

²⁴At the outset, and in six other places, Reg. Guide 3.69 states that documentary material should be identified in or made available “via the LSN.” Reg. Guide 3.69 at 3.69-1 to 3.69-7. The Commission’s Statement of Considerations in revising Reg. Guide 3.69, likewise states that documentary materials should be made available “via the LSN” in at least six places. 69 Fed. Reg. at 40,681-87. Lest it be thought that this is a recent development, it should be noted that the original September 1996 version of Reg. Guide 3.69 likewise used the phrase “in the LSS” on multiple occasions, Reg. Guide 3.69 (Sept. 1996) at 3.69-1 to 3.69-5, as did DG-3022 at 1-8.

²⁵This issue is relevant, but of significantly less concern, in considering *how* participants must make documents available.

²⁶DOE and the State agree that perfection is not required. *See* DOE Answer at 2; Tr. at 7, 43.

technical anomalies are to be expected when initiating a large database and Web site system such as the LSN. *See* Tr. at 107.

All parties agree that the regulatory requirement to produce “all documentary material” is not to be read literally and should be read as embodying a good faith standard. *See* DOE Answer at 8; Tr. at 17-19, 142. The Commission first articulated this standard in 1989:

The Commission expects all LSS participants to make a good faith effort to identify the documentary material within the scope of § 2.1003. However, a rule of reason must be applied to an LSS participant’s obligation to identify all documentary material within the scope of the topical guidelines. For example, DOE will not be expected to make an exhaustiv[e] search of its archival material that conceivabl[y] might be within the topical guidelines but has not been reviewed or consulted in any way in connection with DOE’s work on its license application.

54 Fed. Reg. at 14,934.

We agree that a good faith standard must be applied to each participant’s document production. Thus, on the date it chose to certify its document production, DOE must have made, in good faith, every reasonable effort to make all of its documentary material available. In this context, good faith involves at least several factors.

The fact that DOE has had over 15 years to comply and effectively controlled the timing of its document production are key factors in assessing whether it has met its good faith duty to produce all documents.²⁷ DOE had ample time within which to gather its documents, determine whether they constituted “documentary material,” and to review them for possible claims of privilege. DOE knew

²⁷NWPA requires DOE to submit its license application to the Commission 90 days after the date on which the President’s recommendation to use the Yucca Mountain site is effective. *See* NWPA § 114(b), 42 U.S.C. § 10134(b). Subpart J dictates that DOE must make its documents available 6 months before the application is docketed. *See* 10 C.F.R. § 2.1012(a). However, DOE has never suggested that its June 30, 2004, document production was done in response to these requirements. We surmise that this is because, in reality the Presidential recommendation under NWPA § 114(b) is triggered by DOE’s recommendation of the Yucca Mountain site to the President under NWPA § 114(a), the timing of which was entirely within DOE’s control. We note that the Presidential recommendation was effective on July 23, 2002, after Congress passed a joint resolution overriding the State’s veto and approving the development of a repository at Yucca Mountain. *See* Pub. L. No. 107-200, 116 Stat. 735 (2002) (codified at 42 U.S.C. § 10135 note). Thus, under the combination of NWPA § 114(b) and 10 C.F.R. § 2.1012(b), DOE should have made its documents available on April 23, 2002. In contrast, DOE stated at oral argument that “until the statutory process culminated in Congress’ determination, it was inappropriate to expend those types of monies on that [document production] process.” Tr. at 116. In short, DOE disregarded the statutory deadline for submitting its application and the related regulatory deadline for making its documents available. For our purposes, it is sufficient to note that DOE effectively controlled the timing of these deadlines, and effectively controlled the timing of its 2-year delay in meeting them.

from the start that millions of documents were involved. While we applaud DOE's attempt to manage its work by establishing its own document production schedules and internal deadlines, if, on the day of DOE's self-imposed document production deadline, DOE was not quite finished, that deadline, not compliance with 10 C.F.R. § 2.1003, is what now must yield.

The purpose and importance of DOE's obligation to produce all documents are also factors in applying the good faith standard. The Yucca Mountain licensing proceeding is of critical importance. As the Applicant, DOE bears the burden to support all points required for a license, and DOE's certification initiates the entire licensing process. A full and fair 6-month document discovery period, where all of DOE's documents are to be available to the potential parties and the public, is a necessary precondition to the development of well-articulated contentions and to the Commission's ability to meet the statutory mandate to issue a final decision within 3 years. These important objectives cannot be met unless we require DOE to make every reasonable effort to make all of its documentary material available at the start.

Finally, the status and financial ability of DOE must be part of the good faith analysis. DOE is an arm of the U.S. government. It has the resources of the Nuclear Waste Fund at its disposal in assembling its documentary material and complying with 10 C.F.R. § 2.1003. *See* 42 U.S.C. § 10222(d). As the Applicant, DOE has the most critical role and responsibility in initiating this proceeding properly.

In this context, the good faith standard as applied to DOE's duty to produce all documents is a rigorous one, requiring DOE to make every reasonable effort to gather, to assess for privilege, and to produce all documentary material at the outset, without regard to artificial or self-imposed deadlines.²⁸

²⁸ We find it unnecessary to decide whether DOE's document production is subject to the "substantial and timely compliance" standard of 10 C.F.R. § 2.1012(b)(1). DOE does not argue that this "substantial" compliance standard applies to it. The State vigorously argues that DOE is subject to a higher standard and that the term "timely" is meaningless when applied to DOE. *See* Tr. at 27-28. The Staff recognizes that the regulations do not impose such a criterion on DOE but argues that we should apply the substantial and timely compliance standard to DOE: "there does not appear to be any reason to judge DOE's compliance by a standard different from that applicable to other potential parties." NRC Answer at 11. We are not so sure, given that DOE will be the Applicant and its certification triggers the entire pre-license application process. We note that 10 C.F.R. § 2.1012(b)(1), which operates to deny a person party status unless it shows "substantial and timely compliance with the requirements of § 2.1003," does not apply to DOE, because it will be the Applicant and cannot be denied party status. We further agree with the State that at least the "timeliness" criterion cannot apply to DOE, which, having ignored the statutory deadline for submitting its application, effectively chose its own document production date. In any event, given our holding that DOE is subject to a good faith standard, we need not reach the substantial compliance issue.

C. Completeness of Document Production

Having reviewed the relevant regulations and the standard to be applied, we now turn to the issue of whether DOE's document production was sufficiently complete. DOE states that it made 2,090,474 documents²⁹ electronically available on its own Web site on June 30, 2004.³⁰ See DOE Answer at 14. Of these, approximately one-half were made available in full text or image form with headers, and one-half were made available without text with headers only. See Tr. at 62. In short, the text of approximately 1 million of DOE's documents was withheld, even on its own server. Meanwhile, as of June 30, 2004, approximately 500,000 of DOE's documents had been indexed on the LSN Web site. See DOE Answer at 6.

The pleadings, factual answers of DOE and the LSNA, and the oral argument revealed four main categories of documents relating to the completeness of DOE's document production. These are (1) DOE's nonproduction of the text of at least "several hundred thousand" documents due to the fact that DOE had not completed its own privilege review of them; (2) the nonproduction of 4 million "archival" e-mails; (3) the nonproduction of documents that DOE gathered after April 15, 2004 ("gap" documents); and (4) the nonproduction of miscellaneous other groups of documents. The following analysis will review each of these categories in turn, and then address the collateral issue regarding whether DOE can cure any deficiencies in its initial document production by supplementing its production later.

1. Document Texts Withheld Pending DOE's Unfinished Privilege Review

After its June 30, 2004, certification, DOE still had not completed its privilege review of hundreds of thousands of documents. Thus, it chose to withhold the text of these documents. Further, DOE's apparent confusion over the privileged status of its document collection resulted in DOE taking its Web site offline almost immediately. DOE's site was down from July 1 to July 6 in order for DOE "to safeguard the content of certain documents that contain privacy protected [i.e., privileged] information." DOE Answer, Exh. 1, Affidavit of Harry E. Leake

²⁹ In contrast, DOE's public announcement stated that it had certified to the NRC "the public availability through the Internet of approximately 1.2 million documents totaling some 5.6 million pages regarding Yucca Mountain." See DOE, Yucca Mountain Documents Made Available for Licensing Proceeding (last modified June 30, 2004) [http://www.doe.gov/engine/content.do?PUBLIC_ID=16120&BT_CODE=PR_PRESSRELEASES&TT_CODE=PRESSRELEASE].

³⁰ Exhibit 17 to DOE's answer shows that DOE reviewed 2,962,684 documents and excluded 872,210 of them as not meeting the definition of "documentary material." See also Tr. at 61. Of the remaining 2,090,474, approximately one-half, i.e., 1 million, were provided in header-only format. See *id.* at 62.

(July 22, 2004) ¶ 14 [hereinafter Leake Aff.]. On July 2, 2004, W. John Arthur, III, the Deputy Director of the DOE OCRWM, wrote the LSNA that, due to DOE's error, it had "inadvertently made available" a number of privileged documents and thus had taken the DOE Web site offline. DOE Answer, Exh. 16, Letter from W. John Arthur, III, to Daniel Graser, LSNA (July 2, 2004) at 1. Mr. Arthur also requested that the LSNA take all of the DOE documents off the public LSN and that the LSNA "defer activating its index of DOE's documents until it has verified that its website will not make available the documents that may contain privacy protected information." *Id.* These were not problems with the computer systems, but simply resulted from the fact that DOE was still undecided as to which of its documents it wanted to withhold as privileged.

Even before the certification date, DOE uncertainties as to its privilege claims caused unexpected problems on the LSN. After long exhortation from the LSNA, *see* Tr. at 100, DOE finally began making its documentary material available for indexing on the LSN on May 5, 2004. *See* Leake Aff. ¶ 9. Prior to May, DOE and the LSNA had agreed to institute certain access controls so that LSN indexing could begin and DOE documents would not be made publicly available on the LSN until DOE authorized it.³¹ Pursuant to this arrangement, as of June 30, 2004, DOE had made 648,452 documents privately available to the LSNA for indexing. *See* LSNA Answers at 16. But during this same time, DOE reversed itself and instructed that 150,684 of these items be deleted (both header and text) from the LSN. *See id.* This very large number of deletions was unexpected and caused substantial problems by diverting LSN resources that were intended for the indexing of new documents instead to the task of deletion. *See* Tr. at 111. The origin of these difficulties was not of a technical nature, but was a direct result of the incompleteness of DOE's privilege review process.³² The difficulties continued after June 30, 2004, when DOE submitted three more waves of deletion requests to the LSNA, one covering 25,209 documents. *See* LSNA Answers

³¹ *See* DOE Answer, Exh. 14, Letter from Joseph D. Ziegler, Director, DOE Office of License Application and Strategy (OLAS), to Daniel J. Graser, LSNA (May 4, 2004) at 1-2; *id.*, Exh. 15, Letter from Daniel J. Graser to Joseph D. Ziegler (May 5, 2004) at 1. At that point DOE was still estimating that it would make 12 million pages of documentary material available, *see* DOE Answer, Exh. 14 at 1, rather than the 5.6 million pages it ultimately produced on June 30, 2004.

³² The LSNA stated that "[o]nce we began loading the [DOE] documents, we had no technical problems with the LSN side and in fact, we were able to come up to a capacity of loading as many as 40,000 documents in a 24-hour cycle." Tr. at 101-102. "[T]he technical problems we were having are not the result of the DOE document format. The problems that we were experiencing, especially subsequent to July 7, were problems associated with attempting to delete the documents that were already in the LSN system for which [DOE] submitted the call back list of 25,209. . . . [I]t was the unusual situation of having to expeditiously process such a large number of deletions. . . ." *Id.* at 110.

at 16-17; Tr. at 97-98. DOE's very late deletions of over 175,000 documents indicates that DOE had still not finished its privilege review.³³

The incompleteness of DOE's privilege review became further apparent in DOE's Answer and at the oral argument. DOE acknowledged that, 4 weeks after its certification, it still had "ongoing processes and procedures" to identify privileged documents, the text of which DOE had already withheld on grounds of privilege. *See* Tr. at 87.³⁴ DOE conceded that, in its June 30, 2004, document production, of the million or so documents where the text had been withheld, "several hundred thousand" had been withheld under a claim of privilege, even though DOE had not completed its own two-step privilege review process for these documents. *Id.*³⁵

The fact that DOE had not finished its privilege review for several hundred thousand documents came to light as a result of the State's challenge to five of DOE's "header-only" documents. *See* State Motion, Exh. 7. With regard to all five, DOE responded that its screening software had originally classified them as privileged, that as a part of its ongoing privilege review DOE "would have" reviewed the documents, but that in light of the State's motion, DOE "expedited" its second step (human) review of the documents and decided that the documents did not require withholding. DOE Answer, Exh. 20.³⁶ After its

³³ During oral argument, some confusion also arose because DOE's headers included a field where documents were designated either "PUB" or "PRIV." Some of the documents that DOE provided in header format only (implying that they were claimed as privileged) had a "PUB" header. *See* Tr. at 24. DOE clarified that the PUB/PRIV designations derived from a DOE records management system classification ("PUB" designating a document freely available to users in DOE and "PRIV" designating documents with restricted access within DOE) having nothing to do with DOE's classification of the documents as legally privileged for purposes of the Yucca Mountain licensing proceeding. *See id.* at 52. However, it is hard to conceive, as DOE appears to claim, that a "PUB" document that is freely available within DOE can qualify as privileged.

³⁴ DOE stated that its ongoing process involves two steps. *See* Tr. at 85. First, documentary material is reviewed for privilege by a computer — DOE's "privacy and privilege screening software." DOE Answer, Exh. 20, DOE's Response to Documents Identified in Exhibit No. 7 to State's Motion to Strike at 1, 3-5. Second, DOE has a team of twenty to thirty reviewers looking at all documents that had a privilege "hit" from the software and determining whether, in fact, the documents qualify for a privilege. *See* Tr. at 87.

³⁵ DOE stated that its second step — human review of these documents for possible privilege — was proceeding at approximately 20,000 per day. *See id.* at 88.

³⁶ With regard to each of the five documents, DOE stated "[t]he document was in header-only format because it was flagged by [DOE's] privacy and privilege screening software. As part of [DOE's] ongoing processes and procedures, [DOE] would have reviewed this document's bibliographic header-only status. In light of the State's motion, [DOE] expedited its review of this document and determined that the privacy and privilege concern flagged by the screening software did not require [DOE] to continue withholding the full text and image of this particular document." DOE Answer, Exh. 20 (in reference to documents 1, 6, 9, 11, and 12).

second-step review, DOE dropped its privilege claim on all five of the documents. *See* Tr. at 25.

At the oral argument, the State presented further evidence of disarray in DOE's privilege review process. The State indicated that a computer search of DOE's Web site, using the search term "party," produced the headers (but not text) of dozens of documents whose title contained the term "party" (e.g., "bachelor party," "party for Debbie," "December 13th party," "Thanks for the party," "housewarming party," "pool party") and that "every one of [them] is marked 'privileged.'" Argument Exh. 4; Tr. at 173-74.³⁷ It is hard to imagine that such documents qualify for any legal privilege.

More substantively, the State stated that it had done a search of DOE's Web site for the phrase "alloy-22 corrosion," which it views as "one of the most critical topics in this proceeding." Tr. at 21. The State reported that the search had produced 9261 hits, and that the first 4876 of these documents were on the DOE Web site in header-only form (i.e., claimed to be privileged). *See* Argument Exh. 3; Tr. at 21, 169. Our brief review of these 4876 headers reveals that the documents are mostly technical reports, studies, minutes, and data. It strains credulity to believe that any substantial number, much less all, of the 4876 documents can fairly be withheld as legally privileged.

The incompleteness and ongoing status of DOE's review of its documents for potential claims of privilege and the fact that DOE purported to make all of its documents available, while still withholding the text of many of them because it had not decided whether they were privileged or not, makes it clear that DOE has not met its duty, in good faith, to produce all documents. By DOE's own admission, there are "several hundred thousand" documents that DOE has not produced in full text but for which DOE had not completed its own two-step privilege review process. Tr. at 87. But the 10 C.F.R. § 2.1003 duty to produce the full text of all nonprivileged documents means that DOE must complete its privilege review, and make the full text of all nonprivileged documents available, *before* it can certify that it has made all documents available. Providing the header only for hundreds of thousands of documents, while DOE's privilege review is still "ongoing," is insufficient. And, while we recognize that the pre-license

³⁷ At oral argument, the State submitted four exhibits. Argument Exhibit 1 is an August 9, 2002 memorandum from Lee Liberman Otis, General Counsel of DOE, regarding the "Search for and Retention of Relevant Hard Copy and Electronic Documents for the [LSN]." Argument Exhibit 2 is a May 27, 2004, Freedom of Information Act (FOIA) request by the law firm of Egan, Fitzpatrick, Malsch & Cynkar, PLLC to DOE concerning its standards for screening and excluding documents from the LSN. Argument Exhibit 3 is a set of several hundred pages of screen shots for the first 4900 documents produced when the State queried the DOE Web site with the search phrase "alloy-22 corrosion." Argument Exhibit 4 is a set of twenty-seven pages of headers produced when the State queried the DOE Web site with the search term "party." All of these documents have been entered as argument exhibits, and have been placed in the agency's electronic hearing docket.

application phase permits participants to challenge another participant's privilege claims, the 6-month period is neither designed for, nor to be consumed by, internal DOE waffling about whether the text of documents that it has already withheld really should have been provided at the outset.

DOE is not aided by its characterization of its second step as an additional one that DOE has "taken upon [itself]." Tr. at 86. The two-step privilege review process was established by DOE, not us, long before its June 30, 2004, certification and is still ongoing for several hundred thousand documents. Indeed, if DOE chose from the outset to do only a one-step privilege analysis and had finished the one-step by June 30, then this precise problem might not have arisen, although undoubtedly such an approach would have spawned myriad other problems.³⁸ But the fact is that DOE chose to use a two-step privilege review process and plainly it was substantially incomplete as of June 30, 2004. That, as an entirely separate matter, DOE withdrew 150,000 documents from the LSN on privilege grounds before June 30, 2004, and another 25,000 thereafter, further illustrates that DOE's privilege review process was still unfinished. The incompleteness of DOE's privilege review is not a minor or inadvertent human mistake or technical glitch. It is a fundamental and systemwide problem caused by a conscious DOE decision to certify on June 30, 2004, before DOE's privilege review was finished.³⁹

To allow DOE's certification to stand in light of its substantially unfinished privilege review process would wreak havoc on the 6-month document discovery period. Rather than allowing all participants the full 6 months to review the nonprivileged documents, DOE's approach leaves the full text of hundreds of thousands of relevant documents unavailable unless and until DOE finishes its review. Motions to produce and massive privilege disputes over thousands of documents, such as the 4876 alloy-22 corrosion documents, would needlessly proliferate. This tremendous diversion of effort would be largely avoided by

³⁸ Given DOE's difficulties, articulated in the May 20, 2004, report of its Inspector General (IG), with its privilege review software, and the indications that the software vastly overexcludes and withholds nonprivileged documents (e.g., the 4876 alloy-22 corrosion documents), it is appropriate, and perhaps even required, that DOE conduct its second-step human review of the documents for claims of privilege. See State Motion, Exh. 3, DOE Office of Inspector General Audit Report on Management Controls over the Licensing Support Network for the Yucca Mountain Repository (May 2004) [hereinafter DOE IG Report].

³⁹ Further evidence that DOE has simply failed to finish its task is found in the DOE IG's report, issued 1 month before DOE's certification, stating that DOE "still faces a number of obstacles in . . . ensuring that documents are available for public review by June 2004. Specifically, *the majority of the documents have yet to be screened for privileged and Privacy Act information*. In February 2004, the Department implemented a newly designed software package and began processing documents; however, it had not yet evaluated whether the system was effective and was properly identifying information that should not be disclosed." *Id.* at 2 (emphasis added).

insisting that DOE meet its regulatory obligation and finish its own two-step privilege review before certifying.⁴⁰

Thus, while we express no opinion as to the merits of DOE's claim of privilege for any of these hundreds of thousands of documents, it is clear that a good faith and reasonably complete document production requires that DOE finish its own privilege review process before certifying, and that DOE's document production, therefore, has not met the requirements of 10 C.F.R. §§ 2.1003 and 2.1009(b).

2. *Archival E-mails*

The second subissue in evaluating the completeness of DOE's document production is its nonproduction of approximately 4 million potentially relevant "archival" e-mails. DOE readily acknowledges that it has neither reviewed nor provided these documents, arguing that because they are archival, they are not covered. *See* DOE Answer at 15-16. DOE defines "archival" as any e-mail, no matter how recent, that is on a backup tape. *See* Tr. at 68, 70. However, the fact is that DOE started with approximately 10 million archival e-mails. *See id.* at 70. In preparing for its document production DOE reviewed 60% of the 10 million archival e-mails (i.e., 6 million), *see id.* at 74, 127-28, 135, and on June 30, 2004, it produced 689,600 of them. *See* DOE Answer, Exh. 17. DOE stated that its review of the 6 million archival e-mails showed that approximately 10% were "potentially relevant" and needed to be produced. Tr. at 75. DOE characterizes 10% "as a very low percentage." *Id.* at 76. At some point, DOE halted its review of archival e-mails and did not review or produce any of the remaining 4 million.

Upon questioning, it appeared that the only distinction between the 6 million archival e-mails that DOE reviewed and the 4 million archival e-mails that it did not, is that the former were authored by the 2300 current DOE (and contractor) personnel and the latter were authored by inactive or external users. *See id.* at 134-35; DOE Answer at 15.⁴¹ In short, all 10 million e-mails were "archival." The 4 million unreviewed e-mails include documents created as recently as 2002 and perhaps 2003. *See* Tr. at 73. DOE's rationale for not reviewing the final 4 million archival e-mails was that it was not required to do an "exhaustive search," *id.* at 67, and that, because only 10% of the 6 million archival e-mails were potentially relevant, it was not worth bothering with reviewing the remaining 4 million, *see id.* at 74-75; DOE Answer at 16.

⁴⁰ While the pre-license application phase will certainly have its share of discovery and privilege disputes, today's ruling will obviate a substantial number of them.

⁴¹ Thus, DOE did not review or produce relevant e-mails by even highly significant individuals if they are not current employees or contract personnel. For example, the e-mails of Lake Barrett, DOE's former Program Manager, appear to be part of the 4 million unreviewed and unproduced documents. *See* Tr. at 20.

We do not agree. By DOE's own estimate, approximately 400,000 (10% of the 4 million) documents would have to be produced. We cannot conclude that the conscious exclusion of 400,000 potentially relevant e-mails, including recent ones from key project personnel, meets the good faith standard. Such e-mails are often the source of unvarnished information that can be invaluable to the parties and the decisionmakers.

DOE additionally defends its nonreview or production of the 4 million e-mails by citing the Commission's earlier quoted 1989 statement that a party need not make an "exhaustive search of its archival material" in order to meet the good faith test. *See* Tr. at 67 (*citing* 54 Fed. Reg. at 14,934.) On this basis, DOE argues that it was justified in ignoring these 4 million documents. Again, we are not persuaded. First, the Commission's 1989 use of the term "archival" cannot reasonably be construed to include documents created after 1989. Common sense would indicate that it was referring to historical documents, not future ones. As of 1989, DOE had an electronic records management system in place that could, and apparently did, capture such future documents. Second, even if "archival" could include post-1989 documents, it certainly should not embrace documents created as recently as 2002 or 2003. We believe that the Commission's 1989 use of the word "archival" refers to past documents that might be difficult to find or to review, and the classification of such documents is not determined by whether a network administrator made a backup tape last night. Third, acceptance of DOE's proposed definition of archival — any electronic document that is on a computer backup tape — would produce the absurd result that DOE's future backup tapes (i.e., a backup tape to be made next week) qualify as "archival" and need not be reviewed.

Fourth, and most telling, DOE itself did not use the "archival" versus "nonarchival" distinction in reviewing its e-mails. DOE classified all 10 million of its e-mails as "archival." Of the 6 million that it reviewed, DOE produced 689,600, a relatively high ratio and a very large number of potentially important documents. A similar ratio would reasonably be expected from the other 4 million. Further, these e-mails are not hidden or difficult to find. They are known, available, apparently already segregated, and electronically searchable. In these circumstances, we reject the notion that it would be unreasonable or "exhaustive" for DOE to finish reviewing the remaining archival e-mails.⁴²

⁴²The May 20, 2004, DOE IG Report again confirms that DOE has not finished the task of gathering, reviewing, and producing all documents. The report states: "the Department still faces a number of obstacles in . . . ensuring that documents are available for public review by June 2004." DOE IG Report at 2. It then goes on to specifically discuss DOE's problems with producing e-mails:

Additionally, about 6.4 million electronic mail documents have not been processed, of which 3.1 million belong to personnel currently associated with the Yucca Mountain Project. The

(Continued)

DOE next argues that because (a) it is not planning to cite or rely on the 4 million e-mails, and (b) they are not reports or studies, they do not qualify as Class 1 or Class 3 documentary material and therefore it is less likely that they would need to be produced. *See* Tr. at 74. We see no merit in this argument because the same classification system presumably was applied to the 6 million e-mails, 689,600 of which DOE has already classified and produced as meeting the definition of “documentary material.” Perhaps the 689,600 were all Class 2 “nonsupporting” documentary material — “information . . . that is relevant to, but does not support, that information [i.e., Class 1 information] or that party’s position.” 10 C.F.R. § 2.1001. But Class 2 documents might very well be of the most importance to persons who may want to question or to challenge the licensing of Yucca Mountain. DOE has given us no reason to believe that the classification distribution of the 6 million e-mails, where 10% of them qualified as documentary material, is any different than the classification distribution for the 4 million e-mails. DOE’s argument on this point is without merit.⁴³

Department initially planned to use software to eliminate irrelevant items. However, after it developed and tested the software, it determined that the software was not functioning as intended. Because of these problems, officials determined that personnel still associated with the Yucca Mountain Project must manually review their electronic mail documents for relevancy and initiated this process in late February 2004. These manual reviews, daunting due to the sheer volume of information that must be processed, have the potential to delay the posting process. Department officials told us that they were *still trying to improve the effectiveness of the software in hopes of using it to process the remaining 3.3 million electronic mail documents.*

Id. at 2-3 (emphasis added). When asked about this report at the oral argument, counsel for DOE stated that the 6.4 million e-mails referred to in the IG Report were the same 6 million e-mails that DOE had referred to in its answer, that they *all belonged to current project personnel*, and that DOE had reviewed all 6 million of them. *See* Tr. at 134-35. This seems patently incorrect, as shown by the underlined portion of the DOE IG Report. The IG was referring to 6.4 million e-mails, only 3.1 million of which belonged to current personnel. This leaves 3.3 million e-mails as belonging to *former* personnel — presumably part of the same 4 million that DOE now contends it does not need to review. The final sentence of the above quote makes clear that, as late as May 20, 2004, DOE believed it needed to review these 3.3 million e-mails and was trying to do so. This is further indicia that, at the end, DOE decided to abandon its own document production plan in order to meet its self-imposed deadline of June 30, 2004, rather than complying with its duty to make all documents available.

⁴³The following recent statement by the Commission concerning Class 1 and Class 2 documentary material does not change the result:

[T]he Commission is clarifying that, because the full scope of coverage of the reliance concept will only become apparent after proffered contentions are admitted by the Presiding Officer in the proceeding, an LSN participant would not be expected to identify specifically documents that fall within either Class 1 or Class 2 documentary material in the pre-license application phase.

(Continued)

We conclude that, given the relatively large number of the 4 million archival e-mails that DOE itself estimates is likely to qualify as documentary material that must be produced, the potential value of such nonsupporting documents, the fact that they are already segregated on backup tapes in electronic form, and the fact that DOE has already searched the other 6 million archival e-mails, a good faith effort to produce all documentary material requires that DOE review these remaining e-mails and produce those that qualify as documentary material.

3. *Gap Documents*

The third area of the State's challenge to the completeness of DOE's document production concerns documents collected by DOE's contractor, CACI, Inc. (CACI), after April 15, 2004, and before its certification on June 30, 2004. DOE's certification plan discloses that it does not cover documents received by CACI during this 2½-month "gap."⁴⁴ DOE explained that its document identification and gathering effort was massive, starting in the 1980s and costing \$45 million dollars, *see* DOE Answer at 1, but that "where documents are *still being generated and identified* on a regular basis, no initial certification can be 100 percent complete as of the moment of production, simply because of the lead time needed to collect documents and process them for production." DOE Answer at 7 (emphasis added). DOE acknowledged that it did not produce approximately 81,000 documents that it claimed fell into this gap and argued that the gap is a "necessary consequence of a production that is made in the midst of a large, massive-scale project still underway." Tr. at 128; *see also* DOE Answer at 10. DOE also indicated that the April 15, 2004, cutoff date was not rigid and that

In this regard, the Commission still expects all participants to make a good faith effort to have made available all of the documentary material that may eventually be designated as Class 1 and Class 2 documentary material by the date specified for initial compliance in section 2.1003(a) of the Commission's regulations.

69 Fed. Reg. at 32,843.

First, because DOE is the license applicant and bears the ultimate burden on all points, it should already have identified and produced virtually all of the documents that support and "nonsupport" its application, even before any contentions are formulated. Second, as stated above, DOE has given us no reason to believe that the classification distribution of the 6 million e-mails, where DOE has already produced 689,600 of them as being "documentary material," is any different for the 4 million e-mails. Third, because the definition of Class 2 documentary material in section 2.1001 includes "information that . . . does not support *that information*" (i.e., Class 1 information), this portion of the Class 2 materials does not need to await the formulation of contentions. Finally, the preceding quote makes clear that even for Class 1 and Class 2 documentary material, the Commission still expects all participants to make a "good faith effort" to make it available at the outset.

⁴⁴ *See* DOE Answer, Exh. 4, [DOE OCRWM] [LSN] Certification Plan for Initial Certification (rev. 1, June 29, 2004) at 3-4 [hereinafter DOE Certification Plan].

DOE had in fact processed and provided some documents that had been gathered in May and June. *See* DOE Answer at 10.

DOE's answers to the Board's written questions made clear, however, that many of the 81,000 gap documents were actually pre-April 15, 2004, documents that DOE was still gathering, rather than documents that were "still being generated" after the cutoff date. *Id.* at 16. It appears that as many as 55,000 of the 81,000 documents might have been created before April 15, 2004. *See id.* In short, these documents did not fit DOE's own "still being generated" description of gap documents.

In assessing the gap document situation, we accept the proposition that, when a document production occurs in the midst of a large and ongoing project, those documents that are created after a reasonable cutoff date might not be included in the initial document production. That is not what happened here. Instead, DOE acknowledges that many of the 55,000 documents that DOE did not produce on June 30, 2004, were created before the cutoff date of April 15, 2004. These were simply "late-gathered" documents. While the nonproduction of the documents *created after* a (reasonably short) cutoff date is perhaps inevitable, the nonproduction of a significant number of documents *created before* the cutoff date is not inevitable and represents an entirely different situation.

The fact that DOE effectively chose its own time for producing its documents weighs heavily against accepting DOE's excuses with regard to late-gathered documents. DOE knew that there must be a lead time between the date when it called for documents and the date when all of the documents could be gathered, reviewed, and produced. DOE should have incorporated this lead time into its schedule for document production, and should have produced its documents only after it had gathered all of its extant documents. In managing the lead time, it was entirely within DOE's control to impose strict discipline in the gathering and production of documents by its various operations and contractors so as to assure that, in good faith, all extant documents were gathered and produced. This it did not do. Instead, DOE forged ahead on June 30, 2004, failing to produce tens of thousands of late-gathered documents. Even with regard to late-gathered documents, we accept that perfection is not required and that human error might excuse the initial nonproduction of a few such documents. We cannot accept, however, the systematic nonproduction of tens of thousands of documents simply because DOE and its agents did not get their act together in time to meet DOE's own self-imposed deadline.

We reject any implication that tens of thousands of documents, even in the context of a "massive" document production, can be disregarded as *de minimis*. We acknowledge that this is a major undertaking and that, by its own count, DOE has already produced the text of approximately 1 million documents. But the systematic nonproduction of 55,000 documents, for example, is a substantial and serious deficiency, not to be excused under the rubric of an argument that because

it represents only a small percentage of the total, it is therefore *de minimis*. See DOE Answer at 11 (asserting that production of all 81,000 documents would constitute only a 3.7% addition to DOE's document collection). The reality is that even in a large document production, tens of thousands of relevant documents are meaningful and could be significant, regardless of what percentage they represent.

Given the fact that DOE has very substantial resources, and that the timing of its document production and the lead time such a document-gathering exercise would inevitably involve was substantially within DOE's control, we find that DOE reasonably should have imposed greater discipline on its organization to gather all relevant and extant documents before its document production and that the nonproduction of tens of thousands of late-gathered documents did not meet DOE's obligation, in good faith, to produce all documents at the outset.

4. Other Categories of Miscellaneous Documents

DOE's answers to the Board's questions reveal several other groups of documentary material that DOE did not make available on June 30, 2004. The various groups of nonproduced documents include, first, documents from DOE's offices and contractors that failed to certify to DOE that they had provided all of their potentially relevant documents. See DOE Answer at 15. Five out of ninety-four entities did not respond and the number of documents they might have is not known. See *id.* at 15-16, 17. Second, DOE did not provide an estimated 12,000 documents created after April 15, 2004, that have not yet been collected. See *id.* at 15-16. Third, DOE did not produce approximately 18,000 archival e-mails (possibly with documents attached) with "encryption problems." *Id.* at 17. Fourth, with regard to documents in the OCRWM and Bechtel SAIC Company, LLC employee concerns program (ECP), over which DOE claimed a privilege, DOE only produced a header for each ECP file, rather than for each document. See *id.* at 18.⁴⁵

We find it hard to understand why, with all the time and technical expertise at its command, DOE should be unable to produce 18,000 e-mails due to "encryption problems." Likewise, consciously declining to provide a header for each ECP document and instead providing only a header for each *file*, is not acceptable. ECP documents might very well include some of the most "nonsupporting" documents. Each ECP file might include hundreds of documents. We reject DOE's argument that providing a header for each ECP document might reveal privileged information; the same can be said for many other categories of privileged documents. In short, DOE must provide a header for each of them.

⁴⁵ In addition, DOE made clear that it did not produce the 872,210 documents that it concluded did not meet the definition of "documentary material." See DOE Answer, Exh. 17.

Finally, in concert with our reasoning in the preceding section, we are less troubled by DOE's failure to produce 12,000 documents created after April 15, 2004. While 2½ months is a relatively long gap, at least these documents genuinely belong in the "still being generated" category.

Given our ruling today, granting the State's motion, we find it unnecessary to go into greater detail with regard to these various categories of absent documents. Suffice it to note that these categories of documents may not be dismissed as merely *de minimis* and DOE now must work diligently to produce them if it is to meet its obligation, in good faith, to produce all documents.

5. *Supplementation*

DOE's failure to make all of its documentary material available on June 30, 2004, is not excused by its indicated intent to supplement its initial production at a later time. To accept such a proposition would destroy the 6-month document discovery period that is critical to the entire licensing proceeding.

The regulations call upon DOE to supplement its initial document production in only two situations, neither of which is applicable here.⁴⁶ First, 10 C.F.R. § 2.1003(e) states that each party "shall continue to supplement its documentary material . . . with any additional material *created after* the time of its initial certification." 69 Fed. Reg. at 32,848 (emphasis added). Documents created *before* a party's initial certification — which represent the vast majority of documents that DOE has not reviewed or produced here — are not covered by this duty to supplement. Clearly, section 2.1003(e) is not the solution. The second mandatory supplementation is detailed in 10 C.F.R. § 2.1009(b), which requires DOE to "update [its] certification at the time DOE submits the license application." For documents created before DOE's initial certification, supplementation at the time of license application, coming at the end of the 6-month document discovery period, is much too late.

DOE points out that, under 10 C.F.R. § 2.1010(b), the Board has the authority to order DOE to produce missing documents. *See* Tr. at 129-30. That may be so. The short answer, however, is that any documents produced in response to a Board order would not have been available for the entire 6-month discovery period — which availability, as we have seen, is a central feature of the regulatory

⁴⁶In addition to mandatory supplementation, DOE volunteered to supplement certain documents. DOE stated that, once processed, the 55,000 documents "will be made available in a supplemental production," and that it will "promptly make" an additional 26,000 e-mails available. DOE Answer at 16; *see also* Tr. at 81. DOE also stated that its privilege review process was ongoing, implying that it would make the text of more documents available after the privilege review was completed. We are not inclined to rely on such voluntary promises, when DOE has already failed to comply with its legal obligations.

scheme. Apart from this dispositive consideration, resort to such authority would embroil this Board in many needless disputes and motions over thousands of documents that should have been made available, and properly classified by DOE as privileged or not, at the outset.

Finally, we recognize that there is one other mechanism whereby other participants may be able to obtain documents from DOE. Section 2.1004 provides that a participant may request that another participant produce a document and that the document must be produced within 5 days. Using this approach to correct DOE's initial failure to make documents available suffers, however, the same crucial defects as discussed in the preceding paragraph.⁴⁷

6. Conclusion as to Completeness

Given that DOE has had more than 15 years to assemble and produce its documents and effectively controlled the date for its production and that DOE's assembling and privilege review of its documents is still far from complete, and in light of the substantial disruption, delay, and confusion that such incompleteness will cause to the pre-license application 6-month document discovery process, we must conclude that DOE's June 30, 2004, document production did not meet the requirement that it, in good faith, make all of its documentary material available as of the date of its initial certification, as required by 10 C.F.R. § 2.1003.

D. Availability

We now turn to the second basis for the State's motion to strike, the assertion that documents need to be indexed on the Commission's central LSN Web site before they are "available" within the meaning of the regulations and that DOE's placement of its documents on its own Web server does not suffice. *See* State Motion at 14-15. In the State's view, "[c]ompliance with Subpart J requires that the documents be available and indexed on NRC's Web site (at least by an active hyperlink to DOE's LSN server) and that the LSN Administrator (not DOE) be in a position to assure access and data integrity." *Id.* at 15 (emphasis in original);

⁴⁷ In addition, the State has already requested documents from DOE pursuant to section 2.1004, and DOE has not produced them. On July 16, 2004, the State requested that DOE produce nineteen header-only documents. Several days later, DOE responded that the request "has been turned over to our document handlers," and that "[n]inety-nine percent of the time our turnaround is ten working days." Tr. at 22-23. Surely nineteen documents should not overwhelm DOE or require it disregard the 5-day response time mandated in the regulation. The nineteen documents had not been produced by DOE by July 27, 2004. Counsel for the State stated that if this is how DOE responds, "we're going to be [before the Board] thousands of times asking for documents." *Id.*

see also Tr. at 34. DOE's failure to comply with Subpart J, according to the State, renders its purported certification invalid. *See* State Motion at 17.

DOE responds that it complied with the regulations by placing electronic versions of its documents on the DOE Web server where they could be indexed by the LSN. *See* DOE Answer at 4. DOE further asserts that it "went above and beyond those requirements" by simultaneously making those files publicly available on the Internet with an index. *Id.* at 4. DOE maintains that there is no language in the regulations that indicates DOE's documentary material can be considered "available" only after it has been indexed on the LSN. *See id.* at 4-5; Tr. at 122-23.

For its part, the Staff agrees with DOE that, because section 2.1003(a) contains no express requirement that documentary material must be indexed and made available via the LSN, the phrase "make available" leaves DOE free to make its documents available via whatever method it chooses, so long as they may be indexed by the agency's central LSN site. *See* NRC Answer at 6; Tr. at 145-47.

The "language and structure" of the regulations is our starting point in construing their meaning.⁴⁸ Unfortunately, however, as discussed above in Part III.A, 10 C.F.R. §§ 2.1003(a) and 2.1009(b) do not specify how documentary material is to be made available. Section 2.1003(a) merely states that a participant must "make available" its documentary material. Section 2.1009(b) only adds that the documents must be made "electronically available." What is entirely unclear in the regulations — and what is vigorously disputed by the participants — is *how* the documentary material is to be "made available" or "made electronically available."

Because sections 2.1003(a) and 2.1009(b) do not answer the question as to how documents are to be made available, we must, as counseled by the Commission, "examine the agency's entire regulatory scheme."⁴⁹ First, we note that a recent addition to section 2.1003 states that a participant "shall continue to supplement its documentary material made available to other participants *via the LSN.*" 69 Fed. Reg. at 32,848 (emphasis added). This provision, appearing in the same section and dealing with the same subject matter, indicates that the LSN is the method for making documents available. The importance of the LSN is corroborated by the regulation establishing it, which requires that the LSNA

⁴⁸ *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 299 (1997) (quoting *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988)).

⁴⁹ *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 366 (2001); *see also* 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.05 (6th ed. 2000) [hereinafter *Sutherland*] ("A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.").

“[i]dentify any problems regarding the integrity of documentary material *certified in accordance with § 2.1009(b) by the participants to be in the LSN.*” 10 C.F.R. § 2.1011(c)(4) (emphasis added). We note also that Reg. Guide 3.69, which has regulatory significance because it is specifically incorporated into the definition of “documentary material,” *id.* § 2.1001, repeatedly specifies that documents are to be made available “via the LSN.” Reg. Guide 3.69 at 3.69-1 to -7. The introductory statement accompanying the most recent revision to Reg. Guide 3.69 also uses the phrase many times. *See* 69 Fed. Reg. at 40,681-87. Earlier drafts of Reg. Guide 3.69 were to the same effect, repeatedly stating that documents were to be “in the LSN.” DG-3022 at 1-8.

Perhaps the most telling element of the Subpart J regulatory scheme is the definition of the LSN — it is “*the combined system that makes documentary material available electronically to [other participants].*” 10 C.F.R. § 2.1001 (emphasis added). This tells us that the LSN is not optional. It is *the* system for making documents available.

Read as a whole, it is clear that Subpart J requires participants to make their documentary material electronically available in or via the LSN. But this does not end the inquiry, because we next need to determine what is required in order for a document to be “in the LSN” or available “via the LSN.” More specifically, is a document “in the LSN” if it is only on a participant’s own Web server and capable of being indexed, but is not yet actually indexed by the LSN?

Section 2.1001 specifies that the “LSN” is “*the combined system*” for making documentary material available. *Id.* (emphasis added). The “combined system” includes both the Commission’s central LSN server and each of the participant’s individual Web servers. *See* 66 Fed. Reg. at 29,455. But the parties dispute what it means for a document to be “in” the combined system. DOE and the Staff essentially contend that, so long as documents are electronically placed on a *component* of the system, i.e., a participant’s Web server, the documents are “in the LSN” and meet the regulatory requirements. *See* Tr. at 119, 158-59. The State insists that the LSN is the *whole* system, not each of its discrete parts, and that, unless and until a document is indexed by the central LSN portal, its integrity and validation have not yet been established by the LSNA, and its availability remains subject to the vagaries of DOE’s Web server and thus it is not “in” or “available” in the LSN. *See id.* at 41-42, 167-68.

Because the plain language of the regulations is ambiguous as to what constitutes “availability” and what it means to be “in the LSN,” we look to the regulatory history to resolve this ambiguity and to ascertain the Commission’s

intent.⁵⁰ At the outset, the Commission observed that “[t]he LSS is intended to provide for the entry of, and access to, potentially relevant licensing information as early as practicable before DOE submits the license application.” 54 Fed. Reg. at 14,926. The chief purpose of the original LSS was to (1) eliminate the need for the physical production of documents — the most burdensome and time-consuming aspect of document discovery; (2) eliminate the equally burdensome and numerous FOIA requests anticipated to be received by DOE and the NRC; (3) enable the comprehensive and early technical review of the millions of pages of relevant licensing material produced by DOE and the NRC through the LSS’s full-text search capability; and (4) enable the comprehensive and early review of the licensing material by the potential parties so as to permit the earlier submission of better focused contentions. *See id.*⁵¹

Even after the centralized LSS database approach was replaced with the LSN, an Internet-based system, these purposes remained central. *See* 63 Fed. Reg. 71,729, 71,729 (Dec. 30, 1998). In August 2000, the Commission introduced the concept of a central “LSN site” based on internet portal software technology to “ensure that the totality of the individual websites operate in an ‘efficient and effective’ manner,” and sought public comment on proposed minimum design standards for individual participant Web sites. 65 Fed. Reg. 50,937, 50,938, 50,940 (Aug. 22, 2000). In response to comments received from DOE in connection with this proposed rulemaking, the Commission agreed to change the term “‘LSN site,’ which refers to the LSN Administrator’s portal site, to ‘central LSN site,’” so as to distinguish it from the “‘LSN’ [which] refers to the *totality of the ‘central LSN site’ and the various participant websites.*” 66 Fed. Reg. at 29,455 (emphasis added).

The Commission described the value of the central LSN site and LSN as follows:

The [central] LSN web page standardizes search and retrieval across all collections by providing a common user search interface, rather than requiring users to learn the search and retrieval commands from each different site.

⁵⁰ *See Shoreham*, ALAB-900, 28 NRC at 288; *see also Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1269 (D.C. Cir. 2004) (referring to statute’s legislative history because the provision at issue did not “clearly and unambiguously answer[] the precise question” before the court). We note in this regard that while guidance found in regulatory guides and Statements of Considerations that conflict with or are inconsistent with a regulation cannot of course trump the plain meaning of the regulation, “guidance consistent with the regulations and at least implicitly endorsed by the Commission is entitled to correspondingly special weight.” *See Shoreham*, ALAB-900, 28 NRC at 290-91.

⁵¹ The LSS was also intended to provide for the electronic filing of documents during the hearing. *See* 54 Fed. Reg. at 14,926. This function was later shifted from the LSS/LSN to the Electronic Information Exchange system. *See* 69 Fed. Reg. at 32,836.

Each participant website acts as a file server to deliver the text documents responsive to a query found through a search at the LSN website. The LSN identifies the contents of each server and stores this information in its own database, which is then used to respond to searches. Users are presented lists of candidate documents that are responsive to their search. When the user wants to view a document, the LSN directs the participant server to deliver the file back to the user.

In addition to the search and retrieval, the LSN keeps track of how data was stored in the participant servers. . . . It also gathers information about the performance of the participants' servers including availability, number of text or image files delivered, and their response times.

Finally, the central LSN site will be used to post announcements about the overall LSN program and items of interest (hours of availability, scheduled outages, etc.) for the participant sites.

The Commission believes that the recommended design represents the least cost to both the NRC and the individual parties to the HLW licensing proceeding, while at the same time providing high value to the users. Because it is based on a proven technical solution that has been successfully implemented, the recommended design will provide a document discovery system that will facilitate the NRC's ability to comply with the schedule for decision on the repository construction authorization; provide an electronic environment that facilitates a thorough technical review of relevant documentary material; ensure equitable access to the information for the parties to the HLW licensing proceeding; *ensure that document integrity has been maintained for the duration of the licensing proceeding; most consistently provide the information tools needed to organize and access large participant collections; feature adequately scaled and adaptable hardware and software; and include comprehensive security, backup, and recovery capabilities.*

66 Fed. Reg. at 29,461 (emphasis added).

Based on the repeated references to documents being available "in" or "via" the LSN, the definition of the LSN as "the system" for making documentary material available and the regulatory history and Commission's purpose in establishing the LSN, we conclude that being "in the LSN" means that a documentary material must be indexed on the central LSN site so that its integrity and stability is assured and it can be accessed via the single, consistent central LSN site search engine. This interpretation best effectuates the entire purpose of making documents "available" and assuring that there be an "adequate amount of time for participants to review the documentary material." *Id.* at 29,459. Indeed, DOE "fully supports" this objective — "ensuring that interested members of the public have a full 6 months in advance of submission of the License Application to review the Department's documentary material." DOE Proposed Rule Comments Cover Letter at 1, 2. As recognized by DOE, this objective is "at the heart" of the Commission's effort to meet the 3-year statutory deadline. DOE Proposed Rule Comments at 1.

It is apparent to us that DOE's position — that documentary material is "available" once a participant loads the material onto its LSN participant server and makes the material available for indexing by the LSNA — would completely frustrate the Commission's objective. DOE's interpretation seriously undermines the value and function of the central LSN site. It flies in the face of section 2.1001's definition of LSN as "the . . . system" that makes documentary material available. Most importantly, DOE's approach destroys the 6-month pre-license application discovery period, reducing it by the amount of time needed to index the DOE document collection.⁵²

The difference between accessing documents via the LSN central site versus accessing them via each individual participant's LSN server is substantial. As explained by the LSNA: "The LSN alone provides a mechanism to verify that documents, once made available, are not subsequently removed or revised." LSNA Answers at 14. And, because the operation of the LSN is under the independent control of the LSNA, rather than under the control of an interested participant, "[d]ata integrity, user access availability, and system performance response times cannot be manipulated by a party to the proceeding in such a way as to thwart effective and efficient access to the data collection under the party's operational control." *Id.* The independence of the LSNA also protects the integrity of a search and retrieval site that would otherwise be under the control of a party to the proceeding. *See id.* In addition, "[r]eliance on a single LSN search and retrieval interface requires that users only become familiar with a single search interface." *Id.*⁵³

If a document collection is available only on an individual participant's server, there can be no assurance that (1) a participant has not removed or revised any of its documents; and (2) user accessibility, system performance response times, and search and retrieval results have not been manipulated by the participant controlling the individual server. As we have seen, during the first 4 weeks of operation of the DOE server, DOE has taken it offline on three occasions, *see* DOE Answer at 14-15, and has removed many privileged documents from it, *see* LSNA Answers at 16-17. This uncertainty seriously undermines the purpose and value of the pre-license application document discovery because, from one day to the next, a person searching the DOE site might get different

⁵² As discussed above, as of DOE's June 30, 2004, certification, approximately 500,000 (or only half) of DOE's 1.2 million full-text documents had been indexed by the LSN central site. *See* DOE Answer at 6. The LSNA stated that his target was to index 30,000 documents a day and 150,000 documents per week. *See* Tr. at 108-09. On July 23, 2004, the LSNA estimated that it would take a minimum of 6 or more weeks (i.e., at least until September 3, 2004, to index the remainder of the DOE document collection. *See* LSNA Answers at 12.

⁵³ Indeed, the design standards for participant servers do not even require the individual servers to have search and retrieval software capabilities. *See* 66 Fed. Reg. at 29,458.

“hits” or results. The 6-month document discovery period is thus diminished by the erosion of the participants’ ability to perform their technical reviews and to formulate their contentions using a system whose integrity is independently assured. Such an outcome is completely at odds with the key purpose of the LSN and the Commission’s stated goals to ensure not only “equitable access to the information for the parties to the HLW licensing proceeding,” but also “that document integrity has been maintained for the duration of the licensing proceeding.” 66 Fed. Reg. at 29,461.

In addition to undermining the participants’ ability to have equitable and early access to DOE’s documentary material, DOE’s interpretation would force the Board and the parties to confront a large number of needless additional discovery-related disputes, resulting in a further compromise of the 6-month document discovery period as well as inevitable delay in the proceeding. *See* Tr. at 175. The Commission rejected a proposed design for the LSN system (“Design Option 1”) that is technically similar to DOE’s current approach (i.e., implementing a search engine on its own Web server) when it chose the final central LSN portal design.⁵⁴ In rejecting this approach, the Commission stated that it would be “of low benefit in terms of delivering efficient or effective access to users,” and determined that this alternative would create “a significant risk that system implementation and operation issues may result in disputes whose resolution could have a negative impact on the agency’s ability to meet its 3-year schedule for making a decision on repository construction authorization.” *Id.* Given these Commission statements and the critical integrity assurance function the LSN performs, DOE’s position that documentary material is “available” for purposes of section 2.1009(b) when DOE places the unindexed material on its own participant server, is wholly inconsistent with the purpose of the LSN, and DOE’s assertions to the contrary are unavailing.

To support its position, DOE insists that, because section 2.1009(b) does not expressly state that documentary material must be indexed by the LSN central site prior to certification, DOE’s ability to make its certification is not dependent upon the completion of the indexing. *See* DOE Answer at 4; Tr. at 121-23. To be

⁵⁴ *See* LSNA Answers at 6. As described by the Commission in the Statement of Considerations:

Design Option 1 [which the Commission rejected] is characterized by an LSN homepage/website that points end-users to the web accessible documentary collections of each of the participants. The LSN homepage/website adds no value to the inherent information management capabilities found at any of the participant sites. The “LSN site” simply serves as a pointer to other home pages. This option provides no search and retrieval or file delivery processes to any user. The participant website provides the sole search and retrieval tools to access its text documents. Participants may use any software to provide text search and retrieval, and those packages may represent a wide range of capabilities from minimal to fully featured.

65 Fed. Reg. at 50,943.

sure, that particular provision does not allude to the completion of an indexing, but, as previously noted, provisions are not to be read in isolation without regard to the regulatory scheme in its totality. Rather, a provision must be “construed in connection with every other part or section so as to produce a harmonious whole.” *Sutherland* § 46.05 (6th ed. 2000). And, as we have already discussed, the “general purpose and intent” animating Subpart J is not served by DOE’s interpretation of the regulations.

DOE also relies on statements made by the Commission in connection with the promulgation of the June 2004 final rule, which, among other things, further amended the rules applicable to the use of the LSN. *See* DOE Answer at 5; 69 Fed. Reg. at 32,840. In that issuance, the Commission noted that three commenters, including the State, had requested that, in addition to the DOE certification, the Commission add a second certification by the LSNA that would indicate that the DOE documentary material collection had been indexed and audited. *See* 69 Fed. Reg. at 32,840. The commenters urged that the LSNA certification serve as the trigger for all subsequent document productions. *See id.* Rather than addressing the substance of the commenters’ request, the Commission noted that the amendment being sought was “outside the scope of this rulemaking” and that the issue “was not raised in the proposed rule and was not intended to be part of this rulemaking effort.” *Id.* The Commission went on to observe that, because “[t]he NRC is pursuing an approach with DOE to ensure that the DOE collection has been indexed and audited by the LSN Administrator in approximately the same time frame as the DOE certification,” this approach “should ensure that an indexed and baselined DOE collection will be available to other LSN participants well in advance of the point at which the NRC docket an acceptable DOE license application.” *Id.*

In DOE’s view, the Commission’s “rejection” of the commenters’ request confirms that the agency’s regulations do not require an indexing of DOE’s documentary material by the LSN Administrator prior to its certification. *See* DOE Answer at 5. We disagree. We believe that, as attested to by the LSNA, the Commission’s statement merely referred to a joint effort between DOE and the LSNA that would allow the LSN central site to access the DOE document collection and begin the indexing process prior to making the collection publicly available at the time of DOE’s certification. *See* Tr. at 95-97; LSNA Answers at 8; *see also* DOE Answer, Exh. 13, LSN Guideline 23, Access Control Prior to Initial Certification (March 2004). In this light, it is clear that the Commission simply chose not to address the issue of whether the LSN central site had to complete an indexing of a document collection prior to certification and was under the impression that the timing issue would be moot because DOE and the LSNA were actively working together in such a way that DOE’s documentary

material would be indexed and available via the LSN essentially simultaneously with DOE's planned document production date of June 30, 2004.⁵⁵

In addition, DOE raises a "fairness" issue, claiming that it would be unfair to condition DOE's ability to make its certification on the completion of the LSN indexing of its document collection, because the indexing function is beyond DOE's control. *See* DOE Answer at 5; Tr. at 125. This argument, however, is as equally unpersuasive as DOE's previous two claims. First, DOE had and has considerable involvement and control in the effort to index its documents on the LSN. Had DOE not waited until the eleventh hour to begin making its documents available to the LSN central site for indexing, the issue of timing would likely never arise.⁵⁶ Second, whatever burden the regulations place on DOE is greatly outweighed by the unfairness that would be placed on the other participants by DOE failing to put forth a good faith effort to produce all of its documentary material, and failing to make its document collection "available" as contemplated by the Commission by thus significantly reducing the other participants' 6-month pre-license application review period. To put these participants at such a disadvantage would discredit this proceeding from the outset.

E. Facial Invalidity of Certification

The State's third assertion is that DOE's initial certification "fails to meet the elemental requirements of Subpart J [and thus] is unlawful on its face and of no legal effect." State Motion at 13. The State argues that in contrast to

⁵⁵In the May 2001 Statement of Considerations — published nearly 5 months before the LSN central site actually became operational on October 18, 2001 (*see* LSNA Answers at 12) — the Commission also recognized "the possibility that there could be a significant period between the time the LSN central site becomes operational and the dates upon which [DOE] and other potential parties must provide certifications that their existing section 2.1003 documentary material is accessible." 66 Fed. Reg. at 29,460 n.4. Because the Commission likely made this observation without knowledge of the date the LSN would be ready to accept material for indexing and without knowledge of the anticipated certification dates of DOE and the other participants, we do not view this statement as being contradictory to the premise underlying the Commission's entire regulatory scheme (i.e., that for purposes of "availability" under sections 2.1003(a) and 2.1009(b), documentary material must be indexed by the LSN Administrator).

⁵⁶DOE did not begin making its documentary material available for indexing until May 5, 2004, despite exhortations from the LSNA that DOE make its documents available for indexing much earlier than that date. *See* Tr. at 100; *see also* State Motion, Exh. 2, Letter from Daniel J. Graser, LSNA, to Joseph D. Ziegler, Acting Director, DOE Office of License Application and Strategy (June 27, 2003) at 2. DOE also ignored the Commission's exhortations in May 2001 that "the Commission strongly recommends that all those who are parties or potential parties to the HLW repository proceeding make every effort to provide access to as much of their existing section 2.1003 documentary material as soon as possible after the LSN central site is operational." 66 Fed. Reg. at 29,460 n.4.

the requirements of 10 C.F.R. §§ 2.1003 and 2.1009(b), *see id.* at 9-11, the DOE certification merely states that it has made available the documentary material “identified from those documents submitted to CACI by April 15, 2004,” *id.* at 11 (*quoting* DOE Certification at 1). Thus, it is argued the DOE Certification is facially invalid because it expressly acknowledges that it is limited (a) by the April 15, 2004, cutoff date and (b) to the documents submitted to CACI.

DOE responds by arguing that, in any massive document production such as this, a gap is appropriate. *See* DOE Answer at 7; Tr. at 128. DOE further states, primarily in response to the Board’s nine questions in its July 14 Order, that it was careful to define and explain those documents that it had not included in its production. *See* DOE Answer at 15-16.

At the outset we note that it is not necessary for us to reach the facial invalidity issue because, given our other rulings today, DOE is obligated to complete its document production and recertify. Nevertheless, we believe that the following discussion will provide DOE and the other participants with valuable guidance so that future certifications are not inappropriately circumscribed.

Our assessment of this “facial invalidity” argument starts with the recognition that DOE’s document production legitimately required a substantial and organized effort. On May 5, 2003, the DOE General Counsel issued a call memo (“Call Memo”)⁵⁷ to some ninety-four of its offices and subcontractors. *See* DOE Answer at 17; DOE Certification Plan at 2. DOE reports that eighty-nine of them provided DOE certifications in response to the Call Memo and five did not. *See* DOE Answer at 17. Next, presumably DOE and CACI undertook to review the documents submitted in response to the Call Memo to determine if, and how, they needed to be produced, i.e., whether they met the definition of “documentary material,” were duplicative, and whether they were privileged and thus only required a header. Further, the record reflects that the DOE Certification was underpinned by three documents of the same date. The Arthur Certification Letter of June 30, 2004, includes Appendix A, a certification by CACI that the “documents identified in Section 4.3 of the [Certification Plan] that were submitted to CACI Inc. by April 15, 2004, have been processed by CACI, Inc. and loaded on the [DOE LSN] server”; Appendix B, a direction by Mr. Arthur that CACI make the documents available on DOE’s server; and Appendix C, a certification by CACI that “documents identified in Section 4.3 of the [Certification Plan] for Initial Certification . . . that were submitted to CACI, Inc. by April 15, 2004, have been made electronically available” on DOE’s World Wide Web server. In short, the DOE Certification is underlain by the Certification Plan and by a certification pyramid of eighty-nine and then three

⁵⁷The DOE General Counsel issued a related memo on August 9, 2002. *See* Tr. at 46, 119.

certifications. This is a reasonable approach, so long as it produces a single DOE certification that complies with the regulatory requirements.

Upon review of these documents, however, significant deficiencies are readily apparent. First, we examine the Certification Plan, which is purportedly the basis for all of DOE's efforts. *See* DOE Answer, Exh. 4. The regulations require that DOE "[e]stablish procedures *to implement* the requirements in § 2.1003," 10 C.F.R. § 2.1009(a)(2) (emphasis added), and to certify, *inter alia*, that these procedures "*have been* implemented." 10 C.F.R. § 2.1009(b) (emphasis added). The first speaks in the future tense, the second speaks in the past tense. The procedures are to precede the implementation and the certification is to assure that the procedures were implemented. In contrast, however, the Certification Plan plainly reveals that it was first adopted on June 25, 2004, which can only be *after* DOE had essentially finished its document collection. *See* Certification Plan at v. This interpretation is confirmed by the fact that the "plan" repeatedly speaks in the past tense: "the following collections of documents *were* identified," *id.* at 2; "the cut-off date of April 15, 2004 *was* necessary," *id.* at 3; "CACI *was* not directed to include," *id.* at 5; "CACI *was* authorized to exclude," *id.*; and "emails that *were* submitted," *id.* at 6 (emphasis added in all quotations). This is not a certification "plan"; it is simply a certification *report*, recording what CACI had already done. Nevertheless, we recognize that DOE is only required to certify that these procedures "have been implemented," *see* 10 C.F.R. § 2.1009(b), and, regardless of how late the "plan" was adopted, we cannot say that DOE did not implement the actions reflected in this report. The key point is that the Certification Plan and the "documents identified in Section 4.3" of it — the phrase that DOE uses repeatedly in its certification pyramid — can be properly seen as *ex post facto* limitations as to what DOE actually did, rather than an advance plan for gathering the right documents.⁵⁸

Viewed in this light, DOE's Certification Plan, and particularly section 4.3 thereof which plays so prominently in DOE's certification pyramid, is facially

⁵⁸ DOE's June 30, 2004, certification was accompanied by the Certification Plan, first adopted on June 25, 2004, and revised on June 29, 2004, as well as four corollary documents dated slightly earlier. These were (1) the OCRWM [LSN] Certification Plan for Document Collection, dated April 16, 2004; (2) the OCRWM [LSN] Compliance Assurance Plan for Document Collection, dated April 30, 2004; (3) the OCRWM [LSN] Certification Plan for Document Processing, dated May 20, 2004; and (4) the OCRWM [LSN] Compliance Assurance Plan for Document Processing, dated May 25, 2004. The June 29, 2004, Certification Plan, section 4.3 lists many categories of documents that were excluded from DOE's document production, while, in contrast, most of these exclusions do not seem to appear on the four earlier documents. As noted earlier, in its May 20, 2004, report the DOE IG stated that DOE faced significant "challenges" in achieving its "planned" review of e-mails and of privileged documents by June 30, 2004. These corollary documents together with the IG report support the appearance that, on June 30, 2004, DOE simply called it a day, issued a certification report reflecting what was excluded, and called it a plan.

deficient for the same reasons discussed in Part III.C. Specifically, the Certification Plan section 5 expressly excludes e-mails from “persons other than active users.” DOE Certification Plan at 8. These are the same 4 million archival e-mails that this Board has already addressed in Part III.C.2, above. Because the DOE Certification expressly incorporates the Certification Plan, noncompliance by the latter triggers noncompliance by the former.

Next, turning to the Arthur Certification Letter to NRC of June 30, 2004, and its four exhibits, we find that they, and DOE’s Certification, are facially deficient because they are all circumscribed by the phrase “the documents submitted to CACI.” We do not know, nor do we wish to delve into, exactly what documents each of DOE’s eighty-nine offices and contractors provided to CACI or the wording of (and limitations on) each of their certifications to CACI. Nor does the Certification Plan answer these questions. DOE merely certified that it made available those documents — the word “all” is conspicuously absent — that were submitted to CACI. While we understand DOE’s reluctance to say more, this does not comport with the requirement that it certify that the documents required by section 2.1003 (i.e., all documents) have been made available. This is not acceptable.

Finally, we note the other major caveat to the DOE certification — its cutoff date of April 15, 2004. As discussed in Part III.C, we are willing to accept DOE’s argument that, in the context of an ongoing project, a reasonable cutoff date for *after-created* documents is permissible. But a cutoff date that facially excludes extant documents that DOE and its contractors simply had not collected is not acceptable.

In conclusion, we point out that the DOE Certification contrasts sharply with the NRC Certification dated July 30, 2004, that simply states “documentary material specified in 10 C.F.R. § 2.1003 has been identified and made electronically available.”⁵⁹ No caveats. No cutoff date. Just a straightforward certification of compliance. This is what is required of DOE.⁶⁰

⁵⁹ Certification of Availability of Documentary Material (July 30, 2004) at 1.

⁶⁰ Finally, we note that the Staff argues that because the State has “neither demonstrate[d] that the purposes or objectives of the regulations have been thwarted nor that [DOE] is not in timely and substantial compliance with the electronic availability requirements,” NRC Answer at 13, the State has not met its burden of proof to show that DOE’s certification should be stricken, *see id.*; Tr. at 141, 160-61. Contrary to the Staff’s view, we find that the State sufficiently met its burden by providing us with ample legal authority and specific facts in support of its position, particularly in light of the fact that DOE was given 15 years to comply, and the State, pursuant to 10 C.F.R. § 2.323, had only 10 days (during which time the DOE Web site was down approximately half of the time) within which to review DOE’s document collection and prepare its motion. The State’s motion, the DOE answers to our questions, and the testimony and answers of the LSNA provide ample information to support today’s ruling.

IV. CONCLUSION

We conclude that DOE's June 30, 2004, document production and certification did not comply with the requirements of 10 C.F.R. §§ 2.1003 and 2.1009(b). First, given the 15 years that DOE had to gather, review, and produce its documents and the fact that the date of production was within DOE's control, the significant gaps in the document production, and the incompleteness of its privilege review, it is clear to us that DOE did not meet its obligation, in good faith, to make all reasonable efforts to make all documentary materials available. Second, given that a minimum of 6 months public access to DOE's produced documents is "at the heart" of the Subpart J system, and that the integrity and validity of the produced documents can only be assured after they have been indexed in the LSN — "the" system for making documents available — we conclude that 10 C.F.R. §§ 2.1003 and 2.1009(b), read in context, require that documents be indexed on the central LSN site before they are deemed available. Finally, as an aside, we note that DOE's certification, expressly founded on the deficient Certification Plan and expressly limited to documents submitted to CACI, appears, on its face, insufficient to comply with the regulations. Accordingly, we find that DOE has not made all of its documentary material available, grant the State's motion to strike DOE's certification, and rule that the State and other potential participants are not required to make their documents available under 10 C.F.R. § 2.1003 until 90 days after DOE makes all of its documents available on the central LSN site, and so certifies.⁶¹

⁶¹ It does not appear that it will take DOE a significant amount of time to complete its processing of the outstanding documents prior to being able to make a recertification. With respect to the 55,000 late-gathered documents, DOE estimated that it would take 4-6 weeks from July 27 for its contractor to process those documents. *See* Tr. at 78-79. During that same time, DOE will continue to process the 26,000 e-mails, which DOE estimates will require only 3 to 4 weeks to complete. *See* Tr. at 82. Relative to the "several hundred thousand" documents that were still undergoing the second step of the privilege review process, DOE did not provide an estimated completion date. Assuming, however, that "several hundred thousand" documents means something on the order of 400,000 documents, DOE's review team, which has an average review rate of 20,000 documents per day, *see* Tr. at 88, should have been able to complete step 2 of the privilege review process within 20 days. We also expect that DOE, considering the substantial resources it has at its disposal, will be able to resolve shortly the technical difficulties it encountered in converting the 18,000 encrypted e-mails. *See* Tr. at 83. In addition, although DOE did not indicate how long it would take to review and process the 4 million "archival" e-mails, we do not expect that an inordinate amount of time would be required to complete the review of these e-mails. In response to recommendations made by the DOE IG in its May 2004 report, DOE's OCRWM expressed confidence that the electronic and manual processing of the 6.4 million e-mails, which was begun in late February 2004, could be completed by May 15, 2004. *See* DOE IG Report at 2; *id.*, Appendix 2 at 7. At this rate, DOE should be able to process the remaining 4 million e-mails within a relatively short period of time. Finally, the LSNA estimated on July 23, 2004, that indexing the remaining half of DOE's full text document collection would require a minimum of 6 weeks to complete (i.e., until September 3). *See* LSNA Answers at 12.

Pursuant to 10 C.F.R. § 2.1015(b), any party to the proceeding seeking to appeal this ruling must file a notice of appeal and supporting brief with the Commission within ten (10) days after electronic service of this Memorandum and Order. That same provision provides that “[a]ny other party . . . may file a brief in opposition to the appeal no later than ten (10) days after service of the appeal.” 10 C.F.R. § 2.1015(b).

It is so ORDERED.

THE PRE-LICENSE APPLICATION
PRESIDING OFFICER BOARD

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

Alex S. Karlin
ADMINISTRATIVE JUDGE

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
August 31, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

J. E. Dyer, Director

In the Matter of

Docket Nos. 50-247
50-286
(License Nos. DPR-26,
DPR-64)

ENTERGY NUCLEAR OPERATIONS, INC.
(Indian Point, Units 2 and 3)

August 17, 2004

The Petitioner requested that the Nuclear Regulatory Commission (NRC) take the following actions: (1) order the Licensee for the Indian Point Nuclear Generating Units 2 and 3 (IP2 and 3) to conduct a full review of the facility's (a) vulnerabilities and security measures and (b) evacuation plans and, pending such review, suspend operations, revoke the operating license, or take other measures resulting in a temporary shutdown of IP2 and 3; (2) require the Licensee to provide information documenting the existing security measures that protect the IP facility against terrorist attacks; (3) immediately modify the IP2 and 3 operating licenses to mandate a defense and security system sufficient to protect the entire facility from a land- or water-based terrorist attack; (4) order the revision of the Licensee's Emergency Response Plan and the Radiological Emergency Response Plans for the State of New York and the counties near the plant to account for possible terrorist attacks; and (5) take prompt action to permanently retire the facility if, after conducting a full review of the facility's vulnerabilities, security measures, and evacuation plans, the NRC cannot sufficiently ensure the security of the IP facility against terrorist threats or cannot ensure the safety of New York and Connecticut citizens in the event of an accident or terrorist attack.

The final Director's Decision on this petition was issued on August 17, 2004. In that Decision, the NRC stated that its actions had in effect partially granted the Petitioner's request for an immediate review of vulnerabilities, security measures, and evacuation and emergency response planning at IP2 and 3. On November 18,

2002, the NRC issued a Director's Decision, which addressed many of the security measures and emergency planning issues raised in this petition, to Riverkeeper, Inc. Thus, no further action was deemed necessary to address these issues. Subsequently, the NRC in its April 29, 2003, orders required IP and other plants to implement additional security measures. During the week of July 28, 2003, the NRC conducted a force-on-force exercise at the IP site to assess and improve the performance of defensive strategies at the facility. Moreover, on July 25, 2003, FEMA determined that reasonable assurance existed that appropriate protective measures to protect the health and safety of communities around IP2 and 3 can be implemented in the event of a radiological incident at the IP facility. FEMA reaffirmed this position in a letter to the Petitioner dated June 1, 2004. Consequently, the NRC denied the remainder of the Petitioner's requests.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206

I. INTRODUCTION

By letter dated April 23, 2003, as supplemented on June 3 and October 16, 2003, the Honorable Richard Blumenthal, Attorney General for the State of Connecticut, filed a petition pursuant to Title 10 of the *Code of Federal Regulations*, section 2.206 (10 C.F.R. § 2.206). The Petitioner requested that the Nuclear Regulatory Commission (NRC) take the following actions: (1) order the Licensee for the Indian Point Nuclear Generating Units 2 and 3 (IP2 and 3) to conduct a full review of the facility's (a) vulnerabilities and security measures and (b) evacuation plans and, pending such review, suspend operations, revoke the operating license, or take other measures resulting in a temporary shutdown of IP2 and 3; (2) require the Licensee to provide information documenting the existing security measures that protect the IP facility against terrorist attacks; (3) immediately modify the IP2 and 3 operating licenses to mandate a defense and security system sufficient to protect the entire facility from a land- or water-based terrorist attack; (4) order the revision of the Licensee's Emergency Response Plan and the Radiological Emergency Response Plans for the State of New York and the counties near the plant to account for possible terrorist attacks, and (5) take prompt action to permanently retire the facility if, after conducting a full review of the facility's vulnerabilities, security measures, and evacuation plans, the NRC cannot sufficiently ensure the security of the IP facility against terrorist threats or cannot ensure the safety of New York and Connecticut citizens in the event of an accident or terrorist attack.

The Petitioner's representative participated in a teleconference with the Petition Review Board (PRB) on June 19, 2003, to discuss the petition. This teleconfer-

ence gave the Petitioner and the Licensee an opportunity to provide additional information and to clarify issues raised in the petition as supplemented. The results of this discussion were considered in the PRB's determination regarding the request for immediate action and in establishing the schedule for reviewing the petition.

In a letter dated July 3, 2003, the PRB notified the Petitioner that it had determined that his request would be treated pursuant to 10 C.F.R. § 2.206 of the Commission's regulations. The July 3, 2003, letter further stated: "In response to your requests for immediate actions contained in items 1, 2, 3, and 4 above, the NRC has, in effect, partially granted your requests." This document is available in the NRC's Agencywide Documents Access and Management System (ADAMS) (Accession No. ML031740470). The letter reflects actions that have been taken by the NRC since the September 11, 2001, terrorist attacks, including a series of orders issued to nuclear facilities, including IP2 and 3.

The aforementioned correspondence and a transcript of the June 19, 2003, teleconference, are available in ADAMS for inspection at the Commission's Public Document Room (PDR) at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records are also accessible from the ADAMS Public Electronic Reading Room on the NRC Web site <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or have problems in accessing the documents located in ADAMS should contact the NRC PDR reference staff by telephone at 1-800-397-4209 or 301-415-4737 or by e-mail to pdr@nrc.gov.

The NRC sent a copy of the proposed Director's Decision to the Petitioner and to the Licensee for comment on May 17, 2004. The Petitioner responded with comments in a letter dated June 18, 2004. The Licensee did not comment on the proposed Director's Decision. Copies of these documents are also publicly available under ADAMS Accession Nos. ML040490404, ML040490646, and ML041760274, respectively. The comments and the NRC Staff's responses to them are attached to this Director's Decision.

II. DISCUSSION

As discussed in Section I, the Petitioner requested that the NRC take certain actions regarding IP2 and 3. The specific requested actions are restated (with references to the Petitioner's supporting assertions) and discussed in the following paragraphs.

A. Requested Action 1a — Full Review of Vulnerabilities and Security Measures

1. Petitioner's Concern

The Petitioner requested that the NRC order the Licensee to conduct a full review of the facility's vulnerabilities and security measures and to suspend operations, revoke the operating license, or take other measures resulting in a temporary shutdown of IP2 and 3. The Petitioner's request was based on the following assertions: IP and NRC personnel and resources confront "dual challenges" when ensuring security at an operational facility; the spent fuel storage facility is vulnerable to terrorist attack; the security forces at nuclear power plants have repeatedly failed to repel mock-terrorist attackers; and a terrorist attack on IP will have catastrophic effects.

2. Staff's Response

The Petitioner's request for a review of vulnerabilities and security measures was in effect granted in part by NRC actions following the events of September 11, 2001. Additionally, in response to a prior 2.206 petition requesting that the NRC take actions at IP similar to those in this petition, the NRC has concluded that IP has sufficient security measures in place to defend itself from a broad spectrum of potential terrorist attacks. *See Entergy Nuclear Operations, Inc.* (Indian Point, Units 1, 2, and 3), DD-02-6, 56 NRC 296, 300-304, 308-11 (2002) (ADAMS Accession No. ML022630099), *appeal dismissed, Riverkeeper, Inc., v. Collins*, 359 F.3d 156, 170 (2nd Cir. 2004) (ADAMS Accession No. ML0406805860).

Moreover, in a September 3, 2002, letter, the Licensee notified the NRC that it had fully complied with the requirements of a February 25, 2002, Order imposing interim compensatory measures (ICMs) to enhance security after September 11, 2001. The NRC verified IP's compliance with the ICMs imposed by the order with an onsite team inspection. The inspection was conducted over 2 weeks during January and February 2003, and concluded that the implementation of the ICM enhancements to security was complete. Additionally, between December 2002 and January 2003, several NRC security specialists reviewed a number of concerns that had been raised about implementation of IP's security program. No violations of requirements were identified during this inspection; however, the inspectors identified some areas for improvement. The Licensee took prompt action to address these issues at the time of the inspection.

During the week of October 6, 2003, using a modified procedure from the NRC's Risk-Informed Baseline Inspection Program, the NRC again confirmed IP's conformance with the February 25, 2002, order. This program supports the evaluation of Licensee performance in areas not measured or not fully measured by performance indicators reported by the Licensee.

On April 29, 2003, the NRC issued additional orders to all commercial nuclear power plants, including IP, to require security enhancements to protect against a revised design basis threat (DBT). *See* 68 Fed. Reg. 24,517 (May 7, 2003). On April 29, 2003, the NRC issued two other orders intended to enhance the readiness and capabilities of security force personnel at nuclear power plants. One order established requirements to limit work hours of security force personnel and provide reasonable assurance that the effects of fatigue will not adversely impact the readiness of security officers in performing their duties. *See* 68 Fed. Reg. 24,510 (May 7, 2003). The other order requires additional measures regarding security officer training and qualification, including exercising the protective strategies and capabilities required to defend nuclear power plants against sabotage by an attacking force. *See* 68 Fed. Reg. 24,514 (May 7, 2003). This order also requires frequent firearms training and qualification under a broad range of conditions representative of site-specific protective strategies. As required by the order, on April 29, 2004, the Licensee submitted its revised security plans (with an implementation schedule) to the NRC for review and approval.

In addition to the aforementioned NRC inspections and evaluations, the NRC evaluated the effectiveness of IP's security program in July 2003 as part of a pilot program of force-on-force exercises. IP's Licensee successfully protected the plant from repeated mock adversary attacks during the exercise. Further details regarding the force-on-force exercise are provided in the response to requested action 3.

Based on the previous November 18, 2002, Director's Decision regarding security and vulnerabilities at IP and subsequent inspections, exercises, and security-related NRC orders, the NRC concludes that the petition does not support a departure from the previous NRC decision that suspension of operations at IP2 and 3 is not necessary to provide adequate protection of public health and safety.

B. Requested Action 1b — Full Review of Evacuation and Emergency Response Planning

1. Petitioner's Concern

The Petitioner requested that the NRC order the Licensee to conduct a full review of the facility's evacuation plans and to suspend operations, revoke the operating license, or take other measures resulting in a temporary shutdown of IP2 and 3. The Petitioner's request was based on the following assertions: the IP Radiological Emergency Preparedness Plan (REPP) fails to adequately inform the public in the event of a radiological emergency and relies on selective release of critical information and irrational and unenforceable secrecy; the IP REPP fails to address voluntary evacuation as required by NRC guidance documents;

the IP REPP fails to address family separation in its analysis of evacuation times; the IP REPP fails to meet requirements for protection of foodstuffs and drinking water within the 50-mile ingestion exposure pathway emergency planning zone; the evacuation travel time estimates for the IP REPP fail to meet NUREG-0654/FEMA-REP-1; the IP REPP fails to address the administration of radioprotective drugs to the general population; and catastrophic effects will result from a terrorist attack on IP.

2. Staff's Response

The Petitioner's request for a review of evacuation and emergency response planning has in effect been granted in part by NRC actions following the events of September 11, 2001. The NRC has previously evaluated the appropriateness of emergency preparedness plans and evacuation planning at IP for use in response to a radiological emergency, including a release caused by a terrorist attack. *See Indian Point*, DD-02-6, 56 NRC at 304-07. While NRC is responsible for evaluating the adequacy of onsite emergency plans developed by the Licensee, the Federal Emergency Management Agency (FEMA) is responsible for assessing the adequacy of offsite (state and local) radiological emergency planning and preparedness activities. However, the NRC makes the overall determination as to the state of emergency preparedness. FEMA informed the NRC and Governor Pataki of New York, on July 25, 2003, that, "after carefully considering all available information, we have reasonable assurance that appropriate protective measures to protect the health and safety of surrounding communities can be taken and are capable of being implemented in the event of a radiological incident at the Indian Point facility." *See* 68 Fed. Reg. 57,702 (Oct. 6, 2003). FEMA's finding recognized that the affected counties had received an updated "evacuation time estimate" (ETE) study (incorporating 2000 census data with voluntary or "shadow" evacuation estimates) and had specifically included the updated ETE study in their REPP. FEMA's reasonable assurance finding also reflected a review of plans for schoolchildren, including appropriate notification and protective action. In addition, FEMA considered the New York State report (referenced as the Witt Report in the petition).

After reviewing the FEMA offsite findings in conjunction with the NRC's review of onsite emergency preparedness, the NRC concludes that the petition does not support a departure from the NRC's previous conclusion that the overall state of emergency preparedness at IP2 and 3 provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

As a separate matter, the Petitioner also petitioned FEMA on February 20, 2003, requesting withdrawal of FEMA's approval of the IP REPP. FEMA informed the NRC that it notified the Petitioner by letter on September 9, 2003,

that FEMA would not act on his petition as a result of FEMA's July 25, 2003, finding of "reasonable assurance." The Petitioner filed a subsequent request on November 5, 2003, for the withdrawal of FEMA's July 25, 2003, finding of "reasonable assurance." FEMA responded to this request in a letter dated June 1, 2004. FEMA's response stated: "We have formally considered your concerns, and, together with revisiting the information used to make our July 25, 2003, determination, have found no compelling information that would warrant withdrawal of that determination." The response also stated that FEMA reaffirmed its finding of "reasonable assurance" for IP.

With regard to the administration of radioprotective drugs to the "general population," the State of New York and local response organizations developed plans for the distribution of potassium iodide (KI). The distribution is directed to the affected population located within the 10-mile plume exposure pathway emergency planning zone (EPZ) around Indian Point. The "affected population" is the part of the general population within the 10-mile EPZ for which the ingestion of KI has been determined in an emergency situation. On February 20, 2002, the State of New York requested and subsequently received 1.2 million KI tablets from the NRC to support the State's plans for populations within a 10-mile EPZ around the nuclear power plants located in the State of New York. In accordance with FEMA guidance issued December 2001 and updated October 4, 2002,

[t]he State must complete and submit revised plans and procedures, public information materials, and prescribed emergency instructions to the public within one year after the receipt of the KI. Because States are not required to have their emergency plans revised prior to receipt of KI tablets, the tablets should be stored in convenient locations for ad hoc distribution, should that become necessary. The capability to distribute KI tablets to the general public will be demonstrated by all Offsite Response Organizations (OROs) during the first exercise following the submission of the plans and procedures (but no sooner than 90 days from submission).

New York State has developed and issued KI guidance in accordance with the FEMA criteria.

Based on the previous November 18, 2002, Director's Decision (DD-02-6, 56 NRC 296) regarding emergency preparedness plans and evacuation planning at IP and on FEMA's subsequent finding that reasonable assurance exists that appropriate protective measures can be implemented in the event of a radiological incident, the NRC concludes that the petition does not support departure from the previous NRC decision that suspension of operations at IP2 and 3 is not necessary to provide adequate protection of public health and safety.

C. Requested Action 2 — Documentation of Security Measures

1. Petitioner's Concerns

The Petitioner requested that the NRC require the Licensee to provide information documenting the existing security measures that provide the IP facility with protection against terrorist attacks. The Petitioner's request was based on the following assertions: the spent fuel storage facility is vulnerable to terrorist attack, the security forces at nuclear power plants have repeatedly failed to repel mock terrorist attackers, IP and NRC personnel and resources confront "dual challenges" when ensuring security at an operational facility, and catastrophic effects will result from a terrorist attack on IP.

2. Staff's Response

The Petitioner's request for documentation of security measures has in effect been granted in part by NRC actions following the events of September 11, 2001. In addition, the NRC has previously evaluated a request that it require the Licensee to provide information documenting the existing security measures that protect IP against terrorist attacks. *See* DD-02-6, 56 NRC at 300-304, 308-11. Based on the previous evaluation of this issue documented in the November 18, 2002, Director's Decision and the response to Requested Action 1a, the NRC concludes that the petition does not support a departure from the previous NRC decision that information provided by the Licensee in conjunction with other sources of security information demonstrates that the security posture at IP2 and 3 is appropriate under the current circumstances. Therefore, additional action on this request is not warranted.

D. Requested Action 3 — Security and Immediate Modification of Operating Licenses

1. Petitioner's Concerns

The Petitioner requested that the NRC immediately modify the IP2 and 3 operating licenses to mandate a defense and security system sufficient to protect the entire facility from a land- or water-based terrorist attack. The Petitioner also requested that the NRC implement several air-related security measures for IP, including a no-fly zone and a defense system to protect the no-fly zone. The Petitioner's request was based on the following assertions: the security forces at nuclear power plants have repeatedly failed to repel mock terrorist attacks, the spent fuel storage facility is vulnerable to terrorist attack, IP and NRC personnel and resources confront "dual challenges" when ensuring security at an

operational facility, and catastrophic effects will result from a terrorist attack on IP.

2. Staff's Response

The Petitioner's request for revised security measures has in effect been granted in part by NRC actions following the events of September 11, 2001. In addition, the November 18, 2002, Director's Decision regarding security measures at IP, the response to requested action 1, and a recent federal court decision discuss the licensee's defense and security systems. See DD-02-6, 56 NRC at 300-304, 308-11; *Riverkeeper*, 359 F.3d at 170. Furthermore, the NRC has resumed force-on-force exercises at nuclear power plants as part of a pilot program. The force-on-force exercises are conducted to assess and improve the performance of defensive strategies at NRC-licensed facilities. The NRC has already conducted pilot exercises at fifteen nuclear power plant sites, including IP2 and 3. During the week of July 28, 2003, the NRC conducted a force-on-force exercise at the IP site using Multiple Integrated Laser Engagement System (MILES) equipment to enhance the realism of the exercise. MILES gear is a ground combat training system used by the Department of Defense (DoD), the Department of Energy (DOE), and other agencies. The system employs modified weapons fitted with laser transmitters that add realism to exercises by simulating combat between protective and adversary forces. During the IP exercise, the security forces were able to thwart the mock adversary force in all the scenario attacks evaluated. These exercises continue to be a primary means to assess the performance of a licensee's security force and its ability to prevent radiological sabotage as required by NRC regulations and orders.

The NRC oversight program for security is far broader than the baseline inspection program and force-on-force exercises. The oversight program also includes threat and vulnerability assessments and related evaluations of mitigative strategies; development, implementation, and inspection followup of advisories and orders; and a variety of other activities. NRC oversight has resulted in a multitude of security enhancements, including an increase in the number of security officers, an increase in the number of security posts, increased vehicle standoff distances, more stringent access authorization requirements at the facilities, limitations on security officer work hours, and more stringent security officer training and qualification requirements. This approach to security reflects the NRC's philosophy by ensuring that requirements for plant safety features and mitigation strategies, security measures, and emergency preparedness are addressed in an integrated manner.

In light of existing security requirements and enhancements established since September 11, 2001, and the response to Requested Actions 1 and 2, the NRC concludes that the petition does not support a departure from the previous NRC

decision that modification of the IP2 and 3 operating licenses to mandate a more extensive defense and security system than currently required is not necessary to provide adequate protection of public health and safety. Therefore, additional action on this request is not warranted.

E. Requested Action 4 — Revise Emergency Response Plan and Radiological Emergency Response Plans To Address Terrorist Attack

1. *Petitioner's Concerns*

The Petitioner requested that the NRC order the revision of the Licensee's Emergency Response Plan and the Radiological Emergency Response Plans of the State of New York and the counties near the plant to "account and prepare for possible terrorist attacks." The Petitioner's request was based on the following assertion: the IP REPP fails to adequately inform the public in the event of a radiological emergency and relies on selective release of critical information and irrational and unenforceable secrecy; the IP REPP fails to address voluntary evacuation as required by NRC guidance documents; the IP REPP fails to address family separation in its analysis of evacuation times; the IP REPP fails to meet requirements for protection of foodstuffs and drinking water within the 50-mile ingestion exposure pathway emergency planning zone; the evacuation travel time estimates for the IP REPP fail to meet NUREG-0654/FEMA-REP-1; the IP REPP fails to address the administration of radioprotective drugs to the general population; the IP REPP does not adequately address the possibility of a terrorist attack; IP and NRC personnel and resources confront "dual challenges" when ensuring security at an operational facility; and catastrophic effects will result from a terrorist attack on IP.

2. *Staff's Response*

The Petitioner's request for revisions to the Licensee's emergency response plan has in effect been granted in part by NRC actions following the events of September 11, 2001. In addition, the November 18, 2002, Director's Decision regarding emergency preparedness and evacuation at IP, FEMA's reasonable assurance finding, and the response to requested action 1 reflect the pertinent information regarding emergency preparedness and evacuation planning for IP. *See* DD-02-6, 56 NRC at 304-07; 68 Fed. Reg. 57,702 (Oct. 6, 2003). Based on that prior Director's Decision, FEMA's reasonable assurance finding, and the response to requested action 1, the NRC concludes that the petition does not support a departure from the previous NRC decision that the emergency preparedness plans and evacuation planning at IP2 and 3 are appropriate to use

in response to a radiological emergency, including a release caused by a terrorist attack. Therefore, additional action on this request is not warranted.

F. Requested Action 5 — Retire Facility if Security and Safety Not Ensured

1. *Petitioner's Concerns*

The Petitioner requested that the NRC take prompt action to permanently retire the facility if, after conducting a full review of the facility's vulnerabilities, security measures, and evacuation plans, the NRC cannot sufficiently ensure the security of the IP facility against terrorist threats or cannot ensure the safety of New York and Connecticut citizens in the event of an accident or terrorist attack.

2. *Staff's Response*

As discussed in the November 18, 2002, Director's Decision and the responses to requested actions 1, 2, 3, and 4, thorough reviews of security measures and emergency response at IP2 and 3 have been conducted and enhancements implemented. *See* DD-02-6, 56 NRC at 300-304, 308-11. In view of previous NRC and FEMA decisions on emergency preparedness, enhancements to site security, and emergency response planning, the NRC concludes that operation of the IP nuclear power plant does not pose an undue risk to public health and safety and that closing the IP nuclear power plant is not warranted.

III. CONCLUSION

As stated in a letter to the Petitioner on July 3, 2003, the NRC's actions have in effect partially granted the Petitioner's request for an immediate review of vulnerabilities, security measures, and evacuation and emergency response planning at IP2 and 3. In addition, on November 18, 2002, the NRC issued a Director's Decision that addresses many of the security measures and emergency planning issues raised in this petition. *See* DD-02-6, 56 NRC at 300-311. No further action is deemed necessary to address the Petitioner's request regarding these issues. Subsequent to the November 18, 2002, Director's Decision, the NRC in its April 29, 2003, orders required IP and other plants to implement additional security measures. During the week of July 28, 2003, the NRC conducted a force-on-force exercise at the IP site to assess and improve the performance of defensive strategies at the facility. Moreover, on July 25, 2003, FEMA determined that reasonable assurance existed that appropriate protective measures to protect the health and safety of communities around IP2 and 3 can be implemented in the

event of a radiological incident at the IP facility. *See* 68 Fed. Reg. 57,702 (Oct. 6, 2003). FEMA reaffirmed this position in a letter to the Petitioner dated June 1, 2004. Consequently, the NRC denies the remainder of the Petitioner's requests.

As provided in 10 C.F.R. § 2.206(c), a copy of this Director's Decision will be filed with the Secretary of the Commission for the Commission to review. 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

J. E. Dyer, Director
Office of Nuclear Reactor Regulation

Dated at Rockville, Maryland,
this 17th day of August 2004.

Attachment: Staff Responses to Comments on Proposed Director's Decision
DD-04-3

ATTACHMENT

STAFF RESPONSES TO COMMENTS ON PROPOSED DIRECTOR'S DECISION DD-04-3

This attachment documents the Nuclear Regulatory Commission (NRC) Staff response to comments received on proposed Director's Decision DD-04-3. These comments were solicited by a letter dated May 17, 2004. The Petitioner replied by letter dated June 18, 2004.

Specific Petitioner Comments

COMMENT 1: NRC's proposed decision has not specifically addressed the patent inability of the regional road system to handle the probable number of evacuees.

As the basis for this comment, the Petitioner states: "It cannot be maintained that the transportation system as it now stands can move large numbers of panic-stricken civilians fleeing a terror attack and a cloud of radiation." The Petitioner also states that the Radiological Emergency Preparedness Plan (REPP) cannot be taken seriously without a realistic approach to sheltering-in-place or alternative transportation planning. The Petitioner also questions whether the REPP addresses the consequences of multiple simultaneous terror attacks on the transportation infrastructure.

Staff's Response

The Federal Emergency Management Agency (FEMA) is responsible for assessing the adequacy of offsite (state and local) radiological emergency planning and preparedness activities. On July 25, 2003, FEMA concluded there is reasonable assurance that appropriate protective measures to protect the health and safety of surrounding communities can be implemented in the event of a radiological incident at the Indian Point facility. In a letter dated June 1, 2004, FEMA reaffirmed its reasonable assurance finding in response to an appeal filed by the Connecticut Attorney General. In the letter, FEMA addressed several issues, including the Attorney General's specific comments on the proposed Director's Decision. The proposed Director's Decision will be updated to reflect the conclusion of FEMA's June 1, 2004, letter.

COMMENT 2: NRC's proposed decision does not contain sufficient information to permit a determination as to whether new security enhancement initiatives provide a reasonable degree of security from potential terrorist attacks.

The Petitioner states that it is clear that NRC has undertaken several important new security initiatives. However, the Petitioner still maintains that the proposed decision does not provide sufficient information to permit a determination as to whether a reasonable degree of security is provided, particularly with respect to the ability to defend against deliberate attacks.

Staff's Response

Details of specific security requirements are considered safeguards information and cannot be made public. Nevertheless, the NRC's goal is to provide an appropriate level of detail to the public regarding security information.

The proposed Director's Decision incorporates, by reference, the November 18, 2002, Director's Decision that describes in some detail the protection offered by robust plant design features, sophisticated surveillance equipment, physical security protective features, professional security forces, access authorization requirements, and NRC regulatory oversight. The details of a February 25, 2002, order to all operating power reactor facilities requiring certain interim compensatory measures are considered safeguards information and cannot be made public. However, some specific measures are cited in the November 18, 2002, Director's Decision (including increased patrols, augmented security forces and capabilities, additional security posts, installation of physical barriers, vehicle checks at greater standoff distances, enhanced coordination with law enforcement and military authorities, and more restrictive site access controls for all personnel). The proposed Director's Decision notes that the Licensee has fully complied with the order imposing the interim compensatory measures.

The proposed Director's Decision also describes an order requiring security enhancements to protect against a revised design-basis threat. The details of the design-basis threat are safeguards information and cannot be publicly released. The proposed Director's Decision discusses two additional orders regarding fatigue and security officer training and qualification. The proposed Director's Decision also reports on a recent force-on-force exercise at Indian Point where the security forces were able to thwart the mock adversary force in all the scenario attacks evaluated. Accordingly, no changes to the proposed Director's Decision are necessary as a result of this comment.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ann Marshall Young, Chair
Anthony J. Baratta
Thomas S. Elleman

In the Matter of

**Docket Nos. 50-413-OLA
50-414-OLA
(ASLBP No. 03-815-03-OLA)**

**DUKE ENERGY CORPORATION
(Catawba Nuclear Station, Units 1
and 2)**

September 17, 2004

In this proceeding, in which Duke Energy applies to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) fuel lead test assemblies (LTAs) as part of the ongoing U.S.-Russian Federation plutonium disposition program, the Licensing Board addresses the standard for making “need-to-know” determinations regarding sensitive information in the discovery stage of a proceeding, finds a need to know on the part of the Intervenor with regard to certain classified guidance documents, and refers its ruling to the Commission for its consideration.

**RULES OF PRACTICE: DISCOVERY; “NEED-TO-KNOW”
SENSITIVE INFORMATION**

When a party seeks access to sensitive information, including safeguards and classified information, distribution must be limited to those having an actual and specific, rather than a perceived, need to know.

**RULES OF PRACTICE: DISCOVERY; “NEED-TO-KNOW”
SENSITIVE INFORMATION**

In ruling on need-to-know requests, boards must keep in mind the “delicate balance” between fulfilling the Commission’s mission to protect the public and providing the public enough information to help the Commission discharge that mission.

**RULES OF PRACTICE: DISCOVERY; “NEED-TO-KNOW”
SENSITIVE INFORMATION**

The traditional discovery standard of relevance and whether information is “reasonably calculated to lead to the discovery of admissible evidence” has come to define what is “necessary and “indispensable” to a party in preparing for litigation on any cause or issue. Thus, it is appropriate to apply the discovery standard in determining whether access to safeguards, classified, and other sensitive information sought in discovery is necessary and indispensable. In addition, appropriate balancing of public safety and other security and discovery-related factors must be undertaken, and access to sensitive documents must be as narrow as possible, with redactions to particular documents appropriate in some cases.

**MEMORANDUM AND ORDER
(Finding Need-To-Know by Intervenor Regarding Certain
Classified Documents and Referring Ruling to Commission)**

Before us is a request by Intervenor Blue Ridge Environmental Defense League (BREDL) for a “need-to-know” determination with respect to two classified NRC guidance documents that BREDL has sought in discovery on the sole security-related contention admitted in this proceeding.¹ For the reasons stated herein, we find, pursuant to 10 C.F.R. § 2.905, that BREDL’s counsel and expert, both of whom have been granted appropriate NRC clearances, do have a need for access to such documents for the preparation of BREDL’s case, and find further that granting such access will not, in light of such clearances, as well as protective orders issued and security procedures followed in this proceeding to date,² be

¹ See [BREDL]’s Request for Need-To-Know Determination (Aug. 26, 2004) [hereinafter BREDL Request].

² See Memorandum and Order (Protective Order Governing Duke Energy Corporation [Duke]’s September 15, 2003 Security Plan Submittal) (Dec. 15, 2003); Addenda to Protective Order Governing [Duke]’s September 15, 2003 Security Plan Submittal (Dec. 15, 2003) (Mar. 5, 2004); Addendum
(Continued)

inimical to the common defense and security. We also find, after consultation with Mr. Francis Young, Senior Program Manager in the Materials Transportation and Waste Security Section, Division of Nuclear Security, Office of Nuclear Security and Incident Response (NSIR), appointed by the Commission as the representative to advise and assist the Board with respect to security classification of information and the safeguards to be observed in this proceeding,³ that it would not be possible to redact any of the information in the documents in any way that would be meaningful in light of the need we find on the part of BREDL for the information. We thus rule that access to such documents shall be provided, in a manner and location to be determined in consultation with NRC Staff. Finally, we refer our ruling to the Commission pursuant to 10 C.F.R. §§ 2.730(f) and 2.786(g),⁴ and stay the ruling pending the Commission's consideration and ruling.

I. BACKGROUND

A. Subject Matter of Proceeding

This proceeding involves Duke Energy Corporation's (Duke's) February 2003 application to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) lead test assemblies at the station, as part of the U.S.-Russian Federation nuclear nonproliferation program to dispose of surplus plutonium from nuclear weapons by converting it into MOX fuel to be used in nuclear reactors.⁵ By Memoranda and Orders dated March 5 and April 12, 2004 (the latter sealed as Safeguards Information (SI); redacted version issued May 28, 2004), the Licensing Board granted BREDL's request for hearing

Number 3 to Protective Order Governing [Duke]'s September 15, 2003 Security Plan Submittal (Dec. 15, 2003) (June 28, 2003); Addendum Number 4 to Protective Order Governing [Duke]'s September 15, 2003 Security Plan Submittal (Dec. 15, 2003) (Aug. 13, 2004); Memorandum and Order (Protective Order Governing Non-Disclosure of Proprietary Information) (Apr. 8, 2004); Addendum Number 1 to Protective Order Governing Non-Disclosure of Proprietary Information (Apr. 8, 2004) (May 18, 2004). In addition, we have on many occasions in this proceeding consulted with the parties, their experts, and NRC security experts on the proper security procedures to follow, including procedures related to, among other things, physical security, security classification, information security, and the use of electronic equipment.

³ Commission Order (Aug. 2, 2004) (*citing* 10 C.F.R. § 2.904).

⁴ The citation to 10 C.F.R. §§ 2.730(f) and 2.786(g) is to the former section numbers that were in effect prior to a significant revision to the agency's 10 C.F.R. Part 2 rules of practice and procedure, which became effective February 13, 2004. Under part of this revision, the provisions of these sections were moved to new sections 2.323(f) and 2.341(f). *See* 69 Fed. Reg. 2182, 2217 (Jan. 14, 2004). Because this proceeding commenced prior to the effective date of the revision, the former Part 2 rules still apply here, and we use the former numbering throughout this Memorandum and Order.

⁵ Letter from M.S. Tuckman, Executive Vice President, Duke Power, to NRC (Feb. 27, 2003).

and admitted various non-security-related and security-related contentions.⁶ An evidentiary hearing has already been held on the one remaining non-security-related contention in the proceeding.⁷ The ruling herein relates to the one admitted security contention of BREDL, on which the parties are now engaged in discovery. This is one of a series of “need-to-know” rulings we have made in this proceeding, some of which have been in a discovery context, and all but one of which,⁸ up to this date, have concerned Safeguards Information.

The contention to which the need-to-know request now before us relates concerns a number of exemptions Duke seeks, as part of its application, from certain regulatory requirements, found in 10 C.F.R. Part 73, for the physical protection of formula quantities of special nuclear material. The contention in question, in the form we admitted it in LBP-04-10, states:

Duke has failed to show, under 10 C.F.R. §§ 11.9 and 73.5, that the requested exemptions from 10 C.F.R. § 73.46, subsections (c)(1), (h)(3) and (b)(3)-(12), and (d)(9) are authorized by law, will not constitute an undue risk to the common defense and security, and otherwise would be consistent with law and in the public interest.⁹

Both Duke, and BREDL quoting Duke, have described the cited provisions from which Duke seeks exemption as follows:

Section 73.46(c)(1) requirements related to physical barriers for vital areas and Material Access Areas (MAAs);

Section 73.46(h)(3) requirement to establish a Tactical Response Team, and associated requirements in Section 73.46(b)(3) through (b)(12) related to Tactical Response Team personnel assignment, weapons qualification, training, and physical fitness to the extent they exceed the current requirements in 10 C.F.R. 73.55; and

Section 73.46(d)(9) requirements related to armed guards at MAA access points and search requirements for personnel and materials entering/exiting MAAs.¹⁰

The documents now at issue are NRC guidance documents providing clarification of the design basis threats for theft or diversion, and for radiological

⁶ LBP-04-4, 59 NRC 129 (2004); LBP-04-10, 59 NRC 296 (2004).

⁷ Tr. 2072-2708.

⁸ Memorandum and Order (Ruling on BREDL Motion for Need To Know Determination Regarding Classified Documents) (Feb. 17, 2004) (unpublished) [hereinafter 2/27/04 Need-To-Know Ruling].

⁹ LBP-04-10, 59 NRC at 352.

¹⁰ See Letter from M.S. Tuckman, Duke Energy Corporation, to Document Control Desk, NRC, Attachment 7, Request for Exemptions from Selected Regulations in 10 C.F.R. Part 11 and Part 73 (Sept. 15, 2003) at 9 [hereinafter Exemption Request] (SI); [BREDL]’s Contentions on Duke’s Security Plan Submittal (Mar. 3, 2004) at 15 [hereinafter BREDL Security Contentions] (*citing* Exemption Request at 9) (SI); LBP-04-10, 59 NRC at 336.

sabotage, at licensee sites where there are formula quantities of special nuclear material. We examine herein BREDL's need for access to these documents for adequate preparation of its case in the current discovery context.

B. Arguments of Parties

BREDL's initial indication of intent to request copies of the documents in question was made on August 3, 2004, in a letter from BREDL counsel to NRC Staff counsel, in which reference is made to an unclassified letter from Michael F. Weber, identifying "certain NRC guidance documents 'for the design basis threat for theft or diversion.'" ¹¹ The Weber letter contains a reference to the NRC's "guidance documents for the design basis threat (DBT) for theft or diversion and the DBT for radiological sabotage to be used in the design of the mixed oxide fuel fabrication facility (MOX FFF) with respect to safeguards and security" ¹² — the documents to which BREDL seeks access. On August 19, 2004, NRC Staff counsel informed BREDL counsel that, "[p]ursuant to 10 C.F.R. § 2.905(b)(1) and (f), the Staff has determined that you must make your requests to the Board presiding over the instant case." ¹³ Thereafter, BREDL filed its formal request of August 26, 2004.

BREDL in its request asserts that it "has a need-to-know with respect to the requested documents because they appear to constitute generic NRC guidance for compliance with NRC regulations for security of its licensed facilities, including protection against both theft and sabotage." ¹⁴ As such, BREDL argues, the documents "not only illustrate the NRC Staff's view of how to comply with NRC regulations, but are given 'considerable weight' in NRC adjudicatory proceedings," and adherence to them "may be deemed sufficient to demonstrate compliance with NRC regulatory requirements." BREDL Request at 2. Therefore, BREDL urges, it is "appropriate and necessary for BREDL to evaluate whether Duke's Security Plan Submittal complies with this guidance." *Id.*

Citing the Commission's decisions in CLI-04-6, 59 NRC 62 (2004), and CLI-04-19, 60 NRC 5 (2004), as well as certain regulations on access to restricted data and national security information, Duke argues that BREDL's request for

¹¹ Letter from Diane Curran to Antonio Fernández (Aug. 3, 2004).

¹² Letter from Michael F. Weber, Director, Division of Fuel Cycle Safety and Safeguards, NRC Office of Nuclear Material Safety and Safeguards, to Duke Engineering & Services, Inc., Attn: Mr. Peter Hastings (Mar. 13, 2000).

¹³ Letter from Antonio Fernández to Diane Curran and Mark J. Wetterhahn (Aug. 19, 2004).

¹⁴ BREDL Request at 2.

the documents at issue should be denied.¹⁵ Noting that the Weber letter “specifically states that [the guidance documents are] to ‘be used in the design of the [MOXFFF],’”¹⁶ Duke asserts that “[c]learly, the guidance was being provided only for its potential applicability to a particular proposed fuel fabrication facility. There is no indication of any more general applicability.”¹⁷ Duke also represents that it has never relied upon this guidance, and states that “[b]ecause the [two guidance documents] do not apply to Catawba, it is neither ‘appropriate’ nor ‘necessary’ for BREDL to have access to those documents” to prepare its case on the one security-related contention admitted in this proceeding.¹⁸ Duke suggests that the Commission has ruled that “[i]nformation relating to NRC Category I facilities . . . [is] outside the limited scope of this proceeding,” and, more specifically, that “any guidance applicable to the MOX FFF as to *radiological sabotage* is clearly beyond the scope of this proceeding.”¹⁹ Finally, Duke has asked that, if we grant BREDL’s request, we also make the documents in question “available to Duke’s attorneys, representatives and consultants who have the required security clearance,” and moved that we certify questions related to this need-to-know request to the Commission for its determination.²⁰

The NRC Staff has indicated that it does not object to BREDL’s request for access to the two classified documents in question, “[i]n light of the Board’s recent order issued on August 13, 2004.”²¹ In addition, “given the type of information contained in the documents, the Staff joins the licensee in its motion for certification of this matter to the Commission.”²²

¹⁵ [Duke]’s Response to [BREDL]’s Request for Need-To-Know Determination on Classified Regulatory Guidance for NRC Category I Facilities (Aug. 31, 2004), at 2, 5 [hereinafter Duke Response].

¹⁶ The license application for the MOX fuel fabrication facility is the subject of another proceeding that is currently pending before another licensing board. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility, Docket No. 70-03098-ML, ASLBP No. 01-790-01-ML).

¹⁷ Duke Response at 4.

¹⁸ *Id.*

¹⁹ *Id.* at 5 (*citing* CLI-04-19, 60 NRC at 13 (emphasis in original)).

²⁰ [Duke]’s Request for Action Under Subpart I of 10 C.F.R. Part 2 (Aug. 27, 2004) at 2 [hereinafter Duke Request].

²¹ NRC Staff Response to Intervenor’s Motion Requesting Access to Certain Classified Documents (Sept. 7, 2004) [hereinafter Staff Response] (*citing* Memorandum and Order (Confirming August 10, 2004, Bench Ruling Finding Need To Know and Ordering Provision of Documents Sought by Intervenor in Discovery) (Aug. 13, 2004) [hereinafter 8/13/04 Memorandum and Order]).

²² *Id.*

C. Licensing Board's August 13, 2004, Memorandum and Order

Given the Staff's reliance on our August 13 Memorandum and Order, along with Duke's indication on more than one occasion (including in its current response) that it considers that it has somehow retained the right to appeal a portion of our rulings therein,²³ and given as well the applicability of principles addressed therein to the dispute currently before us, we recount here some of the salient points then at issue. We do this in some detail, in order to clarify as much as possible the development in this proceeding of an approach and standard for making the kind of need-to-know determinations that, in addition to being uniquely related to the application at issue in this proceeding, have come to be more frequently called for in this post-9/11 world. We follow and develop further this approach and standard in our analysis of the current dispute, which, like that at issue in the August 13 ruling, involves the discovery stage of the proceeding, and which, according to recent indications,²⁴ is not the last need-to-know dispute that we will see in this case. Moreover, in the post-9/11 threat environment, there are likely to be an increasing number of such need-to-know disputes requiring resolution generally, and we provide this background for whatever light it may shed on the types of factual and legal issues and nuances that may arise in such disputes.

In the August 13 Memorandum and Order we confirmed an August 10 verbal bench ruling reversing an August 6 determination by Duke, as the holder of two documents that are part of its security program for its Catawba plant, that BREDL had no "need to know" the contents of the documents. On BREDL's appeal, we concluded that the documents should be made available to BREDL.²⁵ The documents then before us were listed as items 67 and 68 in an attachment to Duke's response to certain BREDL discovery requests, identified as "Armed Response Procedure Security Procedure 213" and "Security Conditions Security Procedure 401."²⁶

Duke's original determination not to provide documents 67 and 68 had been based on their not having been "developed or changed to support the receipt and storage of MOX fuel" and as such, in Duke's view, not being "'indispensable' to

²³ See Letter from Mark J. Wetterhahn to Administrative Judges (Aug. 16, 2004); Duke Response at 3; see also 10 C.F.R. § 2.786(b)(1), which provides that a petition for review must be filed within 15 days after service of a decision or action.

²⁴ See, for example, our discussion in note 74, below.

²⁵ See 8/13/04 Memorandum and Order at 1; Tr. 2968-69 (SI).

²⁶ See 8/13/04 Memorandum and Order at 2 (citing Letter from Mark J. Wetterhahn to Diane Curran (Aug. 6, 2004), at 5 [hereinafter *Wetterhahn 8/6/04 Letter*]; [Duke]'s Response to [BREDL]'s First Document Production Request on BREDL Security Contention 5, Attachment 1 (July 2, 2004), at 10). For ease of reference we will refer herein to the two documents then in question as "documents 67 and 68."

the issue of the adequacy of the incremental measures taken to protect the MOX lead assemblies against theft''; and on their ''represent[ing] particularly sensitive information and [being] subject to the policy considerations'' of limiting access to safeguards and security information and avoiding inadvertent security breaches.²⁷

During the course of the August 10 closed session, the Board ascertained from Duke counsel that, although documents 67 and 68 were not part of those security-related procedures and measures adopted by Duke to protect the MOX fuel assemblies at issue in this proceeding, they do ''govern the reaction of the security force to any threat to the facility,'' including the ''ability [of any threat] to get into the facility,'' the ''details of the defenders, where they are positioned, where they have to go and the details of the response strategy,'' as well as timelines and details of how a security incident is defined and how defenders are to react to an incident.²⁸ Moreover, although Duke had also argued that the documents were not indispensable to BREDL because it had already been granted access to other relevant documents, Duke was unwilling to forego the possibility of relying on part or parts of the documents in question or of asking the Board to consider these in our ultimate decision in this proceeding, should BREDL posit a scenario in which intruders would get into the plant and into the spent fuel building, get the MOX fuel and escape with it.²⁹

BREDL insisted that it has a current need to know with regard to the two disputed documents, in order to postulate scenarios for pointing out vulnerabilities in Duke's security plan. If it is to ''posit detailed scenarios of successful attempts to divert or steal plutonium MOX fuel from the Catawba nuclear power plant,'' BREDL argued, ''then it must be given access to a level of detail regarding Duke's security measures that would allow it to evaluate the number of responders, their weaponry, their positions, and the time it will take them to get to their positions.''³⁰ Speaking through its expert, Dr. Edwin Lyman, during the August 10 session, it explained, for example, that ''a key issue is the amount of time one has to circumvent those fine line measures,'' and that the ''time you have available does depend on your strategy to defeat or otherwise contain the onsite response force and what you know about any additional offsite responders and their response

²⁷ *Id.* at 2 (quoting Wetterhahn 8/6/04 Letter at 5); *see id.* at 4).

²⁸ Tr. 2911-12, 2964-65 (SI); *see* 8/13/04 Memorandum and Order at 2; Tr. 2964-65 (SI).

²⁹ 8/13/04 Memorandum and Order at 2; *see* Tr. 2927-30 (SI). For example, at Tr. 2927, Duke counsel stated at one point, ''I can't say, given the state that we're in on this hypothetical that I'd [never] ever argue that it's not something that we wouldn't somehow or partially rely on, both as the timeline or how long it takes.'' Counsel further agreed that ''there exists the possibility that with regard to these two procedures, that if we relied on these two procedures, at some point we'd have to give it to [BREDL].'' 8/13/04 Memorandum and Order at 2-3; Tr. 2931 (SI).

³⁰ 8/13/04 Memorandum and Order at 3; [BREDL]'s Appeal of [Duke]'s August 6, 2004 Need-To-Know Determination (Aug. 6, 2004), at 2-3 [hereinafter BREDL 8/6/04 Appeal].

times.”³¹ Continuing, Dr. Lyman stated that “we need to know, first of all, how many forces to deploy and the strategy for getting onto the site,” emphasizing that this, along with the likely response from the armed responders, was a “critical bit of information in how you would then go about the successive steps to obtain the fuel and to remove it.”³² As indicated below, these sorts of factors are also relevant to the current dispute.

For its part, Staff counsel indicated that whether or not BREDL should be found to have a “need to know” the contents of the documents in question at this point in this proceeding depended on how the Board interpreted the Commission’s “indispensability” standard for need-to-know determinations in the discovery phase of a proceeding — according to Duke’s interpretation or the Staff’s.³³ Duke counsel agreed that the need-to-know determination we were called upon to make appeared to “hinge on the discovery standard.”³⁴

Duke construed the indispensability standard as being different from and more stringent than the discovery standard of “reasonably calculated to lead to the discovery of admissible evidence.”³⁵ Duke’s argument then was that,

[t]o be “indispensable,” a document containing Safeguards Information must be narrowly related to the issues in the proceeding, and the particular information requested must be essential to the development of the case regarding the admitted contention. Put another way, under the indispensability standard, an expert in security would find it impossible to analyze the incremental security measures taken to prevent theft of the MOX lead test assemblies and prepare testimony and assist in cross examinations on the limited issue before the Licensing Board without the document in question.³⁶

The Staff, on the other hand, interpreted the indispensability standard as being *defined by* the discovery standard during the discovery phase of a proceeding,³⁷ and stated during oral argument, that “during the discovery phase, if there is a safeguards document[] involved, . . . and it’s reasonably likely, reasonably calculated to lead to admissible evidence at the evidentiary hearing stage of the proceeding, then it should be produced to the party requesting it.”³⁸ We noted

³¹ 8/13/04 Memorandum and Order at 3; Tr. 2915 (SI).

³² 8/13/04 Memorandum and Order at 3; Tr. 2915-16 (SI); *see id.* at 2917-18 (SI).

³³ 8/13/04 Memorandum and Order at 3-4; *see* Tr. 2953-56, 2960-61 (SI); *see also* CLI-04-6, 59 NRC at 73.

³⁴ 8/13/04 Memorandum and Order at 4; Tr. 2961 (SI).

³⁵ 8/13/04 Memorandum and Order at 4; *see* Wetterhahn 8/6/04 Letter at 3.

³⁶ 8/13/04 Memorandum and Order at 4; Wetterhahn 8/6/04 Letter at 3.

³⁷ 8/13/04 Memorandum and Order at 4; Letter from Margaret J. Bupp to Diane Curran (Aug. 3, 2004) at 1 [hereinafter Bupp 8/3/04 Letter]; *see also* Tr. 2951 (SI).

³⁸ 8/13/04 Memorandum and Order at 4; Tr. 2951 (SI).

that, in its recent need-to-know determination on various documents requested by BREDL, the Staff had stated, *inter alia*, that

[i]t is the Staff's position that nothing in either CLI-04-19 or CLI-04-21 changes the positions set out by the Commission in CLI-04-06. That decision was limited to a finding that BREDL had a need-to-know in relation only to "information [that was] indispensable to BREDL's opportunity to frame [a] litigable contention." [CLI-04-6, 59 NRC at 67]. However, CLI-04-06 was limited to the contention stage. At this stage of the hearing, the question becomes what information is indispensable to discovery. In making this determination, the Staff looks to two sources. First the traditional discovery standard, that information is discoverable if it is reasonably calculated to lead to admissible evidence. Second, the Staff follows the Commission's admonition that "access to safeguards documents be as narrow as possible." [*Id.*]³⁹

The Staff had found a need to know regarding information "reasonably calculated to lead to admissible evidence," but provided for redaction so that only those portions of a document "related to the exemptions requested by Duke and the additional security measures proposed in support of those exemptions" would be disclosed.⁴⁰

In our August 13 decision we found the Staff's approach to be a reasonable one, and to be in keeping with the analysis we had implicitly applied previously in this proceeding.⁴¹ Notwithstanding Duke's argument that "the discovery standard and the indispensability standard are two different things,"⁴² we pointed out that the traditional discovery standard of whether information is "reasonably calculated to lead to the discovery of admissible evidence,"⁴³ which is contained in the rules that are applicable in this proceeding,⁴⁴ has, as it has developed, come to define what is necessary and indispensable to a party in preparing for litigation on any cause or issue.⁴⁵ And, as the Commission has stated and the NRC Staff has recognized, we noted that "a party's need to know may be different at different stages of an adjudicatory proceeding, depending on the purpose of the

³⁹ 8/13/04 Memorandum and Order at 4-5; Bupp 8/3/04 Letter at 1-2 (*citing* CLI-04-4; CLI-04-19; CLI-04-21, 60 NRC 21 (2004)).

⁴⁰ 8/13/04 Memorandum and Order at 5; Bupp 8/3/04 Letter at 2.

⁴¹ 8/13/04 Memorandum and Order at 5 (*citing* Licensing Board Order (Ruling on Duke Energy Corporation Objection to BREDL Document Production Request No. 2 Regarding BREDL Security Contention) (June 28, 2004) (unpublished)).

⁴² Tr. 2940 (SI).

⁴³ *See* Fed. R. Civ. P. 26(b)(1).

⁴⁴ *See* 10 C.F.R. § 2.740(b)(1).

⁴⁵ 8/13/04 Memorandum and Order at 5.

request for information.”⁴⁶ We observed, citing a statement of Staff counsel, that this language “means something.”⁴⁷ We thus looked to whether the information sought was indispensable to BREDL in preparing for litigation of Contention 5, in the sense of being needed for discovery and “reasonably calculated to lead to the discovery of admissible evidence,”⁴⁸ and found that it was.⁴⁹

We observed that “the material is not only reasonably calculated to lead to the discovery of admissible evidence, it may well be admissible evidence itself, as part of the information used in any scenario(s) that BREDL will formulate.”⁵⁰ And we found that the likelihood of Duke relying on information in the documents could not be said to be so small that we could find the standard for discovery not to have been met at this point.⁵¹ We found, to the contrary (as pointed out by BREDL counsel on August 10), that Duke had already in fact stated that it plans “to rely on the existing security force” at Catawba.⁵²

We concluded:

... BREDL has a current need for the information in question, which it requested in discovery, and [] the information is indispensable in formulating scenarios to demonstrate any asserted vulnerabilities in Duke’s planned security measures for the MOX fuel. Indeed, taking into account, as we have previously noted, the integrated nature of nuclear power plant security, we cannot say that BREDL could prepare an effective scenario — whether or not it ultimately successfully points out any vulnerabilities — *without* access to information on timelines and other details relating to security measures and procedures to prevent access to the plant, whether for radiological sabotage or theft. And thus, even under Duke’s argued standard of “essential to the development of the case regarding the admitted contention,” the material is discoverable.⁵³

⁴⁶ *Id.* (citing CLI-04-6, 59 NRC at 72; Bupp 8/3/04 Letter at 1; Tr. 2951).

⁴⁷ *Id.* (citing Tr. 2951 (SI)).

⁴⁸ *Id.*

⁴⁹ *See id.* at 6.

⁵⁰ *Id.*

⁵¹ *See id.*

⁵² *Id.* at 6 (citing Tr. 2958-59 (SI); [Duke]’s Answers to [BREDL]’s First Set of Interrogatories on BREDL Security Contention 5 (July 2, 2004) (SI) at 14).

⁵³ *Id.* at 6. We noted in making our ruling that we were cognizant of Duke Counsel’s agreement that, if at some point Duke relied on the documents in question, BREDL “would have a right to stop the proceeding, or to [at] some point examine these and take the time necessary to determine how they would respond to that,” and that it “might be the case” that this could necessitate additional hearing time to take more evidence arising out of the results of BREDL’s examination. 8/13/04 Memorandum and Order; Tr. 2930-32. As stated by the Chair at that time, Duke in such instance would have to recognize that it “would be giving up any opportunity to complain about the time that it took to go through that procedure,” by virtue of urging us to delay provision of the materials at issue until

(Continued)

We therefore ordered provision of the documents, subject, as noted above, to possible redaction at the request of the Staff.⁵⁴ No appeal was taken of this ruling, although, as indicated above, Duke has attempted nonetheless to retain its ability to appeal a portion of our ruling related to the standard for need-to-know in a discovery context (without, we note, addressing the question of the timeliness of any such appeal under 10 C.F.R. § 2.786(b)(1)).

II. ANALYSIS

With the preceding background in view, we turn now to the question of BREDL's need for the two classified documents now at issue. We note first that, as Duke argues, there is no reliance by Duke on any information in these documents, in contrast to the possibility of such reliance on documents 67 and 68. Thus the reliance principle that we discussed in our August 13 Memorandum

such time as Duke relied on them to “defend against” any scenario presented by BREDL. 8/13/04 Memorandum and Order at 7; Tr. 2932. We noted Counsel's agreement that this “might present a problem.” 8/13/04 Memorandum and Order at 7; Tr. 2935 (SI).

We ultimately found that Duke's proposal that we, in effect, at the same time rule quickly on the issue now before us, and also leave for a later time any ruling actually providing access to the materials in question, would be problematic and could very plausibly create significant inefficiencies and delays, in this case in which Duke strongly urges an accelerated schedule. 8/13/04 Memorandum and Order at 7 (*citing* Tr. 2939 (SI)). Pointing out that discovery is designed to get all information that is likely to be relevant in a hearing “on the table” *prior to* a hearing, in order to promote the efficient conduct of a proceeding, we determined that to wait, as Applicant Duke would have had us do, and at a later date go through the somewhat cumbersome need-to-know process, would more likely cause undue and unnecessary delay and therefore was not appropriate. *Id.* at 7-8.

⁵⁴Disclosure of the information in documents 67 and 68 is still a pending matter in certain respects. In directing Duke to make available the documents in question, we allowed the Staff to view the materials to see whether, in its view, any redactions to it were necessary, provided this was done in a timely manner and took into account Duke counsel's own statement that the documents in question are “so short and so Catawba-specific that if you removed any portion of it, [] in essence, it would counter [the Board's] ruling.” 8/13/04 Memorandum and Order at 8; Tr. 2971 (SI). Duke subsequently decided to make certain redactions to the documents. *See* Letter from Mark J. Wetterhahn to Administrative Judges (Aug. 16, 2004). Thereafter, on September 1, 2004, Duke agreed to provide the documents to BREDL in unredacted form. *See* Tr. 3141-42 (SI). Then later, on September 3 (notwithstanding our direction that, “absent an appeal and stay of this ruling, the materials shall be made available as soon as possible, and any disputes on redaction issues shall likewise be brought to the attention of the Board at the earliest possible time, and will be considered to the degree necessary at the next scheduled closed session in this proceeding, on September 1, 2004,” 8/13/04 Memorandum and Order at 8), upon the recommendation of the Staff, Duke changed course again and decided not to provide the documents unredacted, but only in their redacted state. Letter from Mark J. Wetterhahn to Diane Curran (Sept. 3, 2004); Letter from Antonio Fernández to Administrative Judges (Sept. 3, 2004). The appropriateness of the redactions to the documents is thus currently pending before us. *See* Tr. 3240-81; Letter from Diane Curran to Antonio Fernández and Susan L. Uttal (Sept. 7, 2004) (SI).

and Order provides no basis for finding a need to know at this time. With regard to the discovery standard we discussed in our August 13 ruling, and to BREDL's ability to create scenarios for pointing out vulnerabilities in Duke's security plan, as Duke has challenged it to do,⁵⁵ we find these to be more relevant herein. Our analysis in this vein starts with the contention in support of which BREDL's scenarios will be offered.

As noted above, in this contention BREDL challenges Duke's request for exemption from several subsections of 10 C.F.R. § 73.46, arguing that Duke has failed to show the exemptions are "authorized by law, will not constitute an undue risk to the common defense and security, and otherwise would be consistent with law and the public interest."⁵⁶ Again, the specific exemptions that are sought concern the following section 73.46 requirements:

Section 73.46(c)(1) requirements related to physical barriers for vital areas and Material Access Areas (MAAs);

Section 73.46(h)(3) requirement to establish a Tactical Response Team, and associated requirements in section 73.46(b)(3) through (b)(12) related to Tactical Response Team personnel assignment, weapons qualification, training, and physical fitness to the extent they exceed the current requirements in 10 C.F.R. 73.55; and

Section 73.46(d)(9) requirements related to armed guards at MAA access points and search requirements for personnel and materials entering/exiting MAAs.⁵⁷

Part 73 governs the "Physical Protection of Plants and Materials." Section 73.46 addresses "Fixed site physical protection systems, subsystems, components, and procedures." We accept the above-quoted summaries of the subject matter of the specific provisions of section 73.46 from which Duke seeks exemption. We note as well the following regulatory provisions from Part 73, including the beginning language of section 73.46, which states:

(a) A licensee physical protection system established pursuant to the general performance objective and requirements of § 73.20(a) and the performance capa-

⁵⁵The first reference in this proceeding to the posing of scenarios by BREDL was in Duke's argument in its (SI) response to BREDL's original security contentions in this matter, based upon its reading of CLI-04-6. *See id.* at 73; LBP-04-10, 59 NRC 296, 312, 346 (2004); *but see also id.* at 350-52. Duke continues to seek (at this point, in discovery requests to BREDL) details of scenarios to be postulated by BREDL, *see* Tr. 3141-42 (SI), and BREDL has indicated an intent to provide the same, *see id.*; BREDL 8/6/04 Appeal at 2-3, even though Duke, as the Applicant in this proceeding, will bear the burden of persuasion that its application should be granted, *see* 10 C.F.R. § 2.732.

⁵⁶LBP-04-10, 59 NRC at 352.

⁵⁷*See id.* at 336.

bility requirements of § 73.45 shall include, but are not necessarily limited to, the measures specified in paragraphs (b) through (h) of this section. . . .

Looking to section 73.20(a), we find the following requirements:

(a) In addition to any other requirements of this part, each licensee who . . . possesses or uses formula quantities of strategic special nuclear material at any site . . . subject to control by the licensee; . . . shall establish and maintain or make arrangements for a physical protection system which will have as its objective to provide high assurance that activities involving special nuclear material are not inimical to the common defense and security, and do not constitute an unreasonable risk to the public health and safety. The physical protection system shall be designed to protect against the design basis threats of theft or diversion of strategic special nuclear material and radiological sabotage as stated in § 73.1(a).

Finally, section 73.1(a) provides in relevant part as follows:

(a) *Purpose.* This part prescribes requirements for the establishment and maintenance of a physical protection system which will have capabilities for the protection of special nuclear material at fixed sites and in transit and of plants in which special nuclear material is used. The following design basis threats, where referenced in ensuing sections of this part, shall be used to design safeguards systems to protect against acts of radiological sabotage and to prevent the theft of special nuclear material. . . .

(1) *Radiological sabotage.* . . .

. . . .

(2) *Theft or diversion of formula quantities of strategic special nuclear material.* . . .

The two classified documents at issue, which the parties have agreed we should examine in making our ruling herein,⁵⁸ contain certain unclassified language, which is relevant to the preceding regulatory requirements. One of the documents, entitled “Guidance on Adversary Characteristics for the Design Basis Threat for Theft or Diversion,” contains the following introductory language:

(U) 10CFR73.1(a)(2) enumerates a set of adversary characteristics that comprise the NRC Design Basis Threat (DBT) for theft or diversion of formula quantities of strategic special nuclear material. The DBT is not intended to represent a real, or actual threat, but rather a hypothetical threat that: 1) provides a standard with which to measure changes in the real threat environment; 2) is used as a basis to develop regulatory requirements; and 3) provides a standard for evaluation of implemented safeguards systems.

⁵⁸Tr. 3195-96 (SI).

(U) The lack of specificity in describing individual adversary characteristics in 10CFR73.1(a)(2) was done to provide information to the public that was not sensitive and would not provide specific details of the adversary against which a licensee's systems were designed to protect. Therefore the following discussion provides clarification and guidance when describing selected characteristics of the adversary to be used for evaluating licensee implemented physical protection programs.

The other of the two classified documents, entitled “Guidance on Adversary Characteristics for the Design Basis Threat for Radiological Sabotage (Category I Fuel Cycle Facility),” contains similar introductory language:

(U) 10CFR73.1(a)(1) enumerates a set of adversary characteristics that comprise the NRC Design Basis Threat (DBT) for radiological sabotage. The DBT is not intended to represent a real, or actual threat, but rather a hypothetical threat that: 1) provides a standard with which to measure changes in the real threat environment; 2) is used as a basis to develop regulatory requirements; and 3) provides a standard for evaluation of implemented safeguards systems.

(U) The lack of specificity in describing individual adversary characteristics in 10CFR73.1(a)(1) was done to provide information to the public that was not sensitive and would not provide specific details of the adversary against which a licensee's systems were designed to protect. Therefore the following discussion provides clarification and guidance when describing selected characteristics of the adversary to be used for evaluating licensee implemented physical protection programs.

It is apparent from the introductory language to the two documents that, contrary to Duke's arguments, they are generic in providing “clarification and guidance” related to the DBTs for theft or diversion of formula quantities of strategic special nuclear material — which all parties agree is relevant herein — as well as for radiological sabotage regarding the same. Indeed, it is difficult to imagine a clearer “indication of . . . general applicability”⁵⁹ than that contained in the quoted language.

We note the parenthetical reference to an unspecified “Category I Fuel Cycle Facility” in the title of the second document, a term we find to be somewhat ambiguous and uncertain as to what kind of facility is being referenced. The “fuel cycle” consists of a number of activities — mining, milling, extraction, enrichment, fabrication, utilization, and disposal or reprocessing. The words “Category I” would limit the activities to those at the enrichment phase or later. But a plant to manufacture fuel would more likely be called a “fuel fabrication

⁵⁹ See Duke Response at 4.

facility,” and indeed, contrary to Duke’s argument to the effect that the document relates specifically to the MOX or any other “fuel fabrication facility,” the words “fuel cycle” are appropriately associated with any of the phases of the fuel cycle, as listed above, limited only by the modifier, “Category I,” to enrichment, fabrication, utilization, and disposal or reprocessing facilities. And, of course, a reactor is a utilization facility.⁶⁰ Thus, just as with the governing regulations and the document relating to the DBT for theft or diversion, there is no limitation on the application of this document, relating to the DBT for radiological sabotage, to any one or more fuel fabrication facilities. Moreover, the purpose of the document — to “provide[] clarification and guidance” in light of the “lack of specificity” in 10 C.F.R. § 73.1(a)(1) — is clearly stated.

We also note Duke’s argument, with regard to the second document, that radiological sabotage is outside the scope of this proceeding, based on the Commission’s statement that the “focus of this adjudication is the license application, which proposes specific measures — enhancements of security requirements for commercial reactors — necessary to protect the MOX fuel from theft or diversion.”⁶¹ But such a focus does not, we find, exclude any consideration at all of radiological sabotage, which BREDL has stated will play a role in its scenario(s) for theft or diversion of SSNM, as part of diversionary tactics the hypothetical attackers might employ.⁶²

In addition, although, as Duke argues, the Commission stated in CLI-04-6 that this proceeding “has nothing to do with the NRC’s post-September 11 general security orders,”⁶³ the documents at issue obviously provide something much more fundamental and basic: namely, “clarification and guidance” regarding regulatory requirements that undisputedly apply to Catawba during the time when, as stated in section 73.20(a), it “possesses” formula quantities of SSNM, prior to loading the MOX fuel into the core of the reactor.⁶⁴ As such, these documents are without question not only relevant as well as “reasonably calculated to lead to the discovery of admissible evidence”; we find they provide clarification that is “necessary” and “indispensable” to BREDL in formulating scenarios that address the governing regulatory requirements — they clarify the actual requirements of section 73.1(a).

⁶⁰ The Commission has explained that, although reactors are not generally considered to be Category I facilities, “[b]y possessing the four lead test assemblies, Catawba will be a Category I facility until the assemblies are inserted into the reactor core.” CLI-04-19, 60 NRC at 8 n.11.

⁶¹ Duke Response at 5; CLI-04-19, 60 NRC at 13.

⁶² See Tr. 3092, 3106-07, 3111-15 (SI).

⁶³ 59 NRC at 72; see Duke Response at 5-6.

⁶⁴ See *supra* note 60; see also, e.g., CLI-04-19, 60 NRC at 10, wherein the Commission states that the “NRC Staff measures license applications against regulatory standards, not against enforcement orders.”

We make this finding in full consideration of the Commission’s guidance that distribution of Safeguards Information must be limited to “those having an actual and specific, rather than a perceived, need to know.”⁶⁵ The same obviously applies to classified information, as does the following Commission statement from CLI-04-6:

Anything less would breach our duty to the public and to the nation, for the likelihood of inadvertent security breaches increases proportionally to the number of persons who possess security information, regardless of security clearances and everyone’s best efforts to comply with safeguards requirements.⁶⁶

In addition, we are heedful of the Commission’s direction that “Boards, like the Commission itself, must keep in mind ‘the delicate balance between fulfilling our mission to protect the public and providing the public enough information to help us discharge that mission.’”⁶⁷

In this proceeding, which involves issues not only of national but of international concern, it is particularly important to be attentive to this “delicate balance[ing]” that we must perform. The interest in limiting the distribution of materials such as the classified documents now at issue is great. But the measures that we and the parties have taken in this proceeding, in following extensive security procedures⁶⁸ and, on the part of some, obtaining appropriate clearances, have also been significant; and the number of persons who would have access to the documents in question is small. In addition, BREDL has shown itself very capable in its important role in this proceeding of “helping [the NRC] discharge [its] mission” of protecting the public by in effect “looking out for” the safety of the public from the perspective *of* the public, of which it is a part, so that providing it with access to relevant materials is to a meaningful degree a consideration on both sides of that delicate balance.⁶⁹

In this context, as in our August 13 ruling, we note, notwithstanding Duke’s argument that the discovery standard and the indispensability standard are two

⁶⁵ CLI-04-6, 59 NRC at 73; *see also* CLI-04-21, 60 NRC at 11.

⁶⁶ CLI-04-6, 59 NRC at 73.

⁶⁷ CLI-04-21, 60 NRC at 31.

⁶⁸ *See supra* note 2.

⁶⁹ To say that BREDL serves in such a role relating to public safety in no way, of course, minimizes the respective responsibilities and particular expertise of the NRC, its Staff, and Duke, relating to the protection of public safety. For example, the central importance of public safety as part of the NRC’s mission is often recognized. BREDL, however, with members who live in the area of Catawba, also serves a public safety function in its own unique, and not insignificant, way, thereby helping the NRC discharge its own public safety mission, a role the Commission recognized in CLI-04-21. *See* text accompanying note 67, above.

different things, that the traditional discovery standard of relevance and whether information is “reasonably calculated to lead to the discovery of admissible evidence,”⁷⁰ has as it has developed come to define what is “necessary” and “indispensable” to a party in preparing for litigation on any cause or issue. Thus, although in all need-to-know questions we must undertake the “delicate balanc[ing]” we address in the preceding paragraphs, we do not find it to be inconsistent, in this discovery stage of this proceeding, to find that the discovery and need-to-know standards are effectively congruent and coextensive. Indeed, there is a balancing inherent in many discovery rulings, which takes into account not only relevance and need for information but also such things as, for example, “embarrassment, oppression, or undue burden or expense,” any of which may be grounds for limitation or denial of discovery.⁷¹

This approach is also consistent with the Commission’s statement in CLI-04-6 that “a party’s need to know may be different at different stages of [a] proceeding,”⁷² language which the Staff has correctly stated “means something” — i.e., the language has meaning that may be applied in making rulings on need-to-know questions. Thus, for example, in our earlier need-to-know ruling on certain classified post-9/11 orders issued by the Commission, we found that a balancing of all relevant factors *at that time* led us to a ruling that allowing access to such classified information prior to admitting BREDL as a party was inappropriate under the circumstances.⁷³ The need-to-know standard that we applied at that stage of this proceeding, prior to admission of contentions, was — reasonably so — more stringent than that we now apply. But we agree with the Staff that, at this discovery stage of this proceeding, provision of the documents at issue is both appropriate and consistent with the discovery standard. And we find, at this stage, that defining the need-to-know “indispensability” standard by reference to the discovery standard, with appropriate balancing of the public safety and other factors unique to the case, is the proper course to follow — a

⁷⁰This standard was incorporated into the governing discovery rule in this proceeding, 10 C.F.R. § 2.740(b)(1), which defines the scope of discovery as allowing parties to

obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. . . . It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

⁷¹ See 10 C.F.R. § 2.740(c).

⁷² CLI-04-6, 59 NRC at 72.

⁷³ See 2/27/04 Need-to-Know Ruling at 9.

course which leads herein to our ruling that access to the documents in question is warranted.

In further explanation of our ruling herein, we reiterate that BREDL, in the contention to which the current discovery and creation of scenarios apply, is contesting Duke's request for exemption from certain requirements that — absent such exemption — will apply to Catawba should Duke go forward with the MOX lead test assembly proposal. BREDL contends that the exemptions cannot be justified, and in response Duke essentially challenges BREDL to construct a credible scenario that could produce theft of the MOX fuel if the exemptions are granted. BREDL has stated that it intends to identify potential weaknesses in Duke's defense strategy, if not a complete strategy leading to theft of MOX fuel while in the spent fuel pool. In order to make such identification, BREDL needs to make reasonably accurate assumptions about defensive strategies, attack teams, and personnel placements in the plant who might defend against intruders who enter the plant and then try to make their way to the spent fuel pool building.⁷⁴ The requested documents will permit BREDL to craft its scenarios with relevant information that clarifies governing regulatory requirements. Such scenarios will, as Dr. Lyman stated, be directed to theft or diversion of the MOX fuel, as well as diversionary tactics using radiological sabotage to draw the attention of security personnel away from the spent fuel pool building area. Thus, we find, the clarifying information in the documents at issue is "relevant," as well as "reasonably calculated to lead to the discovery of admissible evidence," and at the same time also "necessary" and "indispensable" to BREDL in the preparation of its case.

III. RULING

Based upon the preceding analysis, and pursuant to 10 C.F.R. § 2.905, we conclude that access to the classified documents in question shall be provided to BREDL counsel Diane Curran and BREDL expert Dr. Lyman, and also, as requested by Duke, to Duke counsel David Repka and Duke MOX Fuel Project Manager Stephen Nesbit, all of whom, we are informed, hold the appropriate clearances for such access. We conclude that granting such access to the documents will not, in light of clearances held by those to whom access will be provided, along with protective orders issued and security procedures followed in this proceeding to date, be inimical to the common defense and security.

⁷⁴ See also our discussion, *supra*, of our August 13 ruling, with regard to the various sorts of factors that may play into the creation of such scenarios.

Examination of such documents shall take place in a manner and location to be determined in consultation with NRC Staff.⁷⁵

We are mindful of the Commission's guidance in CLI-04-6 that when we make such a ruling, "it is imperative that access to safeguards documents be as narrow

⁷⁵We encourage the parties to work together in good faith to achieve what is ordered herein, and note again, as we have previously done, that such good faith cooperation on matters not legitimately and seriously in dispute may further the goal of going forward in this proceeding in an efficient and expeditious manner — just as we have, for example, made bench rulings (followed by timely issued written confirming orders) whenever possible, in order to move this proceeding forward as speedily as possible. Such an approach is necessary if we are to avoid, for example, the need to suspend discovery pending appropriate resolution of matters necessary to the completion of meaningful discovery, in which there are delays, as we have had to do on one occasion earlier in this proceeding. See Memorandum and Order (Confirming July 16, 2004, Bench Ruling Suspending Discovery Proceedings Pending Further Commission Guidance) (July 28, 2004) (unpublished) [hereinafter 7/28/04 Memorandum and Order]. The then-pending matter was the Staff's appeal of our ruling in LBP-04-13, 60 NRC 33 (2004) (subsequently affirmed by the Commission in CLI-04-21, 60 NRC 21 (2004)), finding, in a need-to-know context, that BREDL's expert, Dr. Edwin Lyman, possessed sufficient knowledge, skill, experience, training, and education to be able to assist and aid the Board in making our determinations on the security issues in this proceeding, and to render him an acceptable expert to examine, with his NRC-issued "L" level clearance, appropriate Safeguards Information. LBP-04-13, 60 NRC at 38.

Unfortunately, despite commendable efforts to proceed as expeditiously as possible even without resolution of all pertinent disputed matters (for example, BREDL's agreement to go forward in good faith with attempts at scenarios in the absence of resolution of all pending need-to-know matters, Tr. 3237 (SI)), we are constrained to observe that delays of the sort addressed in our 7/28/04 Memorandum and Order are still with us. One example of this that is particularly of concern because of the number of documents involved is an apparent misunderstanding between BREDL and the Staff regarding an August 13 BREDL request for various guidance documents, over whether BREDL was expected to await certain post-9/11 public availability determination processes of the Public Documents Room (PDR) prior to the Staff taking action itself to facilitate the speediest possible resolution of these issues with regard to a significant number of requested documents (the Staff citing the provision of 10 C.F.R. § 2.740(b)(1) that when items are "reasonably available" from the PDR it is sufficient response to provide mere reference to the document). Tr. 3312-14 (SI); see *id.* 3309-24 (SI); Letter from Diane Curran to Antonio Fernández (Aug. 13, 2004). The parties are now, at the encouragement of the Board, continuing their admirable attempts to work together to resolve all necessary need-to-know determinations as quickly as possible, but the potential for delay remains a cause for concern, in this as well as certain other matters.

One other matter that more directly involves the sole non-security-related contention in this proceeding, on which we held a hearing July 15-16, 2004, Tr. 2072-2708, is Duke's recent notification of certain calculated doses in a table in the Catawba Updated Final Safety Analysis Report (UFSAR) not being up to date, indicating that Duke was "working to provide . . . updated material by September 10, 2004." Letter from David A. Repka to Administrative Judges (Aug. 31, 2004), and Attached Letter from W.R. McCollum to NRC Document Control Desk (Aug. 31, 2004) at 2. Later, on September 15, 2004, Duke counsel provided notification that the "new target date" for provision of this information is September 17, 2004. E-mail from Anne Cottingham to service list for proceeding (Sept. 15, 2004). Although Duke has stated that this information is not material to certain matters at

(Continued)

as possible,” and it goes without question that the same applies to classified documents.⁷⁶ With regard to the two classified documents at issue, however, we conclude, after consultation with our security expert and advisor, Mr. Young, that it would not be possible to redact any of the information in the documents in any way that would be meaningful in light of the need we find on the part of BREDL for the information.

Finally, taking into consideration both Duke’s request, joined in by the Staff, that we certify questions related to this need-to-know request to the Commission for its determination,⁷⁷ and BREDL’s argument that we as the trier of fact should first make a determination before sending this to the Commission;⁷⁸ and given as well the security classification level of the documents in question, their significance, and the effect on the basic structure of this proceeding of providing access to them;⁷⁹ we refer our ruling to the Commission, pursuant to 10 C.F.R. §§ 2.730(f) and 2.786(g)(1), (2). We also stay the ruling, pursuant to 10 C.F.R. § 2.718(e), pending the Commission’s consideration and ruling.

issue on the non-security contention, the Staff and BREDL have not taken a position on the effect of the information until they have seen the documents, with the Staff indicating that its review of the updated material would take “a least two weeks, and that is a minimum.” Tr. 3083 (SI); *see id.* 3079-84 (SI). It is hoped that this problem will not negatively affect either the Board’s current deliberations and work on its initial decision on the non-security-related issues heard in July, or any ongoing preparation for a hearing on the security-related contention, but the ultimate impact on either is unknown at this time.

⁷⁶ CLI-04-6, 59 NRC at 75.

⁷⁷ Duke Request at 2; Staff Response at 1.

⁷⁸ Tr. 3182 (SI).

⁷⁹ *See* CLI-04-6, 59 NRC at 70.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Anthony J. Baratta
ADMINISTRATIVE JUDGE

Thomas S. Elleman
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 17, 2004⁸⁰

⁸⁰ Copies of this Memorandum and Order were sent this date by Internet e-mail to counsel for all parties.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Dr. Paul B. Abramson, Chairman
Ann Marshall Young
Dr. Richard F. Cole

In the Matter of

Docket Nos. 50-336-LR
50-423-LR
(ASLBP No. 04-824-01-LR)

DOMINION NUCLEAR CONNECTICUT, INC.
(Millstone Nuclear Power Station,
Units 2 and 3)

September 20, 2004

MEMORANDUM AND ORDER
(Denying Motion for Reconsideration and Request for Leave
To Amend Petition)

Before the Licensing Board is an August 9, 2004, motion filed by Connecticut Coalition Against Millstone (CCAM)¹ seeking reconsideration of LBP-04-15, 60 NRC 81 (2004), in which the Board denied CCAM's petition to intervene and request for hearing in the subject operating license renewal proceedings. In addition, CCAM requests leave to amend its petition to provide further support for its contentions. Both Licensee Dominion Nuclear Connecticut, Inc.

¹Connecticut Coalition Against Millstone Motion for Reconsideration and Request for Leave To Amend Petition (Aug. 9, 2004) [hereinafter CCAM Motion].

(“Dominion”) and the NRC Staff oppose the motion and request.² For the reasons set forth below, we deny both the motion for reconsideration and the request for leave to amend the petition.³

In our July 28 Memorandum and Order, we found each of the six contentions proffered by CCAM to be inadmissible under 10 C.F.R. § 2.309(f)(1) and denied CCAM’s intervention petition.⁴ In its August 9 motion, CCAM asserts that the Board’s conclusions “are not justified on the facts or the law” and that “considerations of the public interest compel reconsideration in light of the information” provided in affidavits and other documents delivered with or referenced by the motion.⁵

I. THE MOTION FOR RECONSIDERATION

In ruling on CCAM’s motion for reconsideration, we are bound by the standards set forth in 10 C.F.R. § 2.323(e), which require, in relevant part, that:

Motions for reconsideration may not be filed except upon leave of the presiding officer . . . , upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.

Additionally, the Commission has observed that a reconsideration motion should address the correction of an erroneous decision that resulted from a misapprehension or disregard of a critical fact or controlling legal principle or decision.⁶ Such a motion is not an opportunity to present new arguments or evidence, or a “new

² See Dominion’s Answer to CCAM’s Motion for Reconsideration and Request for Leave To Amend Petition (Aug. 18, 2004) [hereinafter Dominion Answer]; NRC Staff Response to Connecticut Coalition Against Millstone’s Motion for Reconsideration and Request for Leave To Amend Petition (Aug. 18, 2004) [hereinafter Staff Response].

³ We note that CCAM, contemporaneously with the filing of its motion for reconsideration, submitted a notice of appeal of LBP-04-15 to the Commission. See Notice of Appeal (Aug. 9, 2004). The Commission has since indicated that it is holding CCAM’s appeal in abeyance pending Board action on the Motion for Reconsideration. Commission Order (Aug. 23, 2004) at 1 (unpublished). Given this indication from the Commission that we should decide CCAM’s motion, we do not address the arguments of Dominion that we should not entertain CCAM’s motion because we no longer have jurisdiction over the case. See Dominion Answer at 1-2.

⁴ See LBP-04-15, 60 NRC at 90-97.

⁵ CCAM Motion at 2.

⁶ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 (2000).

thesis,”⁷ unless, as provided in the rule, the moving party can demonstrate that the new material’s availability could not reasonably have been anticipated and its consideration demonstrates compelling circumstances, such as a “clear and material error” that renders the decision invalid.

Dominion argues that CCAM has not demonstrated that the new material it has submitted relates to any concern that could not reasonably have been anticipated.⁸ The Staff likewise urges, among other things, that there is no showing by CCAM of “compelling circumstances . . . which could not have reasonably been anticipated, that render[] the decision invalid.”⁹ Nor, the Staff asserts, has CCAM shown any relationship between the safety issues it asserts and aging.¹⁰

Under the Commission’s regulations and case law, we find CCAM’s motion to be without merit.

Although CCAM did not seek leave to file its motion as plainly required by section 2.323(e),¹¹ in the following analysis we consider the motion as if it had satisfied the requirements of that section.

As has been pointed out by both Dominion and the Staff, and as is required under 10 C.F.R. § 2.323(e), CCAM has not shown any compelling circumstances that could not have reasonably been anticipated and which, as a result of consideration at this time would render our earlier decision invalid. Furthermore, as indicated above, CCAM neither pointed out any instance where we misapprehended or disregarded any controlling legal principle or critical fact that led to an erroneous decision, nor made any attempt to establish that any of the material it submitted with its motion addresses any of the requirements of 10 C.F.R. § 2.323(e).

To the contrary, through the exhibits accompanying its motion, CCAM primarily seeks to provide new material, with no attempt to establish that this material addresses any of the relevant regulatory requirements.¹² Instead, CCAM has, once again, merely presented additional supporting documentation for its previously filed contentions, along with bare conclusory assertions that our previous conclusions “are not justified on the facts or the law” and that “considerations of the public interest compel reconsideration in light of [that] information.”¹³

The material now proffered by CCAM includes: (1) the affidavits of two purported experts and four other individuals; (2) an August 5, 2004 report by one

⁷ See *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997).

⁸ See Dominion Answer at 2-3.

⁹ Staff Response at 3 (*quoting* 10 C.F.R. § 2.323(e)).

¹⁰ See *id.* at 5.

¹¹ Section 2.323(e) also limits the length of any motion for reconsideration to ten pages, rendering CCAM’s twelve-page motion procedurally defective in this respect as well.

¹² 10 C.F.R. § 2.323(e).

¹³ CCAM Motion at 2.

of the proffered experts relating to preexisting information; (3) a December 20, 1999, Connecticut Department of Environmental Protection (DEP) transmittal slip on which some handwriting is found; (4) a July 3, 2003, Questioned Document Opinion referring to the DEP transmittal slip; (5) an October 13, 2000, Emergency Authorization regarding a Millstone discharge to the Long Island Sound; (6) an August 28, 2003, DEP internal memorandum; (7) a September 17, 2003, Millstone outage listing report; a December 22, 2003, newspaper article; (8) a May 5, 2004, letter from the Staff to Dominion; and (9) two Notes to File from the NRC Environmental Section Project Manager dated May 24, 2004, and June 1, 2004. Some of these documents predate the initiation of these proceedings, and indeed some appear to have been in CCAM's possession for some time,¹⁴ but none were provided with CCAM's February 12 or March 22, 2004, petitions to intervene, or with its June 14 submittal of a proposed amended petition, or with its June 16 late-filed reply, or (with one questionable exception) at the June 30 oral argument. And CCAM has given no reason whatsoever, either in any of its filings or in its oral presentation, why — despite having numerous opportunities to do so — it chose not to provide this information until now. For us to consider this new material, CCAM must provide legitimate reasons why the material was not provided earlier, together with a sound explanation of how those reasons satisfy the standards set out above.

In addition to delivering this new material, CCAM asserts¹⁵ that a document that was referred to in an attachment to a “declaration”¹⁶ that was hand-delivered to the Board at commencement of the June 30 oral argument was “implicitly accepted by the Board despite its asserted lateness.”¹⁷ We in fact made no specific ruling on that declaration or its references, but implicitly found then, and repeat here, that the declaration (and its related attachments) did not provide sufficient support for the contention for which it was offered.¹⁸

¹⁴ See, e.g., Questioned Document Opinion (July 3, 2003) (referring to Dec. 20, 1999 DEP Bureau of Water Management Transmittal Slip); Tr. at 107 (apparently quoting from Memorandum from Vic Crecco, DEP Biologist, to Ozzie Inglese, DEP Water Bureau Chief (Aug. 28, 2003), at 2).

¹⁵ CCAM Motion at 3.

¹⁶ Declaration of Michael Steinberg (June 29, 2004) [hereinafter Steinberg Decl.].

¹⁷ CCAM Motion at 3.

¹⁸ The reference in question is to a “Connecticut Tumor Registry,” which was not delivered to us, but was merely identified in the attachment to the declaration through instructions regarding how to seek it out on the Internet. Having made such a search, we located a publication entitled “Cancer Incidence in Connecticut Counties, 1995-99,” with a release date of January 2004, which simply reports, without making any conclusions or drawing any inferences whatsoever, bare statistical information regarding cancer incidence rates for various types of cancers in the various Connecticut counties. Any conclusions such as are postulated by CCAM and Mr. Steinberg would require substantial additional information and evaluation by experts in the relevant disciplines, which have
(Continued)

Regarding CCAM's new materials, including the declaration of Ernest J. Sternglass and the affidavit and report of Joseph J. Mangano, CCAM has offered no reason whatsoever why they could not have been provided sooner.¹⁹ Given that the first petition filed by CCAM was submitted in February 2004, and that the adoption of the Agency's revised procedural rules resulted in an April 2004 deadline for its petition, CCAM had ample time to submit, in a timely manner, all of its materials that have been late-filed in this case, including the documents now submitted.

In sum, we find that: (a) CCAM has failed to properly petition this Board to submit its motion for reconsideration; (b) even if we presume that such a request had been appropriately made, CCAM has failed to satisfy the requirements of 10 C.F.R. § 2.323(e) governing reconsideration. We therefore deny CCAM's motion for reconsideration.

II. THE MOTION TO AMEND

We now examine whether CCAM's new materials, when taken together with CCAM's petition to amend, fulfill the requirements for amendment of its petition and contentions. Requests to amend contentions are governed by 10 C.F.R. § 2.309(f)(2), which provides:

[C]ontentions may be amended or new contentions filed after the initial filing only with leave of the presiding officer upon a showing that —

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

Nowhere in its filing does CCAM address any of these criteria. For example, CCAM has not even attempted to demonstrate that the information it now submits, including that contained in the Mangano affidavit and report or the Sternglass declaration, was "not previously available," or that it is "materially different

not been presented, and therefore, even had the Board determined that this submission was timely, it fails, as stated in our July 28 Memorandum and Order, to satisfy the requirements of 10 C.F.R. § 2.309(f)(1).

¹⁹Although the Mangano Report is dated August 5, 2004, and the Sternglass Declaration and Mangano Affidavit are dated August 8 and 9, 2004, respectively, the materials presented therein are not new and the information in both the affidavits and the Mangano Report address the same issues asserted since the beginning of this proceeding.

than information previously available,’’ or that as a result of earlier unavailability, CCAM’s present request to amend has been timely submitted.

As the Commission has very recently reemphasized, “[the NRC] contention admissibility and timeliness requirements ‘demand a level of discipline and preparedness on the part of petitioners,’ who must examine the publicly available material and set forth their claims and the support for their claims at the outset.”²⁰ In the instant circumstances, CCAM has failed to demonstrate even a modicum of the necessary discipline and preparedness. Therefore, CCAM’s motion to amend its petition must be denied.²¹

In this instance, CCAM knew about the Dominion application in February 2004, and it was not required by the Commission to file its petition until April. As previously indicated, this provided ample time to prepare an effective petition to intervene or to provide sound legal reason why this was not done. Having done neither, CCAM cannot now be heard to complain of our earlier findings, nor of our current findings that it has complied with neither the relevant standards for reconsideration or those for amendment of its petition.

CCAM does, however, continue to have the right to bring its concerns before the Commission under 10 C.F.R. § 2.206, and, if CCAM believes that revision of any NRC standards is necessitated, it may file a rulemaking petition with the Commission under 10 C.F.R. § 2.802. Finally, we note generally that, with respect to this proceeding, the careless disregard of relevant standards and procedures by CCAM counsel, and the disorganized manner in which the CCAM information has been presented, ill serves the interests of CCAM’s members or those of other members of the public who might have a like interest.

In conclusion, for all the reasons set forth above, CCAM’s August 9, 2004, motion for reconsideration and its request for leave to amend its petition are denied.

²⁰ *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004) (quoting *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003)).

²¹ Even if we were to treat CCAM’s request as late-filed contentions, no attempt has been made to address the late-filing criteria of 10 C.F.R. § 2.309(c), and thus CCAM could not prevail under this approach either.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD²²

Dr. Paul B. Abramson, Chairman
ADMINISTRATIVE JUDGE

Ann Marshall Young
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Rockville, Maryland
September 20, 2004

²² Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for all participants.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR MATERIAL SAFETY AND SAFEGUARDS

Jack R. Strosnider, Director

In the Matter of

(License No. NYDOL 1944-1879)

RADIAC RESEARCH CORPORATION

September 15, 2004

The U.S. Nuclear Regulatory Commission (NRC) received a petition pursuant to Title 10 of the *Code of Federal Regulations*, section 2.206, dated November 4, 2003, from Michael Gerrard of Arnold and Porter, representing Neighbors Against Garbage (the Petitioner). The Petitioner requested that NRC immediately revoke, suspend, or modify the New York State Department of Labor (NYDOL) license held by Radiac Research Corporation under NRC's authority pursuant to the Atomic Energy Act of 1954 (AEA), as amended to protect the common defense and security. The basis for this request was that Radiac's radioactive waste storage operation adjoining the Radiac hazardous waste transfer and storage operation in Brooklyn, New York, represented a significant risk to the common defense and security.

The final Director's Decision, issued on September 15, 2004, presented the NRC Staff's conclusion that the quantities and types of radionuclides possessed by Radiac Research Corporation do not represent a significant risk to the common defense and security.

DIRECTOR'S DECISION UNDER 10 C.F.R. § 2.206**I. INTRODUCTION**

By letter dated November 4, 2003, Michael Gerrard of Arnold and Porter, representing Neighbors Against Garbage (the Petitioner), filed a petition pursuant to Title 10 of the *Code of Federal Regulations*, section 2.206. The Petitioner requested that the U.S. Nuclear Regulatory Commission (NRC) immediately

revoke, suspend, or modify the New York State Department of Labor (NYDOL) license held by Radiac Research Corporation under the NRC's authority pursuant to the Atomic Energy Act of 1954 (AEA), as amended to protect the common defense and security.

The basis for this request was that Radiac's radioactive waste storage operation adjoining the Radiac hazardous waste transfer and storage operation in Brooklyn, New York, represented a significant risk to the common defense and security.

In a letter dated December 17, 2003, the NRC informed the Petitioner that the request for immediate action was denied because the limits on types and activity of radioactive material that Radiac was authorized to possess were below the levels of concern. The letter added that the issues identified in the petition would be reviewed under 10 C.F.R. § 2.206 and that this review would be conducted by the Office of Nuclear Material Safety and Safeguards (NMSS).

The Petitioner and the Licensee both participated in a meeting with the NMSS Petition Review Board (PRB) on February 20, 2004. At this meeting, the Petitioner provided additional information concerning the bases for the petition, and the Licensee provided additional information concerning its response to the petition. A concerned citizen and a representative of the Honorable Nydia M. Velasquez, U.S. House of Representatives, provided statements. Two other concerned citizens present at the public meeting later provided written statements via e-mail on February 27, 2004. The written presentations of the parties, as well as the transcript of this meeting, have been treated as a supplement to the petition and are available in the Agencywide Documents Access and Management System (ADAMS), which provides text and image files of the NRC's public documents. These documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at <http://www.nrc.gov/reading-rm.html>. The ADAMS Accession Numbers for the packages containing all the publicly available documents regarding this petition are ML041040731 and ML041240485. If you do not have access to ADAMS or there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to pdr@nrc.gov.

In a letter dated December 10, 2003, addressed to the Honorable Nils J. Diaz, Chairman, NRC, the Honorable Nydia M. Velasquez, U.S. House of Representatives, requested the NRC to investigate the risk of an accident or terrorist event at the Radiac facility. By letter dated February 10, 2004, Chairman Nils J. Diaz informed Congresswoman Velasquez that the NRC is reviewing similar common defense and security issues identified in the Neighbors Against Garbage 2.206 petition and that she would be informed of the results of that review.

In a letter dated February 19, 2004, addressed to the Honorable Nils J. Diaz, Chairman, NRC, Mr. Vincent V. Abate, Chairman, Community Board No. 1,

representing Brooklyn, New York, presented information pertinent to the petition. By letter dated March 30, 2004, the PRB informed Mr. Abate that the information would be considered as a supplement to the petition.

In letters dated February 27, 2004, the Petitioner and Licensee provided supplemental information concerning the petition. The Licensee's letter contained a request to reject the petition based on procedural issues. By letter dated April 27, 2004, the NRC Staff informed the Petitioner and the Licensee that the Licensee's request to reject the petition was denied, that the PRB accepted the petition for review because it satisfied the criteria under 10 C.F.R. § 2.206 and Management Directive 8.11, and that the NRC Staff would review the technical merits of the petition.

In a letter dated March 18, 2004, the Licensee provided supplemental information concerning the petition. In a letter dated April 12, 2004, the Petitioner provided supplemental information concerning the petition.

The NRC sent a copy of the proposed Director's Decision to the Petitioner and to the Licensee for comment on June 14, 2004. The Petitioner responded with comments on July 13, 2004. The licensee did not provide comments. The comments and the NRC Staff's response to them are attachments (unpublished) to this Director's Decision.

II. DISCUSSION

As noted in the Introduction, the Petitioner requests that the NRC take action to revoke, suspend, or modify the NYDOL license held by Radiac. The Petitioner identifies that, while health and safety concerns remain under the regulatory authority of NYDOL, the NRC retains regulatory authority for common defense and security. The NRC emphasized in the July 12, 2003, letter from Martin J. Virgilio, former Director, Office of Nuclear Material Safety and Safeguards, to Mr. Michael B. Gerrard, Arnold and Porter, representing the Neighbors Against Garbage, that public health and safety concerns are under the regulatory authority of NYDOL and, therefore, the NRC cannot respond to any public health and safety concerns raised by the Petitioner.

As bases for its requested actions, the Petitioner raised a number of general and specific concerns related to the risks from operation of Radiac's radioactive waste storage facility. For the purpose of addressing the specific concerns, the NRC Staff has grouped them under the two general concerns raised by the Petitioner. The two general concerns are risk to the common defense and security and public health and safety. The NRC will only review those issues related to its authority under common defense and security.

In response to the terrorist attacks on September 11, 2001, the NRC has been thoroughly reevaluating the security of radioactive materials under its respon-

sibility for common defense and security. Based on the joint U.S. Department of Energy (DOE) and NRC studies, and working with the International Atomic Energy Agency on the categorization of sources, specific radionuclides and quantities of those radionuclides that would represent a common defense and security concern have been identified. Using those radionuclides and quantities as screening levels, the NRC has identified NRC and Agreement licensees who have possession limits exceeding those screening levels. The NRC has evaluated the practices of those licensees and the physical and chemical form of the radionuclides the licensees actually possess to develop a graded approach in prioritizing and identifying high-risk categories of licensees. Orders imposing additional security measures for the irradiators and manufacturers/distributors of radionuclides of concern (facilities that pose the highest risk and that, therefore, are of the highest priority categories) have been issued to NRC Licensees and Agreement State Licensees. Under the graded approach, radioactive waste facilities such as Radiac will be reviewed after higher-risk facilities. However, specific concerns identified by the Petitioner required the NRC to specifically review operations at the Radiac facility outside of the ongoing review process. The specific concerns under the general concern of risk to the common defense and security, and the evaluation of these concerns by NRC staff, are as follows:

1. *Concern:* The Petitioner states that co-location of the hazardous waste facility and radioactive waste facility makes the facilities an attractive target for terrorists.

Evaluation: The Petitioner's concern is that with the adjoining hazardous waste facility, terrorists could easily start a fire in the hazardous waste facility with a fire bomb or by other means. The Petitioner believes that a fire starting in the hazardous waste facility would be violent and intense because of the flammable material in the hazardous waste storage facility. Inadequate fire protection would then allow the fire to spread to the radioactive waste facility. The Petitioner used consequence analyses by its consultants to indicate serious physical and psychological consequences from such a fire. The Petitioner believes that the ease of attack and the resulting more severe consequences make the facility an attractive target for terrorists.

The NRC Staff has reviewed the Petitioner's claims in its supplemental material including the affidavit from its fire protection expert and the fire consultant's report. The NRC Staff did not review the supplemental material to judge the merits in the claim that there is a chance of a severe fire in the hazardous waste material. Rather, the NRC Staff evaluated the effects of such a fire in the radiological waste facility. The NRC has not established what consequences from the release of radioactive

material would rise to common defense and security concerns. Rather, the NRC has identified certain radionuclides and quantities that could cause common defense and security concerns according to the graded approach, discussed above. The NRC Staff did review the methodology used by the Petitioner and identified some assumptions that would result in overestimating consequences. The Petitioner used the methodology in NUREG-1140, "A Regulatory Analysis on Emergency Preparedness for Fuel Cycle and Other Radioactive Material Licensees." NUREG-1140 is a guidance document that presents a methodology for calculating doses from accidental releases and is frequently referenced in the supplemental material submitted by the Petitioner as a standard to which it compared its assumptions and calculations. The Petitioner suggests that the hazardous material fire would result in larger release fractions than predicted in NUREG-1140, because the fire would be intense and could result in explosions.

The NRC Staff considers that the intensity and violence of a fire in the hazardous waste facility may increase the likelihood of the fire spreading into the radioactive waste facility; however, because of its conservative assumptions, NUREG-1140 would still bound the magnitude of a release from such a fire. The conservative assumptions cited in NUREG-1140 to calculate the release fractions include: using the entire licensed inventory finely divided and placed on a large amount of combustible material, no credit given for sprinkler systems washing out airborne particles or shortening the duration of the fire; no credit given for firefighting efforts to stop the fire before it reaches the radioactive material; and no credit given for reduction in the amount of radioactive material released because of that material adhering to the building walls, ceilings, and other surfaces within the building. Even under the severe case of the Petitioner's scenario, the release of radioactive material would be less than that evaluated in NUREG-1140. There is a wet pipe sprinkler system in the radioactive waste facility, firefighters would probably already be on the scene fighting the hazardous waste facility fire, and there would be a reduction in the amount of radioactive material released because of that material adhering to surfaces within the building. The NRC Staff concludes that any potential release from the radiological waste facility caused by a fire started in the adjacent hazardous waste facility would be bounded by the NUREG-1140 scenarios resulting in exposures less than 1 rem (10 mSv) (*see* Concern 6 regarding significance of 1 rem (10 mSv)). Therefore, the NRC Staff does not assign a greater than normal attraction for the facility as a terrorist target, based on the consequences of a potential release.

The Petitioner also implies that the co-location of the facilities causes heightened public concern, and therefore, the facilities are attractive targets. The Petitioner believes that terrorists would capitalize on that fear. The statements by members of the public at the public meeting, and submitted by e-mail, attest to the fears of the local residents. The NRC's mission is to regulate the nation's civilian use of byproduct, source, and special nuclear material to ensure adequate protection of public health and safety, to promote common defense and security, and to protect the environment. One way the NRC performs that mission is through scientific and engineering evaluations of licensed activities. While psychological fear exists, the NRC can only evaluate the technical merits of the common defense and security issues that may contribute to the concerned citizens' fears and openly and accurately communicate those findings.

2. *Concern:* The Petitioner states the consequences for a fire at Radiac, based on NUREG-1140, are underestimated because NUREG-1140 does not consider a large number of people living in close proximity to such a licensed facility.

Evaluation: The NRC acknowledges the large population near the Radiac Research Corporation's facility in Brooklyn, NY. However, predicted consequences, based on NUREG-1140, would not underestimate actual consequences. Rather, consequences would be overestimated because of the following factors acknowledged in NUREG-1140:

- a. As discussed in Concern No. 1, the fraction of material released, according to NUREG-1140, is overpredicted;
- b. NUREG-1140 assumed a ground-level release with no plume buoyancy, which would result in little dispersion of the material and, for individuals near the facility, exposure to relatively high concentrations. Realistically, material released in a fire would rise above the facility (and nearby population) in a heated buoyant plume of air. This would provide greater opportunity for dispersion before the air cools and the material settles to the ground much farther away (several hundred meters). Consequently, due to exposures to lower concentrations of material, individual radiation exposures would be much less than predicted; and
- c. Release of toxic fumes from a fire starting in the hazardous waste facility, under the Petitioner's scenario, could result in evacuation or other protective measures in downwind areas. Also, a natural response for individuals is to move away from irritation that might

be caused by the toxic fumes. Both actions would limit residents' exposure to radioactive material in a following plume.

3. *Concern:* The Petitioner cites the U.S. Department of Justice's and other government sources' statements regarding the general heightened threat of terrorist attacks against hazardous material facilities and others.

Evaluation: The Petitioner accurately quotes other government agencies' statements about the general threat of terrorist attacks. However, a general increased threat of terrorist attacks, alone, is not a basis for revoking, suspending, or modifying a license. The NRC Staff recognizes that the country, in general, is on a heightened state of alert due to the elevated terrorist threat and has issued security advisories to NRC and Agreement State licensees. These advisories provide recommendations for increasing licensees' awareness of terrorist threats and actions to reduce vulnerabilities. The Licensee has adopted those recommendations they deemed appropriate for their facility.

4. *Concern:* The Petitioner states that the security at the facilities is poor.

Evaluation: The Petitioner's concern is that the facility has poor security, which increases the risk of terrorist attack by providing an easy or more attractive target. The Petitioner presented photographs showing graffiti and open, unmonitored doors, and provided statements from local residents about the poor security. The NRC Staff acknowledges that the ability of the Petitioner to encroach upon the Licensee's property and take photographs without being deterred raises security questions regarding unauthorized access to licensed material. However, subsequent to the Petitioner's photographs, the Licensee enhanced security measures. The Petitioner also states that it would be easy to park or drive a vehicle bomb near the Radiac facilities. The NRC visited the facility and reviewed the Licensee's security measures. The NRC Staff observed that the Licensee has a means to provide physical security, a means for intrusion detection and response, and is in the process of implementing a security plan that will provide additional security measures. Based on the observations and information gathered from the site visit, the NRC has found security at the facility adequate to deter and detect attempts to gain unauthorized access to licensed materials.

5. *Concern:* The Petitioner states that the NRC's jurisdictional decision should be based on the Licensee's possession limit and not actual inventories.

Evaluation: The NRC has granted this, in part, by its decision to review this petition. As noted in Concern No. 1, the NRC has been using

possession limits to identify categories of licensees that warrant further review for additional security measures to address issues under NRC's common defense and security jurisdiction.

6. *Concern:* The Petitioner states the Licensee's NYDOL license possession limits are a risk to the common defense and security.

Evaluation: The Petitioner presents several issues to reach this conclusion. The first issue is that the license's possession limits are different than limits identified by the NRC in NUREG-1140. NYDOL, as the regulatory authority, established limits and issued the license to Radiac based on its determination that public health and safety were protected. NYDOL regulations establishing the possession limits are compatible with NRC regulations. While the Petitioner identifies differences between the license possession limits and the limits under NUREG-1140, the possession limits in license condition 19 are the same as the limits in NRC's regulation, 10 C.F.R. § 30.72, Schedule C. The lack of specific limits in the license for Th-232, Ac-227, and gram limits for plutonium is because Th-232 is source material licensed under Part 40, it has a low specific activity, and it is very hard to disperse; Ac-227 is very scarce; and plutonium is special nuclear material licensed under 10 C.F.R. Part 70. To provide a limit for plutonium, NYDOL established a limit of 200 grams, again, compatible with NRC regulations.

The second issue is that releases involving radioactive material at the Licensee's possession limits can lead to doses greater than 1 rem (10 mSv), a dose the Petitioner states is significant. The 1 rem (10 mSv) is a dose level for which NYDOL regulations indicate it is reasonable to require the preparation of an emergency plan that would help to minimize exposures from an accidental release and protect public health and safety. The Petitioner fails to demonstrate how a 1-rem (10-mSv) dose to an individual demonstrates a threat to the common defense and security.

The Petitioner's supplemental information proposes that with the NYDOL possession limits and a methodology based on NUREG-1140, consequences from a fire or explosion would cause common defense and security concerns. The Petitioner's conclusions are based on several HOTSPOT and AIRDOSE calculations predicting releases of I-125, Th-232, Pu-238, and Pu-239 resulting in doses greater than 1 rem.

The NYDOL reviewed similar Petitioner scenarios for the same spectrum of radionuclides for health and safety concerns, as documented in a letter dated December 24, 2003, from Kevin E. Jones, Senior Attorney,

NYDOL, to Michael B. Gerrard, Arnold and Porter. NYDOL concluded that Licensee's possession limits ensured public health and safety and that consequences from radionuclide releases from the Licensee would be bounded by NUREG-1140.

The NRC Staff reviewed the Petitioner's calculations in the supplemental information in the context of common defense and security and to understand why the Petitioner's calculated consequences were greater than those expected using NUREG-1140 methodology. The NRC Staff found that assumptions used in those calculations significantly overestimate the potential consequences. Examples include using release rates larger than calculated by NUREG-1140, explosions in a building being more dispersive than a fire, and 50 pounds of explosive being able to disperse 400,000 pounds of Th-232 (20 curies of that low-specific-activity radionuclide). The assumptions used in NUREG-1140 are still considered bounding, and the parameters used have been calculated from experimental data by national laboratories in studies referenced in NUREG-1140.

The NRC Staff reviewed current and historic inventories to determine if the quantities that the Licensee possess have exceeded quantities that would cause common defense and security concerns. As mentioned previously, the NRC has undertaken a thorough reevaluation of security measures for radioactive materials. Based on the joint DOE and NRC studies, and working with the International Atomic Energy Agency on the categorization of sources, specific radionuclides and quantities of those radionuclides that would represent a common defense and security concern have been identified. Using those radionuclides and quantities as screening levels, the NRC has identified NRC and Agreement licensees who have possession limits exceeding those screening levels. To determine any need for additional security measures, the NRC has evaluated the practices of those licensees and the physical and chemical form of the radionuclides the licensees actually possess. The NRC Staff has evaluated the Licensee's current and historic inventories and determined that the Licensee does not possess radioactive material that represents a risk to the common defense and security, and that current security measures are adequate.

7. *Concern:* The Petitioner states that the Licensee's possession limits would allow the Licensee to possess at least two Greater than Class C (GTCC) sealed sources and that these type of sources have been identified by the General Accounting Office (GAO) as posing a threat to security.

Evaluation: The Petitioner's reference to the GAO statement is accurate. The threat posed by GTCC sealed sources is that some of these sources are unwanted sources, with limited security. Theft or abandonment is a concern if a terrorist group were to take the sealed source and specially configure it into a dispersable "dirty bomb" that could spread contamination over a significant area. However, the Petitioner's scenario of a fire or even a vehicle bomb would not result in such a release from these sealed sources. In addition, the Licensee's security measures would provide adequate security from theft or abandonment for those sources.

As previously mentioned, the July 12, 2003, letter from Martin J. Virgilio, former Director, Office of Nuclear Material Safety and Safeguards, to Mr. Michael B. Gerrard, Arnold and Porter, representing the Neighbors Against Garbage, highlighted that public health and safety concerns are under the regulatory authority of NYDOL. In 1962, the Commission entered into an agreement with the State of New York where the NRC relinquished and the State assumed regulatory authority for certain radioactive material. Therefore, NRC Staff has determined the following specific concerns are health and safety issues that remain under the regulatory authority of NYDOL or other agencies and will not be considered as part of the petition but forwarded to the other regulatory agencies:

8. *Concern:* The Petitioner states that, as far as it can tell from responses to Freedom of Information Act requests and response to its letters to NYDOL, the risk of an event at the hazardous waste store causing release of radioactive materials was not considered at all during the renewal process for the State radioactive material license.
9. *Concern:* The Petitioner states that the NRC has denied licenses based on accident scenarios demonstrating less than a one-in-one million chance of the accident. Specifically cited is a March 10, 2003, NRC Licensing Board denial of an application for an NRC license to build and operate a facility for storing spent fuel rods (*Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-03-4, 57 NRC 69 (2003)¹).

¹ This case concerned an NRC licensing proceeding rather than a New York licensing proceeding and, therefore, is not directly applicable to this petition.

10. *Concern:* The Petitioner states that a search of records for both the hazardous waste and radioactive waste facilities show a history of violations.
11. *Concern:* The Petitioner states the radioactive waste facility is not needed to serve New York.
12. *Concern:* The Petitioner states that isotope tracking is lacking and may not be adequate to ensure possession limits are not exceeded.
13. *Concern:* The Petitioner states that fire prevention in the co-located Radiac Hazardous Waste Facility is inadequate. Specifically, Radiac hired a fire consultant who determined that the hazardous waste facility sprinkler system is inadequate to prevent a pool fire resulting from the failure of a 55-gallon drum of heptane, using a worst-case scenario dictated by the New York State Department of Environmental Conservation.
14. *Concern:* The Petitioner introduces the chemical consequences from a fire in the hazardous waste facility into both general concerns regarding public health and safety and common defense and security.

III. CONCLUSION

We have denied the request of the Petitioner to revoke, suspend, or modify the NYDOL license held by Radiac Research Corporation under the NRC's authority to protect the common defense and security.

We have granted, in part, the request of the Petitioner to consider possession limits in determining NRC common defense and security jurisdiction by consideration of its petition. This is consistent with the NRC's post-September 11, 2001 reevaluation of security of radioactive materials under the NRC's responsibility for common defense and security (*see* Concern Nos. 1 and 5).

As provided in 10 C.F.R. § 2.206(c), a copy of this Director's Decision will be filed with the Secretary of the Commission for the Commission to review. 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

Jack R. Strosnider, Director
Office of Nuclear Material Safety
and Safeguards

Dated at Rockville, Maryland,
this 15th day of September 2004.

Attachments (not published):

1. Petitioner's Comments on the Proposed Director's Decision
2. NRC Staff Response to the Petitioner's Comments

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 30-07710-CO
(Confirmatory Order
Modifying License)

STATE OF ALASKA DEPARTMENT
OF TRANSPORTATION AND
PUBLIC FACILITIES

October 7, 2004

The Commission reverses the Licensing Board's grant of an intervention petition that challenged a confirmatory order modifying the materials license of the State of Alaska Department of Transportation and Public Facilities.

ENFORCEMENT ACTIONS: SCOPE OF PUBLIC PARTICIPATION

Under a longstanding Commission policy upheld in *Bellotti v. NRC*, petitioners may not obtain Licensing Board hearings to challenge NRC Staff enforcement orders as too weak or otherwise insufficient. *See Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983), *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982). The only issue in an NRC enforcement proceeding is whether the order should be sustained. Boards are not to consider whether such orders need strengthening.

RULES OF PRACTICE: STANDING TO INTERVENE;
INTERVENTION

Pursuant to the Atomic Energy Act § 189a, 42 U.S.C. § 2239(a), to obtain a hearing a petitioner must demonstrate "an interest affected by the proceeding" —

i.e., standing — and submit at least one admissible contention. *See FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157 (2004).

RULES OF PRACTICE: STANDING TO INTERVENE

To establish standing, a petitioner must show: “(1) an ‘injury in fact’ (2) that is fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision.” *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 57 n.16 (2004), citing *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994).

RULES OF PRACTICE: STANDING TO INTERVENE

If a petitioner requests a remedy that is beyond the scope of the hearing, then the hearing request must be denied because redressability is an element of standing.

**ENFORCEMENT ACTIONS: SCOPE OF PUBLIC PARTICIPATION;
AGENCY DISCRETION**

For an enforcement order, the threshold question — related to both standing and admissibility of contentions — is whether the hearing request is within the scope of the proceeding as outlined in the order. *See Davis-Besse*, CLI-04-23, 60 NRC at 157. The Commission has the authority to define the scope of the hearing, and this authority includes limiting the hearing to the question whether the order should be sustained. *See Bellotti*, 725 F.2d at 1381. *See also Maine Yankee*, CLI-04-5; *Davis-Besse*, CLI-04-23; *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980).

ENFORCEMENT ACTIONS: SCOPE OF PUBLIC PARTICIPATION

The petitioner seeks rescission of the order because he speculates that other remedies would be more effective. This is really a request to impose either different or additional enforcement measures — in contravention of Commission doctrine in enforcement actions, as approved in *Bellotti*.

ENFORCEMENT ACTIONS

RULES OF PRACTICE: STANDING TO INTERVENE

To decide whether an enforcement order should be upheld, the pertinent time contrast is between the petitioner’s position with and without the order in question

— not between the disputed order and a hypothetical substitute order, whether or not that substitute order be, in the petitioner’s estimation, an improvement. A petitioner simply is not adversely affected by a confirmatory order that improves the safety situation over what it was in the absence of the order.

RULES OF PRACTICE: STANDING TO INTERVENE

Without any injury attributable to a confirmatory order itself, a petitioner does not have standing. *See Maine Yankee*, CLI-04-5, 59 NRC at 57 n.16.

ENFORCEMENT ACTIONS: SCOPE OF PUBLIC PARTICIPATION

Where the licensee has already agreed to an enforcement order by the time a notice of hearing is published, a challenge to the facts, as stated in the order, by a nonlicensee is not cognizable.

ENFORCEMENT ACTIONS

The critical inquiry under *Bellotti* in a proceeding on a confirmatory order is whether the order improves the licensee’s health and safety conditions. If it does, no hearing is appropriate.

MEMORANDUM AND ORDER

This proceeding arises from a challenge to a confirmatory order modifying the materials license of the State of Alaska Department of Transportation and Public Facilities (“ADOT”). A split Licensing Board, with Judge Bollwerk dissenting, granted the intervention petition of Robert Farmer, and the NRC Staff and ADOT appealed that decision. We agree with Judge Bollwerk’s dissent and reverse the Board’s order.

I. BACKGROUND

ADOT holds an NRC license to possess and use certain licensed material in portable gauging devices. On March 15, 2004, the NRC Staff simultaneously issued a Notice of Violation¹ and a Confirmatory Order Modifying License (Effec-

¹ See Notice of Violation (EA-03-126) (Mar. 15, 2004).

tive Immediately)² to ADOT. The Notice of Violation listed twelve discriminatory actions ADOT allegedly took against Farmer, the Statewide Radiation Safety Officer, between 1999 and 2002 in retaliation for his raising safety concerns about radiation exposures to ADOT employees. The Staff found the violation to be “Severity Level II,” or moderately significant.³ Rather than contest the NRC Staff’s enforcement action, ADOT agreed to a Confirmatory Order requiring ADOT to take actions to ensure compliance with 10 C.F.R. § 30.7, the Commission’s rule regarding employee protection from discrimination for engaging in certain protected activities.⁴ To ensure that ADOT has established and will maintain a Safety Conscious Work Environment, the Confirmatory Order required ADOT to take a variety of planning and training actions which focus on three goals:

- (1) ensuring that ADOT[]’s internal policies and procedures establish and will support a Safety Conscious Work Environment by providing for a review of these policies and procedures by individuals who are independent of ADOT[] and who have subject-matter expertise; (2) developing a plan to conduct training of ADOT[] employees and their supervisors and managers on NRC’s Employee Protection regulations and on establishing a Safety Conscious Work Environment; and (3) developing a long-term plan for maintaining a Safety Conscious Work Environment that includes culture surveys and annual refresher training.⁵

Pursuant to 10 C.F.R. § 2.202,⁶ the Commission invited any person adversely affected by the Confirmatory Order to request a hearing within 20 days and limited the issue to be considered at such a hearing to “whether this Confirmatory

² See In the Matter of State of Alaska Department of Transportation & Public Facilities, Anchorage, AK Confirmatory Order Modifying License (Effective Immediately), 69 Fed. Reg. 13,594 (Mar. 23, 2004) (“Confirmatory Order”).

³ The designation Severity Level I is given to the most significant violations and Severity Level IV to the least significant.

⁴ The so-called “whistleblower” rule describes protected activities as including, but not limited to the following: (i) providing the Commission or the employer information about alleged violations related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act; (ii) refusing to engage in any practice made unlawful by those two statutes; (iii) requesting the Commission to institute action against the employer for the enforcement of these requirements; . . . (v) assisting or participating in (or being about to assist or participate in) these activities. See 10 C.F.R. § 30.7(a)(1). A violation by a Commission licensee may be grounds for “(1) Denial, revocation, or suspension of the license. (2) Imposition of a civil penalty on the licensee . . . (3) Other enforcement action.” 10 C.F.R. § 30.7(c).

⁵ 69 Fed. Reg. at 13,595.

⁶ NRC’s new adjudicatory rules, which became effective on February 13, 2004, apply to this proceeding. See Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004).

Order should be sustained.”⁷ Farmer and the Alaska Forum for Environmental Responsibility (AFER) filed a joint petition requesting a hearing; both ADOT and the NRC Staff opposed the petition. The Licensing Board unanimously denied the petition as to AFER, but a majority of the Board granted the petition as to Farmer and admitted one of his contentions.⁸

In his request for hearing, Farmer asked that the Confirmatory Order not be sustained because he believes that it does not address his interests or protect the public health and safety from further harm.⁹ Farmer argued that “should the agreed-upon Confirmatory Order be rescinded, the Notice of Violation will revert to the posture in which the Licensee must respond to the Violations in a manner appropriate to remedy the findings.”¹⁰ Farmer sought to replace or supplement the order with civil penalties and enforcement actions against individual managers. Specifically, his Contention 1 states:

The agreed upon Confirmatory Order should not be sustained since, even if fully implemented, it does not provide reasonable assurance to the Commission that the health and safety of the public will be protected, in that the Order does not address the illegal retaliatory actions and behaviors of Licensee managers, the failure of the managers to address employee concerns about safety and compliance, the consequences of those behaviors on the remainder of the workforce, and the impact of Licensee management on the freedom of employees to raise concerns without fear of reprisals.¹¹

Farmer also contests the factual basis of the Confirmatory Order. His Contention 2 states:

The agreed upon Confirmatory Order should not be sustained since it is not based upon an accurate assessment and analysis of all the facts available to the Commission, or on a correct interpretation and application of the legal requirements of 10 C.F.R. 30.7 and/or the May 14, 1996 Policy Statement, *Freedom of Employees in the Nuclear Industry to Raise Safety Concerns*, 61 FR 24336.¹²

The majority of the Board found Farmer to have standing and admitted Contention 2 as raising a legitimate factual question for hearing.¹³ The Board rejected

⁷ 69 Fed. Reg. at 13,596.

⁸ See *State of Alaska Department of Transportation and Public Facilities*, LBP-04-16, 60 NRC 99 (2004).

⁹ Request for Hearing at 1 (Apr. 9, 2004).

¹⁰ *Id.* at 9.

¹¹ *Id.* at 10.

¹² *Id.*

¹³ LBP-04-16, 60 NRC at 117-18.

Contention 1 as inconsistent with *Bellotti v. NRC*,¹⁴ where the Court of Appeals upheld an NRC practice not to permit intervenors to seek enforcement relief more extensive than what the NRC Staff had ordered.¹⁵ In dissent, Judge Bollwerk argued that *Bellotti* bars Contention 2 as well because, at bottom, Farmer seeks additional enforcement relief.¹⁶

On appeal the Staff argues that the Board's ruling was legally incorrect and will result in an improper exercise of Board power over enforcement actions that are within the discretion of the Staff. For its part, ADOT quotes the dissenting opinion and says the Confirmatory Order requires "'additional or better safety measures' that relate to the subject matter of Mr. Farmer's concerns about employee protection, which . . . seemingly ends further adjudicatory inquiry regarding the order's sufficiency."¹⁷ ADOT also points to its aggressive implementation of the terms of the Confirmatory Order and maintains that the Board's decision will have a negative impact on other licensees' agreeing to confirmatory orders to resolve inspection and enforcement matters.

II. DISCUSSION

For the third time this year we address the question whether petitioners may obtain licensing board hearings to challenge NRC Staff enforcement orders as too weak or otherwise insufficient.¹⁸ The answer, under a longstanding Commission policy upheld in *Bellotti v. NRC*, is no. The only issue in an NRC enforcement proceeding is whether the order should be sustained. Boards are not to consider whether such orders need strengthening. As the court said in *Bellotti*, allowing NRC hearings on claims for stronger enforcement remedies risks "'turning focused regulatory proceedings into amorphous public extravaganzas."¹⁹ Thus, despite creative pleading, Farmer's bottom-line grievance in this case — that the NRC Staff enforcement order did not take account of the seriousness of ADOT's violation — cannot surmount the *Bellotti* hurdle. As we explain below, *Bellotti* means that Farmer lacks "standing" to seek a hearing and also lacks admissible contentions.

¹⁴ *Id.* at 114, 117.

¹⁵ 725 F.2d 1380 (D.C. Cir. 1983), *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982).

¹⁶ LBP-04-16, 60 NRC at 120-23.

¹⁷ Licensee's Notice of Appeal of "Memorandum and Order (Ruling on Request for Hearing)," LBP-04-16, of July 30, 2004, at 6 (Aug. 18, 2004), *quoting* LBP-04-16, 60 NRC 121-22 (Bollwerk, J. dissenting).

¹⁸ The other two decisions came in the *Maine Yankee* and *Davis-Besse* enforcement proceedings. *See* notes 21 & 22, *infra*.

¹⁹ *Bellotti*, 725 F.2d at 1382.

A. Standing

To obtain a hearing, a petitioner must demonstrate “an interest affected by the proceeding”²⁰ — i.e., standing — and submit at least one admissible contention.²¹ To establish standing, a petitioner must show: “(1) an ‘injury in fact’ (2) that is fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision.”²² If the petitioner requests a remedy that is beyond the scope of the hearing, then the hearing request must be denied because redressability is an element of standing.

For an enforcement order, the threshold question — related to both standing and admissibility of contentions — is whether the hearing request is within the scope of the proceeding as outlined in the order.²³ The Commission has the authority to define the scope of the hearing, and this authority includes limiting the hearing to the question whether the order should be sustained.²⁴ Thus, the only matters at issue in this proceeding are the measures listed in the enforcement order to promote, evaluate, and maintain a Safety Conscious Work Environment. The Board recognized that Contention 1 in reality seeks additional measures as a substitute for those imposed by the Staff; thus, the Board properly rejected it under the *Bellotti* doctrine.²⁵ The rationale underlying *Bellotti* is that, when a licensee agrees to make positive changes or does not contest an order requiring remedial changes, it should not be at risk of being subjected to a wide-ranging hearing and further investigation.

In both of Farmer’s contentions, but most obviously in Contention 1, Farmer seeks rescission of the order because he speculates that other remedies would be more effective. This is really a request to impose either different or additional enforcement measures — in contravention of Commission doctrine in enforcement actions, as approved in *Bellotti*. Although Farmer says he is not seeking a harsher penalty against ADOT, that is precisely what he wants. He does not claim that

²⁰ Atomic Energy Act § 189a, 42 U.S.C. § 2239(a). *See generally Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999).

²¹ *See FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157 (2004).

²² *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 57 n.16 (2004), citing *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994).

²³ *See Davis-Besse*, CLI-04-23, 60 NRC at 157.

²⁴ *See Bellotti*, 725 F.2d at 1381. *See also Maine Yankee*, CLI-04-5, *supra*; *Davis-Besse*, CLI-04-3, *supra*; *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980).

²⁵ *Bellotti*, 725 F.2d at 1381. The Commission’s power to define the scope of a proceeding will lead to denial of intervention only when the Commission requires additional or better safety measures. *Id.* at 1383.

the provisions of the Confirmatory Order, as far as they go, are unwarranted or should be relaxed.²⁶ Nor does he claim the corrective measures outlined in the Confirmatory Order are themselves detrimental to the public health and safety.

The Board majority erred when it stated that Farmer's injury was traceable to the Confirmatory Order and, on that basis, found him to have standing. Farmer's position immediately after the requested rescission of the Confirmatory Order would *not* be improved, for the situation would revert to what it was before the order. To decide whether the order should be upheld, the pertinent time contrast is between the petitioner's position with and without the order in question — not between the disputed order and a hypothetical substitute order, whether or not that substitute order be, in Farmer's estimation, an improvement.²⁷ A petitioner like Farmer simply is not adversely affected by a Confirmatory Order that improves the safety situation over what it was in the absence of the order.²⁸

The Confirmatory Order at issue in this proceeding mandates numerous actions for ADOT to take to ensure a Safety Conscious Work Environment. These actions, including independent policy review, training, and a plan for assuring compliance with section 30.7, cannot conceivably cause Farmer to suffer any injury. And without any injury *attributable to the Confirmatory Order*, Farmer does not have standing in this proceeding.²⁹

That the corrective measures outlined in the Confirmatory Order do not improve Farmer's personal situation does not provide grounds to rescind the Confirmatory Order. Farmer apparently is disappointed that the same ADOT management "remains at the helm,"³⁰ and he is dissatisfied with "resolution of the retaliation findings based strictly on future preventive measures."³¹ But

²⁶ See *Davis-Besse*, CLI-04-23, 60 NRC at 158, citing *Maine Yankee*, CLI-04-5, 59 NRC at 56.

²⁷ Indeed, it is not self-evident that retracting the Confirmatory Order, as Farmer demands, would inevitably lead to strengthened sanctions against ADOT and thus redress Farmer's alleged injuries.

²⁸ In practicality it is unlikely that petitioners will often obtain hearings on confirmatory enforcement orders. That's because such orders presumably enhance rather than diminish public safety. Nevertheless, the notice of opportunity for hearing provides the public a "safety valve" because an order conceivably may remove a restriction upon a licensee or otherwise have the effect of worsening the safety situation. Such an order remains open to challenge. See *Bellotti*, 725 F.2d at 1383. As Judge Bollwerk stated in his dissent:

[A] challenge to an order based on the premise that its terms, if carried out, would be affirmatively contrary to the public health and safety (as opposed to being deficient because it does not impose other or additional measures) would be one that seemingly would fall within the scope of a proceeding as envisioned under *Bellotti*.

LBP-04-16, 60 NRC at 122 n.4.

²⁹ See *Maine Yankee*, CLI-04-5, 59 NRC at 57 n.16.

³⁰ "Petitioner's Opposition to the Appeals of the Atomic Safety and Licensing Board's Order of July 29, 2004" at 2 (Aug. 30, 2003).

³¹ *Id.* at 6.

NRC's role, as outlined in section 30.7, is to procure corrective action for the Licensee's program, and by example, other licensees' programs, not to provide redress for the whistleblower.³² Although Farmer appears to have been a victim of retaliatory misbehavior, and understandably focuses on his personal grievances, our charter does not include providing a personal remedy.³³ Farmer's situation is analogous to that of a crime victim who, dissatisfied with a plea bargain between the government and the accused, lacks standing to insist that the prosecutors seek a harsher punishment for the wrongdoer.³⁴ And, continuing the parallel, just as the crime victim can seek redress through a civil suit, Farmer has civil remedies available through the Department of Labor.³⁵ In evaluating whether to pursue enforcement relief, and in considering various enforcement remedies, the NRC Staff acts like a prosecutor. Our adjudicatory process is not an appropriate forum for petitioners like Farmer to second-guess enforcement decisions on resource allocation, policy priorities, or the likelihood of success at hearings.³⁶

We do not dispute that Farmer suffered injury, but that injury arose from the Licensee's behavior between 1999 and 2002, as outlined in the Notice of Violation. The injury is not related to the Confirmatory Order, which directly addresses ADOT's wrongful behavior by mandating a program designed to alter the Safety Conscious Work Environment favorably and prevent similar injuries in the future. The program initially provides for outside review of the Licensee's program and extensive training of the Licensee's managers and employees. It also dictates that the Licensee submit a long-term plan for maintaining a Safety Conscious Work Environment and request a specific license amendment to require that the long-term plan be maintained and implemented. The critical concept here

³² "A violation [constituting discrimination] by a . . . licensee . . . may be grounds for —

- (1) Denial, revocation, or suspension of the license.
- (2) Imposition of a civil penalty on the licensee
- (3) Other enforcement action."

10 C.F.R. § 30.7(c).

³³ The Atomic Energy Act gave the Commission authority to take action against licensees but did not include a personal remedy for employees who experience discrimination. *See* 42 U.S.C. § 2011 *et seq.*

³⁴ *See Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another"). *See also Doyle v. Oklahoma Bar Association*, 998 F.2d 1559, 1566-67 (10th Cir. 1993).

³⁵ Section 30.7(b) steers Farmer to his possible individual remedy for the discrimination through an administrative proceeding in the Department of Labor. Also, if Farmer believes the Confirmatory Order does not go far enough to remedy the whistleblower situation at ADOT, he can file a petition with the NRC under 10 C.F.R. § 2.206. That section provides that "[a]ny person may 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." 10 C.F.R. § 2.206(a).

³⁶ *See generally Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

is that, with the Confirmatory Order in place, ADOT's employees undoubtedly have considerably more whistleblower protection than without it. Accordingly, Farmer does not have standing to contest the order.

Our holding that Farmer does not have standing is dispositive of this case. The Board majority, however, thought it significant that Farmer had alleged factual discrepancies in the NRC Staff's order. Below, we briefly discuss that question.

B. The Role of Factual Disputes in *Bellotti* Cases

The Board majority perceived Contention 2 as raising a proper challenge to the Staff's assessment and analysis of the facts underlying the issuance of the Confirmatory Order. According to the Board, with a proper verification and analysis of the facts — obtainable only if the Confirmatory Order is not sustained — the Staff may well end up ordering more aggressive enforcement relief than the measures in the March 15 Confirmatory Order. This possibility, says the Board, supports Farmer's standing and requires a hearing on Contention 2 (raising factual disputes).

The Board erroneously based its conclusion on language in our recent *Maine Yankee* decision, which also rested on *Bellotti*. We stated in *Maine Yankee* that the Commission has authority to limit the issues in enforcement proceedings to “whether the facts as stated in the order are true and whether the remedy selected is supported by those facts.”³⁷ The first portion of this language, carried over in our jurisprudence from *Marble Hill* to *Bellotti* to *Maine Yankee*, is inapplicable to a proceeding on a confirmatory order. Unlike the instant case, *Maine Yankee*, *Bellotti*, and *Marble Hill* were enforcement proceedings that were still contestable by the licensees at the time of publication of the notice of hearing. Thus, those three licensees could have contested the Staff's factual findings and/or the sanction(s) the Staff imposed to address their respective factual situations.³⁸ Here, however, ADOT had already agreed to the enforcement order by the time the notice of hearing was published. In such a case, a challenge to the facts themselves by a nonlicensee is not cognizable.

The critical inquiry under *Bellotti* in a proceeding on a confirmatory order is whether the order improves the licensee's health and safety conditions. If it does, no hearing is appropriate. As Judge Bollwerk pointed out in his dissent, allowing a petitioner to attack a confirmatory order under the guise of a factual dispute would effectively permit an end run around *Bellotti*.³⁹ Also, to allow third

³⁷ *Maine Yankee*, CLI-04-5, 59 NRC at 56, citing *Bellotti*.

³⁸ In that event, a petitioner who *supports* the order could have standing. See *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64 (1994).

³⁹ LBP-04-16, 60 NRC at 120-23.

parties to contest enforcement settlements at hearings would undercut our salutary policy favoring enforcement settlements. “Such a policy would be thwarted if licensees which consented to enforcement actions were routinely subjected to formal proceedings, possibly leading to more severe or different enforcement actions.”⁴⁰

The NRC Staff has considerable latitude in choosing enforcement weapons, and Farmer’s (or the Board’s) disapproval of the remedy the Staff selected does not justify reopening an enforcement proceeding.⁴¹ Farmer’s position violates the tenets of *Bellotti* no less than a direct request for additional or better safety measures, for his concerns are well beyond the scope of the hearing. As the Staff pointed out in its brief:

In effect, the Board’s decision is an attempt to void the Staff’s discretion to select the enforcement action which, in its judgment, best fits the violation (i.e., orders modifying licenses, notices of violation, civil penalties, orders to individuals, or any combination thereof) which best addresses the root cause of the violation, and which best protects the public health and safety.⁴²

What’s more, while we need not decide this issue, the record on its face shows that Farmer’s claim of a factual dispute is illusory. To be sure, the Notice of Violation sets out a disturbing array of twelve retaliatory actions ADOT allegedly took over a 3-year period against Farmer, the Statewide Radiation Safety Officer (SRSO), for raising safety concerns regarding radiation exposures to ADOT employees.⁴³ But Farmer does not dispute any of these Staff findings of fact. Rather, he disagrees with the penalty the Staff chose because he believes the

⁴⁰ *Marble Hill*, CLI-80-10, 11 NRC at 441.

⁴¹ See generally *Heckler v. Chaney*, 470 U.S. 821 (1985) (agency’s decision not to take the requested enforcement action was not subject to judicial review); *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 170 (2d Cir. 2004) (The *Chaney* presumption “avoids entangling courts in a calculus involving variables better appreciated by the agency charged with enforcing the statute and respects the deference often due to an agency’s construction of its governing statutes.” (quoting *New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 331 (2d Cir. 2003)); *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411, 413 (1958) (“the [agency] alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically”).

⁴² “NRC Staff’s Notice of Appeal of Licensing Board Order of July 29, 2004 and Accompanying Brief” at 8 (Aug. 18, 2004).

⁴³ The retaliatory actions were:

In September 1999 a three month extension of the SRSO’s probationary period; unacceptable ratings in performance appraisals for the periods 4/16/99 to 10/16/99, 1/16/00 to 1/15/01 and 1/16/01 to 1/5/02; denial of a merit increase for the year 2000; verbal admonitions by the SRSO’s supervisor in September 1999 for breaking the chain of command and in

(Continued)

Staff failed to take account of an additional fact — the deliberateness of the discrimination against him. The Board, too, apparently believed that the Staff had made a finding that there was no deliberate or willful discrimination.⁴⁴ Indeed, the Board went so far as to say that the “sole explanation” for the penalty the Staff chose is lack of deliberateness, and that the “lynchpin [*sic*] fact” underlying the Staff’s Confirmatory Order and the justification for not imposing a civil penalty is that the licensee’s actions were a result of ignorance.⁴⁵ But the Notice of Violation on its face belies the notion that the Staff did not view ADOT’s actions toward Farmer as deliberate.⁴⁶ Actions that are described as “retaliatory,” as the Staff labeled them, are by definition deliberate.⁴⁷ Thus, even if “fact disputes” justified a departure from the *Bellotti* doctrine, there is no genuine dispute here over the “deliberate” issue.

It is also far from clear that the Staff’s chosen remedy was inappropriate. The Staff chose a remedy designed to educate the Licensee and prevent future retaliation against whistleblowers. This remedy is undeniably related to the asserted facts; moreover, the sanctions the Staff chose are appropriate even in a case of deliberate discrimination.⁴⁸ The precise enforcement sanction to impose is within the Staff’s sound discretion, and it was wrong for the Board in effect to try to supervise the Staff’s actions.⁴⁹ Judge Bollwerk’s dissent summarized this principle well:

November 2000 in connection with an evaluation of radiation exposure to Subject A; direction by the SRSO’s supervisor in February 2000 to cease performance of radiation safety duties; a November 15, 2000, Letter of Expectation; an August 25, 2001, Letter of Instruction; direction by the SRSO’s supervisor in November 2001 to sign a letter to the NRC stating that the SRSO’s report of a radiation exposure beyond NRC limits was in error; in April 2002, a direction by the SRSO’s supervisor to limit radiation safety duties to 8% of the SRSO’s time; a May 7, 2002 Letter of Reprimand; denial of the SRSO’s requests for radiation safety officer-related training; and in September 2002 directing the SRSO to provide confidential correspondence between the SRSO and the NRC.

Notice of Violation at 1.

⁴⁴ LBP-04-16, 60 NRC at 118.

⁴⁵ *Id.* at 108.

⁴⁶ *See* note 43.

⁴⁷ Although the Board referred to a Staff *finding* that there was no deliberate or willful discrimination, neither the Notice of Violation nor the Confirmatory Order mentions deliberateness, or lack of deliberateness, in the violations. *See* LBP-04-16, 60 NRC at 118. As noted above, these documents list the numerous violations and call them “retaliatory.”

⁴⁸ *See* 10 C.F.R. § 30.10, which addresses deliberate misconduct. A person who violates section 30.10(a) is, just like ADOT for its violation of section 30.7, subject to an enforcement action in accordance with the procedures in 10 C.F.R. Part 2, Subpart B. This includes section 30.7(c)’s list of possible sanctions. *See* note 26.

⁴⁹ *See Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 312 (1994); *Indiana Regional Cancer Center*, LBP-94-21, 40 NRC 22, 34 n.5 (1994).

In the enforcement arena, given the breadth of possibilities that are open to the Staff in framing an order addressing identified health and safety problems associated with an agency licensee's activities, there also resides with the Staff an obligation to ensure that in issuing such a directive it crafts measures that will directly and promptly address the problem identified. Under *Bellotti*, however, whether the Staff carries out this responsibility to the degree a petitioner believes is warranted is not a matter within the ambit of a Licensing Board.⁵⁰

III. CONCLUSION

As in our recent *Maine Yankee* and *Davis-Besse* cases, the Petitioner here seeks additional measures beyond those set out in the disputed Confirmatory Order. Further, rescission of the order would neither improve his position nor alleviate his concerns about the work environment at ADOT. Therefore, under *Bellotti*, we *reverse* the Board majority's decision to grant Farmer a hearing, and we *terminate* this proceeding.⁵¹

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of October 2004.

⁵⁰ LBP-04-16, 60 NRC at 122.

⁵¹ We also terminate the housekeeping stay that we entered in this case on August 16, 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 50-29
(License Termination Plan)

YANKEE ATOMIC ELECTRIC
COMPANY
(Yankee Nuclear Power Station)

October 7, 2004

The Commission denies the Citizens Awareness Network's (CAN's) motion to dismiss, in which CAN argued that the proceeding should either be dismissed or renoticed because the *Federal Register* notice announcing the opportunity for a hearing on amending Yankee Atomic Electric Company's license by incorporating a license termination plan was unclear. The Commission concludes that the notice adequately informed interested persons.

**RULES OF PRACTICE: NOTICE OF PROPOSED ACTION OR
OPPORTUNITY FOR HEARING**

A notice that does not clearly describe a license amendment request is adequate where: it enabled the petitioner to file a timely request for hearing; the local government demonstrated awareness of the license amendment and the due date for a hearing request on the acceptance of the license termination plan; and the Commission found that other persons with similar interests would have recognized the meaning of the notice and responded appropriately or reviewed the underlying

*CLI-04-27, issued in the matter of Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), is being withheld from publication while the Commission determines which portions of that decision should be withheld from public disclosure as proprietary financial information.

documents referenced in the series of *Federal Register* notices related to the license termination plan.

MEMORANDUM AND ORDER

The Yankee Nuclear Power Station shut down permanently in 1992 and is undergoing decommissioning. On November 24, 2003, Yankee Atomic Electric Company, the facility Licensee, requested an amendment to its operating license that would approve a license termination plan (LTP). (Subsequent amendments to the LTP were received on Dec. 10, 2003, Dec. 16, 2003, Jan. 19, 2004, Jan. 20, 2004, Feb. 2, 2004, Feb. 10, 2004, and March 4, 2004.) The requested license amendment also provided criteria for determining when changes to the LTP would require NRC approval. On May 4, 2004, the Commission issued in the *Federal Register* a notice of receipt of the LTP and its availability for comment. 69 Fed. Reg. 24,695. This notice explained that a power reactor licensee's application for license termination must be accompanied or preceded by an LTP submitted for NRC approval. If the NRC Staff finds the LTP acceptable, the Staff will issue a license amendment approving the LTP, subject to such conditions and limitations that the Staff finds appropriate and necessary.

On review the Staff found the proposed LTP acceptable. The Staff also determined that the license amendment request involved "no significant hazards consideration," based on review of the Licensee's analysis submitted pursuant to 10 C.F.R. § 50.91(a). On June 22, 2004, the NRC published in the *Federal Register* a notice of this proposed no significant hazards consideration determination and an opportunity for a hearing on the LTP license amendment. 69 Fed. Reg. 34,696, 34,707-08. In accordance with the time for response specified by 10 C.F.R. § 2.309(b)(3)(i), the notice stated: "Within 60 days after the date of publication of this notice . . . any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene." *Id.* at 34,696.

On August 20, 2004, the Citizens Awareness Network (CAN) filed a timely request for a hearing.¹ CAN's request cited as a basis for standing that two of its members reside within 6 miles of the Yankee Rowe site "and have legitimate concerns over the need for extensive site clean up beyond what is called for in the

¹ While there has been no other request for a hearing, Franklin Regional Council of Governments responded to the June 22, 2004 *Federal Register* notice and requested "an extension to the hearing request periods for the Yankee Rowe License Termination Plan." Its letter also recognized that the NRC's *Federal Register* notice applied to the "end of the comment and hearing request periods and to the acceptance of the LTP . . ." (emphases provided). Letter from Bill Perlman, Chair — FRCOG Executive Committee, to John Hackman (undated, received July 22, 2004.)

License Termination Plan.’’ CAN noted, correctly, that the subject matter of the hearing would include whether the Commission should amend YAEC’s license by incorporating the LTP. At the same time, however, CAN filed a ‘‘Motion To Dismiss Proceedings as Improperly Noticed or Clarify and Re-Notice the Proceeding.’’ In this motion CAN contended that the notice as written failed to make clear the subject matter of the license amendment at issue and therefore was ‘‘neither reasonable [n]or sufficient under federal law.’’ The motion stated: ‘‘CAN does not know exactly what the subject matter of the hearing at issue will be due to the defective notice.’’ CAN requested that the Commission either dismiss the proceeding for lack of proper notice or issue ‘‘a new notice in plain English that clearly sets forth the terms and conditions for approval of the LTP. . . .’’ CAN speculates that there may be persons ‘‘who would have requested a proceeding, but for the defective notice.’’ CAN evidently intends that any new notice would start another 60-day period for intervention before the proceeding can begin. Yankee Atomic Electric Company and the NRC Staff filed oppositions to CAN’s motion to dismiss the proceedings and CAN filed a ‘‘Reply.’’²

The Commission referred CAN’s hearing request to the Atomic Safety and Licensing Board for appropriate action but retained for its own consideration CAN’s ‘‘Motion To Dismiss Proceedings as Improperly Noticed. . . .’’ The Chief Administrative Judge of the Atomic Safety and Licensing Board Panel issued a memorandum on September 14, 2004, stating that appointment of a hearing board is being deferred pending the Commission’s resolution of CAN’s motion to dismiss the proceedings.

In this Order the Commission denies CAN’s motion for reasons that we now discuss. The NRC’s June 22, 2004 notice described the subject matter of the proceeding as follows:

Description of amendment request: The licensee has proposed to amend its license to incorporate a new license condition addressing the license termination plan (LTP). The new license condition would document the date of NRC approval of the LTP and provide criteria to determine the need for NRC approval of changes to the approved LTP.

The notice went on to describe in detail the NRC Staff’s reasons for concluding that under the standards of 10 C.F.R. § 50.92(c) the amendment request involved no significant hazards consideration.

The NRC Staff in its opposition argues that this notice ‘‘is sufficient to put any interested party on notice that a hearing, if granted, will encompass the staff’s approval of the LTP.’’ In any case, the Staff adds, ‘‘a reading of the

²CAN did not ask permission to file its ‘‘Points in Reply’’ which is not authorized under our rules. Accordingly, we do not consider it. *See* 10 C.F.R. § 2.323(c).

referenced and associated documents and regulations would put any interested party on notice that a hearing, if granted, would encompass approval of the LTP for Yankee-Rowe.” Yankee Atomic’s opposition asserts that “[t]he notice accurately described the LTP *amendment* . . .” (emphasis by Yankee Atomic). This opposition concludes that “[i]n total, there is little ambiguity in the hearing notice, when taken as a whole, that approval of the LTP is the licensing issue that is the subject of the hearing requirement.” Yankee Atomic views CAN’s motion for renouncing as simply an attempt to delay the proceeding by an additional 60 days.

This dispute places before us the question whether the June 22, 2004 notice adequately informed interested persons that the requested amendment would incorporate Yankee Atomic’s license termination plan in the facility license. It must be conceded that the language of the notice, quoted above, does not in so many words describe the amendment request that way. The notice describes the proposed new license condition as “addressing” the license termination plan and says the condition “would document the date of NRC approval of the LTP.” We would characterize this imprecise description as less than a model of clarity. The fact remains, however, that the notice was clear enough to alert CAN that this license amendment proceeding affected CAN’s interest in the Yankee Rowe LTP. The notice enabled CAN to file a timely request for a hearing. CAN’s longstanding interest in Yankee Rowe decommissioning kept CAN aware of regulatory developments like the pending approval of the LTP. For CAN the notice was obviously sufficient. The Franklin Regional Council of Governments demonstrated its awareness of the license amendment and the due date for a hearing request on the acceptance of the LTP. *See* note 1, *supra*.

We would expect that other persons with similar interests would have recognized the significance and thrust of the June 22, 2004 notice and responded appropriately or reviewed at the very least, the underlying documents referenced in the series of *Federal Register* notices cited above. Although we have noted that the notice in question might have been clearer,³ we find that the notice in this case was adequate and renounce is not necessary.

For the above reasons the Commission denies CAN’s motion to dismiss these proceedings as improperly noticed.

³In our supervisory capacity, we remind the Staff that it should make its best efforts to ensure its notices of proposed action are clear and in plain English.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of October 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

**Docket Nos. 50-413-OLA
50-414-OLA**

**DUKE ENERGY CORPORATION
(Catawba Nuclear Station, Units 1
and 2)**

October 7, 2004

In this license amendment proceeding to authorize the use of four lead test assemblies of mixed oxide fuel at one of Duke Energy Corporation's Catawba nuclear reactors, the Commission accepts the Board's referral, clarifies the "need-to-know" standard for discovery, and reverses the result the Board reached.

RULES OF PRACTICE: DISCOVERY

The scope of discovery is usually quite broad, as indicated on the face of our rules: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding. . . . It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 10 C.F.R. § 2.740(b)(1).

SECURITY INFORMATION: NEED TO KNOW

RULES OF PRACTICE: DISCOVERY

For the discovery phase of an adjudication, the Commission finds the NRC Staff approach, now endorsed twice by the Board, a sensible application of need-

to-know doctrine, for it starts with the traditional discovery rules and then narrows their breadth to take account of the sensitive nature of security information. Such information warrants tight control and enhanced precautions.

SECURITY INFORMATION: NEED TO KNOW

RULES OF PRACTICE: DISCOVERY

The Board concluded that “defining the need-to-know ‘indispensability’ standard by reference to the discovery standard, *with appropriate balancing of the public safety and other factors unique to the case*, is the proper course to follow.” *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), LBP-04-21, 60 NRC 357, 374 (2004) (emphasis added). The Commission finds the Board’s approach appropriate, and approves it.

SECURITY INFORMATION: PROTECTION FROM DISCLOSURE

We expect the Board and the NRC Staff to take a hard look at requests for sensitive security documents to make sure disclosure is truly useful in litigating admitted contentions, and not simply an exercise of curiosity or of a party’s hope that something useful may turn up.

NRC: COMMISSION POLICY

Ordinarily the Commission would be disinclined to second-guess the Board’s findings on a discovery dispute, for the Board is more familiar with the nature of the sole admitted security contention. Here, though, the Commission participated in the formulation of the guidance documents requested by the Intervenor during discovery and is therefore in a position to understand both their history and their scope, as well as the reasons for selecting particular design basis threats.

NRC GUIDANCE DOCUMENTS

Guidance documents are, by nature, only advisory. *See Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 397 (1995). They need not apply in all situations and do not themselves impose legal requirements on licensees.

SECURITY INFORMATION: NEED TO KNOW

The guidance documents interpreting the application of 10 C.F.R. § 73.1(a)(1) and (2) to large Category I fuel cycle facilities are so remote from the secu-

rity issues surrounding the proposed Catawba MOX amendment that it is not “indispensable” for BREDL to obtain those documents in discovery.

MEMORANDUM AND ORDER

This case arises from Duke Energy Corporation’s application for a license amendment to authorize the use of four lead test assemblies of mixed oxide (MOX) fuel in one of its Catawba nuclear reactors. The Licensing Board recently ruled in favor of the Intervenor, Blue Ridge Environmental Defense League (BREDL), on a “need-to-know” determination allowing BREDL to obtain two classified NRC Staff documents during prehearing discovery.¹ The Board stayed the ruling and referred it to the Commission. We accept the referral, clarify the need-to-know standard for discovery, and reverse the result the Board reached.

I. BACKGROUND

The current dispute involves BREDL’s discovery request for two classified NRC Staff documents. Those documents provide guidance on how to apply NRC “design basis threat” regulations governing theft and diversion of radioactive materials and radiological sabotage. BREDL says that it “needs to know” information in those documents to help substantiate its contention that the NRC should deny Duke’s request for an exemption from certain security requirements. Before the Board, Duke opposed BREDL’s discovery request, but the NRC Staff did not object to it.

Four earlier Commission decisions in this proceeding² provide the backdrop of BREDL’s “need-to-know” claim seeking discovery of classified (or safeguards) information. In those decisions, we concluded that “the touchstone for a demonstration of ‘need to know’ is whether the information is indispensable.”³ But we also said that “a party’s need to know may be different at different

¹ See LBP-04-21, 60 NRC 357 (2004). See also unpublished Memorandum and Order (Confirming August 10, 2004, Bench Ruling Finding Need To Know and Ordering Provision of Documents Sought by Intervenor in Discovery (Aug. 13, 2004) (“Discovery Order”). Duke requested that the Board certify its ruling to the Commission, and the NRC Staff seconded that request.

² See CLI-04-6, 59 NRC 62 (2004) (providing guidance to licensing boards for their “need to know” determinations); CLI-04-11, 59 NRC 203 (2004) (accepting the Board’s certified questions regarding a security contention); CLI-04-19, 60 NRC 5 (2004) (declining to revisit the “need to know” guidance provided in CLI-04-6); and CLI-04-21, 60 NRC 21 (2004) (providing guidance on expert witness qualifications in the safeguards/security arena).

³ CLI-04-6, 59 NRC at 73.

stages of an adjudicatory proceeding, depending on the purpose of the request for information.”⁴ Under NRC discovery rules in effect for this case, discovery is generally available if information a party seeks is “reasonably calculated to lead to the discovery of admissible evidence.”⁵

In its 21-page decision, the Board grappled with what it called the “delicate” question how to reconcile our narrow “indispensability” test and the broad “discovery” test.⁶ The Board said that the two tests were “effectively congruent and coextensive,”⁷ but that it was also necessary to undertake an “appropriate balancing of the public safety and other factors unique to this case.”⁸ Finding that the “requested documents will permit BREDL to craft its scenarios [challenging Duke’s exemption request] with relevant information that clarifies governing regulatory requirements,” the Board granted BREDL’s discovery request.⁹ We accept the Board’s referral of its ruling. We approve the discovery need-to-know standard the Board outlined, but we reverse the Board’s substantive decision for the reasons we give below.¹⁰

II. DISCUSSION

A. “Need-To-Know” Standard for Discovery

BREDL’s submissions to the Board did not address the discovery standard *per se* as it applies to the two requested documents. Instead BREDL focused on the reason it needs the documents. BREDL said the documents “appear to constitute generic NRC guidance for compliance with NRC regulations for security of its licensed facilities, including protection against both theft and sabotage.”¹¹ As such, argued BREDL, “they not only illustrate the NRC Staff’s view of how to comply with NRC regulations, but are given ‘considerable weight’ in NRC

⁴ *Id.* at 72.

⁵ See 10 C.F.R. § 2.740(b)(1) (2004). The Commission’s new adjudicatory rules do not apply to this case, which began prior to their promulgation. See Final Rule: “Changes to Adjudicatory Process,” 69 Fed. Reg. 2182 (Jan. 14, 2004).

⁶ See LBP-04-21, 60 NRC at 373-74.

⁷ *Id.*

⁸ *Id.* at 374.

⁹ *Id.* at 375.

¹⁰ To avoid unnecessary delay prior to hearing, we are not requesting special appellate briefs to supplement what the parties have already filed with the Board. In the case of any material misapprehensions of law or fact in our appellate decisions, our rules allow for reconsideration petitions. See 10 C.F.R. § 2.786(e).

¹¹ Blue Ridge Environmental Defense League’s Request for Need-To-Know Determination” at 2 (Aug. 26, 2004).

adjudicatory proceedings.”¹² Thus BREDL maintained that the documents are necessary for it to evaluate whether Duke’s Security Submittal is compatible with the NRC guidance.

For the discovery phase, both in the current controversy and in a prior dispute leading to the Board’s August 13 Discovery Order,¹³ Duke has consistently maintained that the “indispensability” standard for establishing need to know is more stringent than the general discovery standard of “reasonably calculated to lead to the discovery of admissible evidence.”¹⁴ Duke has maintained that BREDL does not need the requested documents because there is no indication that they are generically applicable to all Category I facilities.¹⁵

Before the Board the NRC Staff has said that discovery of sensitive safeguards (or classified) information requires examination of “two sources” — both the “general” discovery standard and the “narrow” indispensability standard. In effect, the NRC Staff has maintained that the indispensability standard informs and limits the discovery standard:

[T]he question becomes what information is indispensable to discovery. In making this determination, the Staff looks to two sources. First the traditional discovery standard, that information is discoverable if it is reasonably calculated to lead to admissible evidence. Second, the Staff follows the Commission’s admonition that “access to safeguards documents be as narrow as possible.”¹⁶

In its August 13 Discovery Order, the Board expressly endorsed the NRC Staff’s “two source” interpretation of need to know.¹⁷ It did so again in the

¹² *Id.* (citation omitted).

¹³ See note 1, *supra*.

¹⁴ See 10 C.F.R. § 2.740(b)(1). The scope of discovery is usually quite broad, as indicated on the face of our rules:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding. . . . It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Id.

¹⁵ Category I facilities are licensed to possess formula quantities of strategic special nuclear material. See Final Rule: “Material Control and Accounting Requirements,” 67 Fed. Reg. 78,130-31 (Dec. 23, 2002). A formula quantity “means strategic special nuclear material in any combination in a quantity of 5,000 grams or more computed by the formula, grams = (grams contained U-235) + 2.5 (grams U-233 + grams plutonium).” 10 C.F.R. § 73.2. Strategic special nuclear material is defined as “uranium-235 (contained in uranium enriched to 20 percent or more in the U-235 isotope), uranium-233, or plutonium.” *Id.* Category I facilities are licensed to possess formula quantities of strategic special nuclear material. Catawba will be a Category I facility from the time it accepts delivery of the four MOX lead test assemblies until they are inserted into the reactor core.

¹⁶ Letter from Margaret J. Bupp to Diane Curran (Aug. 3, 2004) at 1 (citation omitted).

¹⁷ Discovery Order at 5.

September 17 Order before us today.¹⁸ We find the NRC Staff approach, now endorsed twice by the Board, a sensible application of need-to-know doctrine, for it starts with the traditional discovery rules and then narrows their breadth to take account of the sensitive nature of security information. Such information warrants tight control and enhanced precautions. As we said previously in this proceeding, “the likelihood of [a] security breach[] increases proportionately to the number of persons who possess security information, regardless of security clearances and everyone’s best efforts to comply with safeguards requirements.”¹⁹

The Board’s approach here is consistent with our views. It stated that “the traditional discovery standard of relevance and whether information is ‘reasonably calculated to lead to the discovery of admissible evidence,’ has . . . come to define what is ‘necessary’ and ‘indispensable’ to a party in preparing for litigation on any cause or issue.”²⁰ But the Board at the same time acknowledged the “balancing inherent in many discovery rulings, which take into account not only relevance and need for information but also such things as, for example, ‘embarrassment, oppression, or undue burden or expense,’ any of which may be grounds for limitation or denial of discovery.”²¹ The Board concluded that “defining the need-to-know ‘indispensability’ standard by reference to the discovery standard, *with appropriate balancing of the public safety and other factors unique to the case*, is the proper course to follow.”²² We find the Board’s approach appropriate, and approve it.²³

We expect the Board and the NRC Staff to take a hard look at requests for sensitive security documents to make sure disclosure is truly useful in litigating admitted contentions, and not simply an exercise of curiosity or of a party’s hope that something useful may turn up.

¹⁸ See LBP-04-21, 60 NRC at 373.

¹⁹ CLI-04-6, 59 NRC at 73.

²⁰ LBP-04-21, 60 NRC at 374 (footnote omitted).

²¹ *Id.*

²² *Id.* (emphasis added).

²³ Although at one point the Board incorrectly *characterized* the discovery and need-to-know standards as “effectively congruent and coextensive,” the Board *in practice* applied the more restrictive standard we have articulated today. See LBP-04-21, 60 NRC at 374. Indeed, our reading of the record suggests that, at bottom, the parties actually agree on the standard to apply, for the differences in the parties’ arguments appear to us to be more a matter of semantics than of substance. Duke would apply a stricter standard than the discovery standard. Both the NRC Staff and the Board nominally adhere to the discovery standard, but in fact temper it with caution for information in the safeguards/security arena. We see no practical difference between the two positions.

B. The Board's Substantive Decision

We turn next to the Board's substantive decision concerning BREDL's need for the two particular NRC Staff guidance documents at issue here. Duke has stated that it did not rely on the documents — indeed, that it has not even seen them; however, that observation is not controlling. Contrary to Duke's position that the documents relate to a specific Category I facility (other than Catawba), the Board examined the guidance documents and found them generic — i.e., applicable to all so-called "Category I" facilities.²⁴ The broad language in the guidance documents ostensibly supports this view.²⁵ The Staff guidance, the Board found, "will permit BREDL to craft its scenarios [in support of its sole admitted security contention] with relevant information that clarifies governing regulatory requirements."²⁶

Ordinarily we would be disinclined to second-guess the Board's findings on this discovery dispute, for the Board is more familiar than we with the nature of BREDL's sole admitted security contention. Here, though, the Commission participated in the formulation of the guidance documents — which were issued in 2000 — and is therefore in a position to understand both their history and their scope, as well as the reasons for selecting particular design basis threats. As we are fully aware, and the Board perhaps was not, the guidance in question relates only to the design basis threats for sabotage and for theft or diversion of formula quantities of strategic special nuclear material at the Category I facilities in existence in 2000 — that is, the fuel fabrication facilities operated by Nuclear Fuel Services, Inc. (NFS) and BWX Technologies (BWXT).²⁷ At that time there was no Category I facility license that was similar to Catawba in terms of the form in which the material would be possessed or the activities for which the material would be used.

Our security regulations, by design, lack specificity in describing the adversary characteristics for a licensee to use to evaluate and implement its physical protection programs.²⁸ The regulations provide general security information to the public that is not sensitive and would not provide specific details of the

²⁴ See note 15, *supra*.

²⁵ See LBP-04-21, 60 NRC at 370-71.

²⁶ *Id.* at 375.

²⁷ The guidance documents are *potentially* applicable to the mixed oxide fuel fabrication facility that Duke Cogema Stone & Webster has proposed for the Department of Energy's Savannah River site. This fuel fabrication facility, if built, will be a Category I facility that will have more in common with NFS and BWXT than does Catawba.

²⁸ See 10 C.F.R. §§ 73.1(a)(1) and 73.1(a)(2), which prescribe requirements for the establishment and maintenance of a physical protection system for special nuclear material. The former section describes requirements to prevent radiological sabotage and the latter, theft or diversion of formula quantities of strategic special nuclear material.

adversary against which a licensee's system are designed to protect, i.e., the design basis threat.²⁹ The guidance documents BREDL requested provide clarification by fleshing out the description of the adversary's characteristics. Guidance documents are, by nature, only advisory.³⁰ They need not apply in all situations and do not themselves impose legal requirements on licensees.

Duke has never seen our 2000 design basis threat guidance on Category I facilities and does not now need to see them. Nor does BREDL, for these guidance documents do not pertain to this proceeding. If Duke receives the current license amendment, it will, technically, be a Category I facility during the time it possesses the four unirradiated MOX test assemblies.³¹ But, as we already have held in this proceeding, the circumstances at Duke's Catawba reactor, even at that time, will be very different from the two existing Category I facilities (the NFS and BWXT plants).³² Because of its composition, form, and low plutonium concentration, the MOX material is not nearly as attractive to potential adversaries from a theft and diversion standpoint as the material at the existing NFS and BWXT facilities. Those facilities engage in fuel processing and possess larger quantities of highly enriched uranium in more accessible forms.³³ When the NRC issued its guidance documents in 2000, it did not intend those guidance documents to cover or address a power reactor licensee's possession and use of already fabricated MOX fuel. Indeed, not only would MOX fuel assemblies be difficult for a terrorist to acquire and transport, but using such an assembly to create a radiological dispersion device would be impractical and ineffectual. For these reasons, it is clear to the Commission that while Catawba would technically be a Category I facility, there is no rational reason for Catawba to have a significantly different level of security than is already existing at the reactor site.³⁴ Therefore, dissemination to

²⁹ The design basis threat itself can change to comport with the nature of the threat environment, and the Commission sometimes issues orders, including interim compensatory measures, to *individual* nuclear facilities. *See, e.g.*, In the Matter of BWX Technologies, Lynchburg, VA; Order Modifying License (Effective Immediately), 68 Fed. Reg. 26,675 (May 16, 2003), and In the Matter of Nuclear Fuel Services Inc., Erwin, TN; Order Modifying License (Effective Immediately), 68 Fed. Reg. 26,676 (May 16, 2003). We held earlier as a matter of law that our NFS and BWXT post-9/11 security orders do not apply to Catawba. *See* CLI-04-19, 60 NRC at 11.

³⁰ *See Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 397 (1995).

³¹ *See* CLI-04-19, 60 NRC at 8 n.11.

³² *See id.* at 11.

³³ *See id.*, citing Safety Evaluation by the Office of Nuclear Security and Incident Response, Renewed Facility Operating License NPF-35 and Renewed Facility Operating License NPF-52, Duke Energy Corporation, et al., Catawba Nuclear Station, Units 1 and 2, Docket Nos. 50-413 and 50-414, at 2 (May 5, 2004).

³⁴ We leave it to the Board to determine whether the specific measures Duke has proposed are adequate to protect the public health and safety.

the Intervenor of Category I security guidance that applies to the BWXT and NFS facilities would be unnecessary and inappropriate.

We are obliged to guard zealously against unnecessary disclosure of classified security information. Catawba simply does not share the underlying conditions, or potential hazards, precipitating the classified security guidance we issued in 2000 that was intended to deal with the general type of Category I facilities then in existence. That guidance does not extend to Catawba. Catawba is not a large-scale fuel facility; rather, it is a commercial nuclear reactor that will, for a short time, possess more plutonium than other commercial reactor sites.³⁵ As we stated earlier in this case, “[a]t stake here is the appropriate increment — the appropriate heightening of security measures — necessitated by the proposed presence of MOX fuel assemblies at the Catawba reactor site.”³⁶ Guidance applicable to an entirely different type of facility is not useful in evaluating the Catawba MOX security proposal.

In short, the guidance documents interpreting the application of 10 C.F.R. § 73.1(a)(1) and (2) to large Category I fuel cycle facilities are so remote from the security issues surrounding the proposed Catawba MOX amendment that it is not “indispensable” for BREDL to obtain those documents in discovery, particularly in view of their classified nature. BREDL does not have a “need to know” the requested guidance documents at any phase of this adjudication.

III. CONCLUSION

For the foregoing reasons, we *accept* the Board’s referral, *approve* the Board’s discovery standard, and *reverse* the Board’s decision in LBP-04-21 to provide BREDL access to the documents it requested.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of October 2004.

³⁵ Earlier in this docket we said that all parties may assume that the Catawba facility will comply with all applicable general security requirements *for reactors*. See CLI-04-6, 59 NRC at 73.

³⁶ *Id.*

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 70-7004

USEC, INC.
(American Centrifuge Plant)

October 7, 2004

**NOTICE OF RECEIPT OF APPLICATION FOR
LICENSE, NOTICE OF AVAILABILITY OF
APPLICANT'S ENVIRONMENTAL REPORT, NOTICE
OF CONSIDERATION OF ISSUANCE OF LICENSE,
AND NOTICE OF HEARING AND COMMISSION ORDER**

**I. RECEIPT OF APPLICATION AND AVAILABILITY
OF DOCUMENTS**

Notice is hereby given that the U.S. Nuclear Regulatory Commission (NRC or the Commission) received on August 23, 2004, an application, safety analysis report, and environmental report from USEC, Inc. (hereinafter USEC), for a license to possess and use source, byproduct, and special nuclear material and to enrich natural uranium to a maximum of 10% U-235 by the gas centrifuge process. The plant, to be known as the American Centrifuge Plant, would be located in Piketon, Ohio. USEC, Inc. is a Delaware corporation.

Copies of USEC's application, safety analysis report, and environmental report (except for portions thereof subject to withholding from public inspection in accordance with 10 C.F.R. § 2.390, Availability of Public Records) are available for public inspection at the Commission's Public Document Room (PDR) at One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. These documents are also available for review and copying using any

of the following methods: (1) enter the NRC's Gas Centrifuge Enrichment Facility Licensing Web site at <http://www.nrc.gov/materials/fuel-cycle-fac/gas-centrifuge.html#correspondence>; (2) enter the NRC's Agencywide Document Access and Management System (ADAMS) at <http://www.nrc.gov/reading-rm/adams.html>, where the accession numbers for USEC's application (including USEC's safety analysis report and USEC's environmental report) is ML042800551; (3) contact the PDR by calling (800) 397-4209, faxing a request to (301) 415-3548, or sending a request by electronic mail to pdr@nrc.gov. Hard copies of the documents are available from the PDR for a fee.

The NRC has now accepted USEC's application for docketing and accordingly is providing this notice of hearing and notice of opportunity to intervene on USEC's application for a license to construct and operate a centrifuge enrichment facility. Pursuant to the Atomic Energy Act of 1954, as amended (Act), the NRC Staff will prepare a safety evaluation report (SER) after reviewing the application and making findings concerning the public health and safety and common defense and security. In addition, pursuant to the National Environmental Policy Act of 1969 (NEPA) and the Commission's regulations in 10 C.F.R. Part 51, NRC will complete an environmental evaluation and prepare an environmental impact statement (EIS) before the hearing on the issuance of a license is completed. The preparation of the EIS will be the subject of a separate notice in the *Federal Register*.

When available, the NRC Staff's safety evaluation and its EIS (except for portions thereof subject to withholding from public inspection in accordance with 10 C.F.R. § 2.390) will also be placed in the PDR and in ADAMS. Copies of correspondence between the NRC and USEC, and transcripts of prehearing conferences and hearings (except for portions thereof subject to withholding from public inspection in accordance with 10 C.F.R. § 2.390) similarly will be made available to the public.

If following the hearing, the Commission is satisfied that USEC has complied with the Commission's regulations and the requirements of this Notice and Commission Order and the Commission finds that the application satisfies the applicable standards set forth in 10 C.F.R. § 30.33, 40.32, and 70.23, a single license will be issued authorizing (1) the receipt, possession, use, delivery, and transfer of byproduct (e.g., calibration sources), source and special nuclear material in the American Centrifuge Plant; and (2) the construction and operation of the American Centrifuge Plant. Prior to commencement of operations of the American Centrifuge Plant, if it is licensed, in accordance with section 193(c) of the Act and 10 C.F.R. § 70.32(k), NRC will verify through inspection that the facility has been constructed in accordance with the requirements of the license for such construction and operation. The inspection findings will be published in the *Federal Register*.

II. NOTICE OF HEARING

A. Pursuant to 10 C.F.R. § 70.23a and section 193 of the Act, as amended by the Solar, Wind, Waste, and Geothermal Power Production Incentives Act of 1990 (Pub. L. No. 101-575), a hearing will be conducted according to the rules of procedure in 10 C.F.R. Part 2, Subparts A, C, G, and to the extent that classified information becomes involved, Subpart I. The hearing will be held under the authority of sections 53, 63, 189, 191, and 193 of the Act. The Applicant and NRC Staff shall be parties to the proceeding.

B. Pursuant to 10 C.F.R. Part 2, Subpart C, the hearing shall be conducted by an Atomic Safety and Licensing Board (Board) appointed by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel. Notice as to the membership of the Board will be published in the *Federal Register* at a later date.

C. The matters of fact and law to be considered are whether the application satisfies the standards set forth in this Notice and Commission Order and the applicable standards in 10 C.F.R. §§ 30.33, 40.32, and 70.23, and whether the requirements of 10 C.F.R. Part 51 have been met.

D. If this proceeding is not a contested proceeding, as defined by 10 C.F.R. § 2.4, the Board will determine the following, without conducting a *de novo* evaluation of the application: (1) whether the application and record of the proceeding contain sufficient information and whether the NRC Staff's review of the application has been adequate to support findings to be made by the Director of the Office of Nuclear Materials Safety and Safeguards, with respect to the matters set forth in paragraph C of this section; and (2) whether the review conducted by the NRC Staff pursuant to 10 C.F.R. Part 51 has been adequate.

E. Regardless of whether the proceeding is contested or uncontested, the Board will, in its initial decision, in accordance with Subpart A of 10 C.F.R. Part 51: Determine whether the requirements of section 102(2)(A), (C), and (E) of NEPA and Subpart A of 10 C.F.R. Part 51 have been complied with in the proceeding; independently consider the final balance among conflicting factors contained in the record of proceeding with a view to determining the appropriate action to be taken; and determine whether a license should be issued, denied, or conditioned to protect the environment.

F. If the proceeding becomes a contested proceeding, the Board shall make findings of fact and conclusions of law on admitted contentions. With respect to matters set forth in paragraph C of this section but not covered by admitted contentions, the Board will make the determinations set forth in paragraph D without conducting a *de novo* evaluation of the application.

G. By December 17, 2004, any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. Petitions for leave to intervene shall be

filed in accordance with the provisions of 10 C.F.R. § 2.309. Interested persons should consult 10 C.F.R. § 2.309, which is available at the NRC's PDR, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, MD (or call the PDR at (800) 397-4209 or (301) 415-4737). NRC regulations are also accessible electronically from the NRC's Electronic Reading Room on the NRC Web site at <http://www.nrc.gov>. If a petition for leave to intervene is filed by the above date, the Commission will issue an order determining standing and refer petitions from persons with the requisite standing to the Board for further processing in the proceeding.

As required by 10 C.F.R. § 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding. The petition must provide the name, address, and telephone number of the petitioner and specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order that may be entered in the proceeding on the petitioner's interest.

A petition for leave to intervene must also include a specification of the contentions that the petitioner seeks to have litigated in the hearing. For each contention, the petitioner must provide a specific statement of the issue of law or fact to be raised or controverted, as well as a brief explanation of the basis for the contention. Additionally, the petitioner must demonstrate that the issue raised by each contention is within the scope of the proceeding and is material to the findings the NRC must make to support the granting of a license in response to USEC's application. The petition must also include a concise statement of the alleged facts or expert opinions that support the position of the petitioner and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the petitioner intends to rely. Finally, the petition must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact, including references to 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. Each contention must be one that, if proven, would entitle the petitioner to relief.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that person's admitted contentions, including the opportunity to present evidence and to submit a cross-examination plan for cross-examination of witnesses, consistent with NRC regulations, policies, and procedures. The Board will set the time and

place for any prehearing conferences and evidentiary hearings, and the respective notices will be published in the *Federal Register*.

A petition for leave to intervene and proffered contentions must be filed by: (1) First-class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemaking and Adjudications Staff; (2) courier, express mail, and expedited delivery services: Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff; (3) e-mail addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, HEARINGDOCKET@nrc.gov; or (4) facsimile transmission addressed to the Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC, Attention: Rulemaking and Adjudications Staff at (301) 415-1101, verification number is (301) 415-1966. A copy of the petition for leave to intervene and proffered contentions should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, and it is requested that copies be transmitted either by means of facsimile transmission to 301-415-3725 or by e-mail to OGCMailCenter@nrc.gov. A copy of the petition for leave to intervene and proffered contentions should also be sent to Donald J. Silverman, Esq., Morgan, Lewis & Bockius, 1111 Pennsylvania Avenue, NW, Washington, DC 20004, the attorney for the Applicant.

Nontimely filings of petitions for leave to intervene, amended petitions, and supplemental petitions will not be entertained absent a determination by the Commission or the Board that the petition should be granted, based upon a balancing of the factors specified in 10 C.F.R. § 2.309(c)(1)(i)-(viii).

H. A state, county, municipality, federally recognized Indian tribe, or agencies thereof, may submit a petition to the Commission to participate as an interested entity under 10 C.F.R. § 2.309(d)(2). The petition should state the nature and extent of the petitioner's interest in the proceeding. The petition should be submitted to the Commission by December 17, 2004. The petition must be filed in accordance with the filing instructions in paragraph G, above, for petitions submitted under 10 C.F.R. § 2.309, except that state and federally recognized Indian tribes do not need to address the standing requirements in 10 C.F.R. § 2.309(d)(1) if the facility is located within its boundaries. The entities listed above could also seek to participate in a hearing as a nonparty pursuant to 10 C.F.R. § 2.315(c).

I. Any person who does not wish, or is not qualified, to become a party to this proceeding may request permission to make a limited appearance pursuant to the provisions of 10 C.F.R. § 2.315(a). A person making a limited appearance may make an oral or written statement of position on the issues, but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to such limits and conditions as may be imposed by the Board. Persons desiring to make a limited

appearance are requested to inform the Secretary of the Commission by December 17, 2004.

III. COMMISSION GUIDANCE

A. Presiding Officer Determination of Contentions

The presiding officer shall issue a decision on the admissibility of contentions no later than sixty (60) days after the petitions and contentions are referred to the Board.

B. Novel Legal Issues

If rulings on petitions, on admissibility of contentions or the admitted contentions themselves, raise novel legal or policy questions, the Commission will provide early guidance and direction on the treatment and resolution of such issues. Accordingly, the Commission directs the Board to promptly certify to the Commission in accordance with 10 C.F.R. §§ 2.319(*l*) and 2.323(*f*) all novel legal or policy issues that would benefit from early Commission consideration should such issues arise in this proceeding.

C. Discovery Management

1. All parties, except the NRC Staff, shall make the mandatory disclosures required by 10 C.F.R. § 2.704 within forty-five (45) days of the issuance of the order admitting that contention.

2. The presiding officer, consistent with fairness to all parties, should narrow the issues requiring discovery and limit discovery to no more than one round for admitted contentions.

3. All discovery against the Staff shall be governed by 10 C.F.R. §§ 2.336(*b*) and 2.709. The Staff shall comply with 10 C.F.R. § 2.336(*b*) no later than 30 days after the Board order admitting contentions and shall update the information at the same time as the issuance of the SER or the Final Environmental Impact Statement (FEIS). Discovery under 10 C.F.R. § 2.709 shall not commence until the issuance of the particular document, i.e., SER or EIS, unless the Board, in its discretion, finds that commencing discovery against the Staff on safety issues before the SER is issued, or on environmental issues before the FEIS is issued will expedite the hearing without adversely impacting the Staff's ability to complete its evaluation in a timely manner.

4. No later than 30 days before the commencement of the hearing at which an issue is to be presented, all parties other than the Staff shall make the pretrial disclosures required by 10 C.F.R. § 2.704(c).

D. Hearing Schedule

In the interest of providing a fair hearing, avoiding unnecessary delays in NRC's review and hearing process, and producing an informed adjudicatory record that supports the licensing determination to be made in this proceeding, the Commission expects that both the Board and NRC Staff, as well as the Applicant and other parties to this proceeding, will follow the applicable requirements contained in 10 C.F.R. Part 2 and guidance in the Commission's *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998) [63 Fed. Reg. 41,872 (Aug. 5, 1998)] to the extent that such guidance is not inconsistent with specific guidance in this Order. The guidance in the *Statement of Policy on Conduct of Adjudicatory Proceedings* is intended to improve the management and the timely completion of the proceeding and addresses hearing schedules, parties' obligations, contentions, and discovery management. In addition, the Commission is providing the following direction for this proceeding:

1. The Commission directs the Board to set a schedule for the hearing in this proceeding consistent with this Order that establishes as a goal the issuance of a final Commission decision on the pending application within 2½ years (30 months) from the date that the application was received. Formal discovery against the Staff shall be suspended until after the Staff completes its final SER and EIS in accordance with the direction provided in paragraph C.3, above.

2. The evidentiary hearing with respect to issues should commence promptly after completion of the final Staff documents (SER or EIS) unless the Board, in its discretion, finds that starting the hearing with respect to one or more safety issues prior to issuance of the final SER¹ (or one or more environmental contentions directed to the Applicant's Environmental Report) will expedite the proceeding without adversely impacting the Staff's ability to complete its evaluations in a timely manner.

¹The Commission believes that, in the appropriate circumstances, allowing discovery or an evidentiary hearing with respect to safety-related issues to proceed 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, *supra*, to ensure a fair, prompt, and efficient resolution of contested issues. For example, it may be appropriate for the 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.

3. The Commission also believes that issuing a decision on the pending application within about 2½ years may be reasonably achieved under the rules of practice contained in 10 C.F.R. Part 2 and the enhancements directed by this Order. We do not expect the Board to sacrifice fairness and sound decisionmaking to expedite any hearing granted on this application. We do expect the Board to use the techniques specified in this Order and in the Commission's *Statement of Policy on the Conduct of Adjudicatory Proceedings* (CLI-98-12, *supra*) 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).

4. If this is a contested proceeding, the Board should adopt the following milestones, in developing a schedule, for conclusion of significant steps in the adjudicatory proceeding.²

Within 10 days of Commission's order determining standing:

Persons found to have standing or entities participating under 10 C.F.R. § 2.309(d) may submit a motion for reconsideration (*see* Section IV.B, below).*

Within 20 days of the Commission's order determining standing:

Persons found to have standing or entities participating under 10 C.F.R. § 2.309(d) may respond to any motion for reconsideration.

Within 60 days of the Commission's order determining standing and referring petitions and contentions to the ASLB:

ASLB decision on admissibility of contentions.

Within 30 days of the ASLB decision determining admission of contentions:

Staff prepares hearing file.

Within 90 days of the ASLB decision determining admission of contentions:

Completion of discovery on admitted contentions, except against the Staff (including contentions on environmental issues arising under NEPA).

²This schedule assumes that the SER and FEIS are issued essentially at the same time. If these documents are not to be issued very close in time, the Board should adopt separate schedules but concurrently running for the safety and environmental reviews consistent with the time frames herein for each document.

Within <i>110 days</i> of the ASLB decision determining admission of contentions:	Deadline for summary disposition motions on admitted contentions.**
Within <i>150 days</i> of the ASLB decision determining admission of contentions:	ASLB decision on summary disposition motions on admitted contentions.
Date of issuance of final SER/EIS:	Staff updates hearing file.
Within <i>20 days</i> of the issuance of the final SER/EIS:	Motions to amend contentions; motions for late-filed contentions.
Within <i>40 days</i> of the issuance of final SER/EIS:	Completion of answers and replies to motions for amended and late-filed contentions.
Within <i>50 days</i> of the issuance of the final SER/EIS:	ASLB decision on admissibility of late-filed contentions; deadline for summary disposition motions on remaining admitted contentions.***
Within <i>80 days</i> of the issuance of final SER/EIS:	Completion of discovery on late-filed contentions; ASLB decision on summary disposition motions on remaining contentions.
Within <i>90 days</i> of the issuance of final SER/EIS:	Direct testimony filed on remaining contentions and any amended or admitted late-filed contentions.
Within <i>100 days</i> of the issuance of final SER/EIS:	Cross-examination plans filed on remaining contentions and any amended or admitted late-filed contentions.
Within <i>105 days</i> of the issuance of final SER/EIS:	Evidentiary hearing begins on remaining contentions and any amended or admitted late-filed contentions.
Within <i>135 days</i> of the issuance of final SER/EIS:	Completions of evidentiary hearing on remaining contentions and any amended or admitted late-filed contentions.
Within <i>180 days</i> of the issuance of final SER/EIS:	Completion of findings and replies.

Within 240 days of the issuance of ASLB's initial decision.
final SER/EIS:

*Motions for reconsideration do not stay this schedule.

**The schedule presumes that a prehearing conference order would establish the deadline for filing of summary disposition motions 20 days after close of discovery, consistent with 10 C.F.R. § 2.710(a), answers to be filed 10 days after filing of any motion, replies to be filed 10 days after any answer, and the Board to issue a decision on any summary disposition motion 20 days thereafter.

***No summary disposition motions on late-filed contentions are contemplated.

To meet these milestones, the 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 Board and parties no later than midnight Eastern Time on the date due, unless otherwise designated by the Board), followed by conforming hard copies that may be sent by regular mail. If participants do not have access to electronic mail, the 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. § 2.306.

In addition, to avoid unnecessary delays in the proceeding, the Board should not grant requests for extensions of time absent unavoidable and extreme circumstances. Although summary disposition motions are included in the schedule above, the Board shall not entertain motions for summary disposition under 10 C.F.R. § 2.710, unless the Board finds that such motions are likely to expedite the proceeding. Unless otherwise justified, the Board shall provide for the simultaneous filing of answers to proposed contentions, responsive pleadings, proposed findings of fact, and other similar submittals.

5. Parties are obligated in their filings before the 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.

6. The Commission directs the Board to inform the Commission promptly, in writing, if the Board determines that any single milestone could be missed by more than 30 days. The Board must include an explanation of why the milestone cannot be met and the measures the Board will take to mitigate the failure to achieve the milestone and restore the proceeding to the overall schedule.

F. Commission Oversight

As in any proceeding, the Commission retains its inherent supervisory authority over the proceeding to provide additional guidance to the Board and participants and to resolve any matter in controversy itself.

IV. APPLICABLE REQUIREMENTS

A. The Commission will license and regulate byproduct, source, and special nuclear material at the American Centrifuge Plant in accordance with the Atomic Energy Act of 1954, as amended. Section 274c(1) of the Act was amended by Public Law 102-486 (October 24, 1992) to require the Commission to retain authority and responsibility for the regulation of uranium enrichment facilities. Therefore, in compliance with law, the Commission will be the sole licensing and regulatory authority with respect to byproduct, source, and special nuclear material for the American Centrifuge Plant, and with respect to the control and use of any equipment or device in connection therewith.

Many rules and regulations in 10 C.F.R. chapter I are applicable to the licensing of a person to receive, possess, use, transfer, deliver, and process byproduct, source and special nuclear material in the quantities that would be possessed at the American Centrifuge Plant. These include 10 C.F.R. Parts 19, 20, 21, 30, 40, 51, 70, 71, 73, 74, 95, 140, 170, and 171 for the licensing and regulation of byproduct, source, and special nuclear material, including requirements for notices to workers, reporting of defects, radiation protection, waste disposal, decommissioning funding, and insurance.

With respect to these regulations, the Commission notes that this is the third proceeding involving the licensing of an enrichment facility. The Commission issued a number of decisions in an earlier proceeding regarding a proposed site in Homer, Louisiana. These final decisions, *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-92-7, 35 NRC 93 (1992); *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997), and *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998), resolve a number of issues concerning uranium enrichment licensing and may be relied upon as precedent.

Consistent with the Act, and the Commission's regulations, the Commission is providing the following direction for licensing uranium enrichment facilities:

1. Environmental Issues

a. General

Part 51 of 10 C.F.R. governs the preparation of an environmental report and an EIS for a materials license. USEC's environmental report and the NRC Staff's associated EIS are to include a statement on the alternatives to the proposed action, including a discussion of the no-action alternative.

b. Treatment of Depleted Uranium Hexafluoride Tails

As to the treatment of the disposition of depleted uranium hexafluoride tails (depleted tails) in these environmental documents, unless USEC demonstrates a use for uranium in the depleted tails as a potential resource, the depleted tails will be considered waste. An approach for disposition of tails that is consistent with section 3113 of the USEC Privatization Act constitutes a "plausible strategy" for disposition of the USEC depleted tails. The Commission is considering matters of law applicable to disposition of tails which may be dispositive of matters arising in a USEC proceeding. *See Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225-26 (2004). The NRC Staff may consider the DOE EIS in preparing the Staff's EIS. Alternatives for the disposition of depleted uranium tails will need to be addressed in these documents. As part of the licensing process, USEC must also address the health, safety, and security issues associated with the storage of depleted uranium tails onsite pending removal of the tails from the site for disposal or DOE dispositioning.

2. Financial Qualifications

Review of financial qualifications for enrichment facility license applications is governed by 10 C.F.R. Part 70. In *Claiborne*, CLI-97-15, 46 NRC at 309, the Commission held that the 10 C.F.R. Part 70 financial criteria, 10 C.F.R. §§ 70.22(a)(8) and 70.23(a)(5), could be met by conditioning the LES license to require funding commitments to be in place prior to construction and operation. The specific license condition approved in that proceeding, which addressed a minimum equity contribution of 30% from the parents and affiliates of LES partners prior to construction of the associated capacity and having in place long-term enrichment contracts with prices sufficient to cover both construction and operating costs, including a return on investment, for the entire term of the contracts prior to constructing or operating the facility is one way to satisfy the requirements of 10 C.F.R. Part 70.

3. *Antitrust Review*

The USEC enrichment facility is subject to sections 53 and 63 of the Act, and is not a production and utilization facility licensed under section 103. Consequently, the NRC does not have antitrust responsibilities for USEC similar to the antitrust responsibilities under section 105 of the Act. The NRC will not entertain or consider antitrust issues in connection with the USEC application in this proceeding.

4. *Foreign Ownership*

Section 193(f) of the Act addresses foreign ownership, control, and domination of enrichment facilities with regard to USEC and its successors. The requirements of section 193(f) are incorporated in 10 C.F.R. § 70.40.

5. *Creditor Requirements*

Pursuant to section 184 of the Act, the creditor regulations in 10 C.F.R. § 50.81 shall apply to the creation of creditor interests in equipment, devices, or important parts thereof, capable of separating the isotopes of uranium or enriching uranium in the isotope U-235. In addition, the creditor regulations in 10 C.F.R. § 70.44 shall apply to the creation of creditor interests in special nuclear material. These creditor regulations may be augmented by license conditions as necessary to allow ownership arrangements (such as sale and leaseback) not covered by 10 C.F.R. § 50.81, provided it can be found that such arrangements are not inimical to the common defense and security of the United States.

6. *Classified Information*

All matters of classification of information related to the design, construction, operation, and safeguarding of the American Centrifuge Plant shall be governed by classification guidance in CG-IGC-1, “DOE Classification Guide for Isotope Separation by the Gas Centrifuge Process” (June 2002) and any later versions. Any person producing such information must adhere to the criteria in CG-IGC-1. All decisions on questions of classification or declassification of information shall be made by appropriate classification officials in the NRC and are not subject to *de novo* review in this proceeding.

7. *Access to Classified Information*

Portions of USEC’s application for a license are classified Restricted Data or National Security Information. Persons needing access to those portions of the

application will be required to have the appropriate security clearance for the level of classified information to which access is required. Access requirements apply equally to intervenors, their witnesses and counsel, employees of the applicant, its witnesses and counsel, NRC personnel, and others. Any person who believes that he or she will have a need for access to classified information for the purpose of this licensing proceeding, including the hearing, should immediately contact the NRC, Division of Fuel Cycle Safety and Safeguards, Washington, D.C. 20555, for information on the clearance process. Telephone calls may be made to Linda Marshall, Licensing Assistant, Special Projects Branch, Telephone: (301) 415-8129.

8. *Obtaining NRC Security Facility Approval and for Safeguarding Classified Information Received or Developed Pursuant to 10 C.F.R. Part 95*

Any person who requires possession of classified information in connection with the licensing proceeding may process, store, reproduce, transmit, or handle classified information only in a location for which facility security approval has been obtained from the NRC's Division of Nuclear Security (NSIR), Washington, D.C. 20555. Telephone calls may be made to A. Lynn Silvious, Chief, Information Security Section, Telephone: (301) 415-2214.

B. Reconsideration

The above guidance does not foreclose the applicant, any person admitted as a party to the hearing, or an entity participating under 10 C.F.R. § 2.315(c) from litigating material factual issues necessary for resolution of contentions in this proceeding. Persons found by the Commission to have standing and entities participating under 10 C.F.R. § 2.315(c) as of the date of the Commission's order on standing may also move the Commission to reconsider any portion of Section IV of this Notice and Commission Order where there is no clear Commission precedent or unambiguously governing statutes or regulations. Any motion to reconsider must be filed within 10 days after the Commission's order on standing. The motion must contain all technical or other arguments to support the motion. Other persons granted standing and entities participating under 10 C.F.R. § 2.315(c), including the Applicant and the NRC Staff, may respond to motions for reconsideration within 20 days of the Commission's Order. Motions will be ruled upon by the Commission. A motion for reconsideration does not stay the schedule set out above in Section III.D.4. However, if the Commission grants a motion for reconsideration, it will, as necessary, provide direction on adjusting the hearing schedule.

V. PENDING ENERGY LEGISLATION

The Energy Policy Act of 2003, H.R. 6, is currently pending in Congress. H.R. 6, as currently constituted, contains provisions that address the manner in which certain issues are to be dealt with and a schedule for overall Commission consideration of an application for licensing a uranium enrichment facility. In the event that H.R. 6 is enacted, the Commission may need to issue an additional order to conform guidance and schedules for the USEC application to any new statutory requirements.

VI. NOTICE OF INTENT REGARDING CLASSIFIED INFORMATION

As noted above, a hearing on this application will be governed by 10 C.F.R. Part 2, Subparts A, C, G, and to the extent classified material becomes involved, Subpart I. Subpart I requires in accordance with 10 C.F.R. § 2.907 that the NRC Staff file a notice of intent if, at the time of publication of Notice of Hearing, it appears that it will be impracticable for the Staff to avoid the introduction of Restricted Data or National Security Information into a proceeding. The Applicant has submitted portions of its application that are classified. The Commission notes that, since the entire application becomes part of the record of the proceeding, the NRC Staff has found it impracticable for it to avoid the introduction of Restricted Data or National Security Information into the proceeding.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 7th day of October 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Presiding Officer
Dr. Richard F. Cole, Special Assistant
Dr. Robin Brett, Special Assistant

In the Matter of

Docket No. 40-8968-ML
(ASLBP No. 95-706-01-ML)

HYDRO RESOURCES, INC.
(P.O. Box 777, Crownpoint,
New Mexico 87313)

October 22, 2004

In response to motions filed by Intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC) seeking to have the Final Environmental Impact Statement supplemented with respect to Church Rock Sections 8 and 17, two of the four sites covered by the materials license authorizing Hydro Resources, Inc. (HRI) to conduct *in situ* leach (ISL) uranium mining in McKinley County, New Mexico, the Presiding Officer concludes that the Intervenors have not met the applicable regulatory standard for requiring the FEIS to be supplemented, and accordingly denies the motions.

NEPA: ENVIRONMENTAL IMPACT STATEMENT (NEED)

The National Environmental Policy Act of 1969 (NEPA) requires that federal agencies prepare an environmental impact statement (EIS) as part of all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C) (2000). The statute imposes procedural constraints upon an agency’s decisionmaking process, requiring an agency to assess the environmental

impacts of its actions without mandating any particular result related to that action. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 44 (2001).

NEPA: RULE OF REASON

The requisite “hard look” at the environmental consequences mandated by NEPA, *see Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87 (1998), is subject to a “rule of reason,” meaning that the assessment need not include every environmental effect that could potentially result from the action, but rather “may be limited to effects which are shown to have some likelihood of occurring,” *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 48 (1978). Thus, the proper inquiry under this standard is not whether an effect is “theoretically possible,” but rather whether it is “reasonably probable that that situation will obtain.” *Id.* at 49.

NEPA: RULE OF REASON

The NRC’s obligation under NEPA does not end following initial approval of an action. Even beyond that stage, the statute requires that the agency take a “hard look” at the environmental effects of the proposal. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989).

NEPA: ENVIRONMENTAL IMPACT STATEMENT (NEED FOR SUPPLEMENTATION); RULE OF REASON

The Commission’s regulations require that a final environmental impact statement must be supplemented if there exists “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 10 C.F.R. § 51.92(a)(2); *see also Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 269 (1996). Similar to the determination to prepare an EIS in the first place, agency decisions regarding whether to supplement an FEIS are also governed by the rule of reason. *See Marsh*, 490 U.S. at 373-74.

NEPA: ENVIRONMENTAL IMPACT STATEMENT (NEED FOR SUPPLEMENTATION)

A supplement to the FEIS is not required “every time new information comes to light.” *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque,

NM 87120), CLI-99-22, 50 NRC 3, 14 (1999) (*citing Marsh*, 490 U.S. at 373). Rather, it is compelled by “only those changes that cause effects which are significantly different from those already studied.” *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 52 (2001) (*citing Davis v. Latschar*, 202 F.3d 359, 369 (D.C. Cir. 2000)). That is to say, the new circumstance must present a “seriously different picture of the environmental impact of the proposed project,” *Hydro Resources*, CLI-99-22, 50 NRC at 14, (*citing Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987)), affecting “the quality of the human environment in a significant manner or to a significant extent not already considered,” *Marsh*, 490 U.S. at 374.

NEPA: ENVIRONMENTAL IMPACT STATEMENT (NEED FOR SUPPLEMENTATION)

The question whether the new information or circumstance is significant ordinarily raises a factual dispute. *See Marsh*, 490 U.S. at 376-77; *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218 (10th Cir. 1997).

MEMORANDUM AND ORDER (Ruling on Intervenors’ Motions To Supplement the FEIS)

Before me are two motions of Intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC) (Intervenors) to supplement the Final Environmental Impact Statement¹ with respect to Church Rock Sections 8 and 17, which are two of the four sites covered by the materials license authorizing Hydro Resources, Inc. (HRI) to conduct *in situ* leach (ISL) uranium mining in McKinley County, New Mexico.²

¹ *See* NUREG-1508, “Final Environmental Impact Statement To Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico,” BLM NM-010-93-02, BIA EIS-92-001, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, in cooperation with U.S. Bureau of Land Management and U.S. Bureau of Indian Affairs (Feb. 1997) [hereinafter FEIS].

² *See* Intervenors’ Motion To Supplement the Final Environmental Impact Statement for the Crownpoint Uranium Project Church Rock Section 8 (May 14, 2004) [hereinafter Intervenors’ Section 8 Motion]; Intervenors’ Motion To Supplement the Final Environmental Impact Statement for the Crownpoint Uranium Project Church Rock Section 17 (May 14, 2004) [hereinafter Intervenors’ Section 17 Motion].

Both HRI and the NRC Staff oppose the motions.³ For the reasons set forth below, I find, with the concurrence of Judge Cole and Judge Brett who have been appointed as Special Assistants, that the Intervenor's have not met the applicable regulatory standard for requiring the FEIS to be supplemented. Accordingly, the Intervenor's' supplementation motions are denied.⁴

I. BACKGROUND

A. Procedural History

On January 5, 1998, the Staff issued HRI a materials license authorizing it to mine uranium ore at four different sites in New Mexico — Church Rock Sections 8 and 17 that are contiguous, Crownpoint Unit 1, and Crownpoint — collectively known as the Crownpoint Uranium Project (CUP).⁵ After the license was approved, several parties, including the Intervenor's, were allowed to intervene to challenge the license. Because HRI planned to mine only Section 8 initially,⁶ the Presiding Officer at the time, Judge Bloch, bifurcated the proceeding and limited the adjudication to issues related to Section 8 and those issues challenging the overall validity of the license.⁷ Following the conclusion of this first phase, Judge Bloch ordered that the remainder of the proceeding be placed in abeyance, believing it would be wasteful to litigate issues related to the remaining sites if

³ See Hydro Resources, Inc.'s Response to Intervenor's Motions To Supplement the Final Environmental Impact Statement for Sections 8 and 17 and to Re-Open and Supplement the Record for Section 8 (June 21, 2004) [hereinafter HRI Response]; NRC Staff's Answer to Intervenor's Motions To Supplement FEIS (June 25, 2004) [hereinafter Staff Response].

⁴ The Intervenor's also filed a motion to reopen and supplement the record with respect to Section 8. See Intervenor's Motion To Reopen and Supplement the Record (June 2, 2004). According to the Intervenor's, the reopening motion was filed out of "an abundance of caution" and in response to a footnote in an earlier filed NRC Staff pleading before the Commission. *Id.* at 6. In addition to addressing the requirements for reopening the record in 10 C.F.R. § 2.734, the Intervenor's present five reasons why such a motion is unnecessary in the context of supplementing a final EIS. See *id.* at 6 n.1. Because of the denial of the Intervenor's two motions to supplement the final EIS, it is unnecessary to reach the question of whether, in the circumstances presented, a motion to reopen is required or whether the Intervenor's have met their burden pursuant to section 2.734.

⁵ See Letter from Joseph J. Holonich to Richard F. Clement (Jan. 5, 1998) (regarding issuance of source material license SUA-1508, for the *in situ* leach uranium mining project at Crownpoint, New Mexico).

⁶ See HRI's Request for Clarification or Reconsideration of Presiding Officer's Memorandum and Order of May 13, 1998; and Request for Bifurcation of the Proceeding (June 4, 1998) at 2-3.

⁷ See Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation) (Sept. 22, 1998) at 2-3 (unpublished).

HRI had no present intention actively to mine those locations.⁸ On appeal, the Commission overturned this ruling, and ordered that the hearing should resume on the remaining issues, if HRI did not voluntarily limit its license to the Section 8 site.⁹ At the request of the parties, the proceeding was again held in abeyance so that the parties could attempt to reach a settlement on the remaining issues.¹⁰ The settlement negotiations ultimately failed.

On February 27, 2004, I ruled on the last outstanding issue concerning the Church Rock Section 8 site pertaining to the decommissioning financial assurance plan, and prohibited HRI from using its license until it had corrected three specific deficiencies in the Restoration Action Plan (RAP) for that Section.¹¹ That decision closed the administrative record with respect to the Church Rock Section 8 site.¹²

While the above Section 8 RAP issues were under consideration, Intervenors filed a request with the Staff to have the FEIS supplemented based on the Springstead Estates Project (SEP), a proposed housing development to be built in Fort Defiance, New Mexico, approximately 2 miles from the southern restricted site boundary of Church Rock Section 17.¹³ In a joint status report, and later during a telephone conference call, the Staff indicated that it had determined that no supplementation was required.¹⁴ After indicating they planned to file a motion seeking supplementation of the FEIS, I directed the Intervenors to file any such motion with respect to Section 17 with me and any motion regarding Section 8 with the Commission because jurisdiction over Section 8 matters had passed to the Commission with the filing of petitions to review LBP-04-3.¹⁵

As instructed, on May 14, 2004, the Intervenors filed separate motions requesting that the Staff be directed to supplement the FEIS for Sections 17 and 8.¹⁶ Subsequently, due to their nearly identical nature, the Commission referred the Section 8 motion to me to be considered in conjunction with that for Section 17.¹⁷ The Intervenors then filed an additional motion to reopen and supplement

⁸ See *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-99-40, 50 NRC 273 (1999).

⁹ See *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 38 (2001).

¹⁰ See Order (Nov. 19, 2001) (unpublished).

¹¹ See *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), LBP-04-3, 59 NRC 84, 108-09 (2004), *petitions for review granted*, CLI-04-14, 59 NRC 250 (2004).

¹² See *id.* at 109.

¹³ See Letter from Eric D. Jantz to Mitzi A. Young and John T. Hull (July 31, 2003) [hereinafter Jantz 07/31/03 Letter].

¹⁴ See Joint Status Report (Mar. 26, 2004) at 6-7; Tr. (Apr. 14, 2004) at 54.

¹⁵ See Tr. at 66-67.

¹⁶ See *supra* note 2.

¹⁷ See Commission Order (May 26, 2004) at 2 (unpublished). The Commission's Order resolved the jurisdictional issue relative to Section 8 that I raised with the parties. See Tr. at 43-47.

the record relating to Section 8.¹⁸ Both HRI and the Staff oppose the Intervenors' motions.¹⁹

B. Factual Background

1. HRI's Proposed Uranium Mining Facilities

HRI's proposed operations for the four sites will consist of three separate facilities including the Crownpoint Central Plant (CCP) and two satellite plants — Churchrock and Crownpoint Unit 1. Each of the three plants will contain production and restoration equipment, and the CCP will also contain a dryer and a drum storage area. At a minimum, two retention ponds will be constructed at each site.²⁰

The mining process to be employed by HRI utilizes a leaching solution (lixiviant) to extract uranium from the geologic formation in which it is found. To begin the process, lixiviant is injected into the zone of interest via injection wells, then recovered by pumping production wells. The pregnant lixiviant is then piped to an ion exchange facility where the uranium is removed by passing the lixiviant through ion exchange resin. The yellowcake slurry produced by this process is then transported to the central Crownpoint processing plant to be dried using a batch-type rotary vacuum dryer system.²¹

Mining at Churchrock will commence first at Section 8 and, including time for restoration, is expected to last approximately 5.5 years. HRI plans to shut down individual wells within the wellfield when they are depleted of uranium. When an entire segment of a wellfield is no longer economically productive, restoration efforts will begin, including groundwater sweep, reverse osmosis treatment, and brine concentration. Mining of Section 17 will follow that of Section 8 and is expected to last 4.5 years, including final decommissioning.²²

In its FEIS, the NRC Staff concluded that the potential significant impacts from HRI's proposed facilities could be mitigated and that the license should be granted with the condition that HRI be bound by both the commitments made in its application and the requirements and recommendations set out by the Staff.²³

¹⁸ See *supra* note 4.

¹⁹ See *supra* note 3.

²⁰ See Crownpoint Uranium Project Consolidated Operations Plan, Rev. 2.0 (Aug. 15, 1997) at 25, 28-29 [hereinafter COP]. The COP was submitted by HRI in an effort to organize filings it had made over a period of more than 10 years.

²¹ See *id.* at 10, 37.

²² See *id.* at 17.

²³ See FEIS at xxi.

2. *The Proposed Springstead Estates Project*

The SEP is a proposed housing development that, if constructed, would be situated on 640 acres of largely undeveloped land on Section 30 of Township 16 North, Range 16 West of the New Mexico Principal Meridian in McKinley County, New Mexico, southwest of the HRI mining operations in Churchrock Sections 8 and 17. The development, which would be constructed in phases over a number of years, would be comprised of up to 1000 residential single-family, apartment, and townhouse units that would provide housing for Native American families in the area.²⁴

II. ANALYSIS

A. Standards for Supplementing an FEIS

The National Environmental Policy Act of 1969 (NEPA) requires that federal agencies prepare an environmental impact statement (EIS) as part of all “major Federal actions significantly affecting the quality of the human environment.”²⁵ The statute imposes procedural constraints upon an agency’s decisionmaking process, requiring an agency to assess the environmental impacts of its actions without mandating any particular result related to that action.²⁶ This requisite “hard look” at the environmental consequences mandated by NEPA²⁷ is subject to a “rule of reason,” meaning that the assessment need not include every environmental effect that could potentially result from the action, but rather “may be limited to effects which are shown to have some likelihood of occurring.”²⁸ Thus, the proper inquiry under this standard is not whether an effect is “theoretically possible,” but rather whether it is “reasonably probable that that situation will obtain.”²⁹

The NRC’s obligation under the statute does not end following initial approval of an action. Even beyond that stage, NEPA requires that the agency take a “hard

²⁴ See Jantz 07/31/03 Letter, Attach. 1, Environmental Assessment Prepared by Howard Bitsui for the Springstead Estates Project (June 1, 2003) at 4-5, ADAMS Accession Number ML032810448 [hereinafter EA].

²⁵ 42 U.S.C. § 4332(2)(C) (2000).

²⁶ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 44 (2001).

²⁷ See *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87 (1998).

²⁸ *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 48 (1978).

²⁹ *Id.* at 49.

look” at the environmental effects of the proposal.³⁰ The Commission’s regulations require that a final environmental impact statement must be supplemented if there exists “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”³¹ Similar to the determination to prepare an EIS in the first place, agency decisions regarding whether to supplement an FEIS are also governed by the rule of reason.³²

A supplement to the FEIS is not required “every time new information comes to light.”³³ Rather, it is compelled by “only those changes that cause effects which are significantly different from those already studied.”³⁴ That is to say, the new circumstance must present a “seriously different picture of the environmental impact of the proposed project,”³⁵ affecting “the quality of the human environment in a significant manner or to a significant extent not already considered.”³⁶ The question whether the new information or circumstance is significant ordinarily raises a factual dispute.³⁷

B. Application of Standards to Intervenor’s Motions

Based upon the principles discussed above, my determination necessarily turns upon two related questions: (1) whether there has already been a “hard look” taken at the potential environmental consequences of HRI’s mining operations affecting the proposed SEP as required by NEPA; and (2) whether the new circumstance, in this case the SEP, presents a “seriously different picture of the environmental impact of the proposed project.”³⁸ In short, will the SEP be affected by HRI’s uranium mining “in a significant manner or to a significant extent not already considered.”³⁹ Following an examination of all the filings on this matter, including affidavits of proffered experts, I find that the requirements of NEPA have been satisfied, and that the Intervenor has not presented a prima

³⁰ See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989).

³¹ 10 C.F.R. § 51.92(a)(2) (2004); see also *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 269 (1996). This language also mirrors that found in the Council on Environmental Quality (CEQ) regulations. See 40 C.F.R. § 1502.9(c)(1)(ii) (2004).

³² See *Marsh*, 490 U.S. at 373-74.

³³ *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 14 (1999) (citing *Marsh*, 490 U.S. at 373).

³⁴ *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 52 (2001) (citing *Davis v. Latschar*, 202 F.3d 359, 369 (D.C. Cir. 2000)).

³⁵ *Hydro Resources*, CLI-99-22, 50 NRC at 14 (citing *Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987)).

³⁶ *Marsh*, 490 U.S. at 374.

³⁷ See *id.* at 376-77; *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218 (10th Cir. 1997).

³⁸ *Hydro Resources*, CLI-99-22, 50 NRC at 14.

³⁹ *Marsh*, 490 U.S. at 374.

facie case that the SEP represents a “significant new circumstance” such that a supplement to the existing FEIS is warranted.

In their motion, the Intervenors assert that the Staff’s refusal to supplement the FEIS is a violation of NEPA, as well as the regulations of both the Council on Environmental Quality and the NRC, because the proposed SEP represents a significant new circumstance warranting a supplementation to the FEIS.⁴⁰ Based upon the affidavits of two individuals, Michael G. Wallace and Alan C. Eggleston,⁴¹ the Intervenors claim that the HRI operations will have a significant effect upon the SEP, such that the groundwater and radiological impacts must be reexamined by the Staff in a supplemented FEIS.

As a general response to these claims, HRI argues that no evidence has been provided to demonstrate that the SEP has advanced beyond the conceptual stage and, in addition, that the Intervenors have failed to show that any adverse impacts from HRI’s operations would exist should the development be constructed.⁴² Thus, HRI asserts that the Intervenors have not supported their assertion that the SEP represents a significant new circumstance warranting a supplemental EIS.⁴³ For its part, the Staff argues that the Intervenors have not shown an environmental effect “significantly different from that already studied,” or a change of circumstances that present a “seriously different picture of the environmental impact of the

⁴⁰ See Intervenors’ Section 8 Motion at 5. For the sake of simplicity, I refer only to Intervenors’ Section 8 motion because Intervenors’ Section 17 motion is essentially identical.

⁴¹ See Intervenors’ Section 8 Motion, Exh. A, Affidavit of Michael G. Wallace in Support of [Intervenors’] Motion To Supplement the [FEIS] for the Crownpoint Uranium Project (May 14, 2004) [hereinafter Wallace Affidavit]; Exh. B, Affidavit of Alan Eggleston in Support of [Intervenors’] Motion To Supplement the [FEIS] for the Crownpoint Uranium Project (May 14, 2004) [hereinafter Eggleston Affidavit].

Mr. Wallace, who earned an M.S. degree in Hydrology and a B.A. degree in Plant and Soil Science, is a hydrogeologist with over 20 years of experience in the field. Dr. Eggleston, who holds a Ph.D. with an emphasis on neuro- and cellular physiology and behavior, and a B.A. degree in Biology, has over 30 years’ experience in the area of neurophysiology. Since 1982, he has served as a consulting scientist in environmental impacts of hazardous and radioactive materials projects.

⁴² See HRI Response at 7. In support of its response, HRI filed the affidavits of Mark S. Pelizza and Craig S. Bartels. See *id.*, Exh. A, Affidavit of Mark S. Pelizza (June 21, 2004) [hereinafter Pelizza Affidavit]; Exh. B, Affidavit of Craig S. Bartels (June 21, 2004) [hereinafter Bartels Affidavit].

Mr. Pelizza, who holds an M.S. degree in Geological Engineering and a B.S. degree in Geology, is a licensed professional geoscientist with over 26 years of experience in the ISL mineral recovery industry. Mr. Bartels, who earned a B.S. degree in Petroleum Engineering, is a professional engineer and geoscientist and is a principal in a consulting company that specializes in hydrology, geochemistry, aquifer test design and analysis, and groundwater modeling.

⁴³ See HRI Response at 7.

proposed project.”⁴⁴ Further, the Staff opposes the Intervenor’s motions on the grounds that the environmental assessment for the SEP prepared on behalf of the Department of Housing and Urban Development does not establish the existence of any new, significant adverse environmental impacts of the HRI mining operations on the SEP.⁴⁵

1. Groundwater Issues

a. Horizontal Excursions

The Intervenor’s first argue that groundwater pumping by HRI for its operations at Church Rock Sections 8 and 17, when performed along with pumping for drinking water for the SEP, likely will affect the groundwater gradient, which potentially could hinder HRI’s ability to balance its wellfield and control horizontal excursions.⁴⁶ Because of the close proximity of the proposed housing development and the Church Rock sites, the Intervenor’s claim that any potential excursions — mining solution seepages usually caused by an imbalance of injection rates and pumping rates — could create serious issues with the drinking water of the SEP.⁴⁷ Specifically, their affiant, Mr. Wallace, asserts that the SEP could conceivably pump water at a rate of more than 300 gallons per minute from any one of the Westwater, Dakota, or Cow Springs aquifers, which, when combined with the HRI operations, potentially could result in changes to the groundwater flow “magnitude and direction” of either Section 8 or 17.⁴⁸ Mr. Wallace states that any change of this nature “would render current monitoring, development, and remediation plans more indefensible and unreliable than they already are.”⁴⁹

⁴⁴ See Staff Answer at 5 (*citing* CLI-01-4, 53 NRC at 52). In support of its response, the Staff filed the affidavits of Ron C. Linton and Richard A. Weller. See *id.*, Staff Exh. 1, Affidavit of Ron C. Linton (June 25, 2004) [hereinafter Linton Affidavit]; Staff Exh. 2, Affidavit of Richard A. Weller (June 25, 2004) [hereinafter Weller Affidavit].

Mr. Linton, who holds M.S. and B.S. degrees in Geology, is a hydrogeologist employed by the NRC and the former Project Manager for the HRI license. Dr. Weller, who earned Ph.D. and M.S. degrees in Nuclear Engineering, and his B.A. degree in Distributed Sciences, is a nuclear engineer and is the current Project Manager for the HRI license.

⁴⁵ The Staff also argues that 10 C.F.R. § 51.92(a) bars formal supplementation by the Staff because the Staff has already issued HRI a materials license. See Staff Response at 9-10. Contrary to the Staff’s argument, the supplementation requirement of NEPA and the agency’s environmental regulations is not abrogated by the Commission’s practice rule authorizing the Staff to issue a license before the adjudication is commenced or completed. See 10 C.F.R. § 2.1205(m) (2004).

⁴⁶ See Intervenor’s Section 8 Motion at 7-8.

⁴⁷ See *id.*

⁴⁸ Wallace Affidavit ¶ 18.

⁴⁹ *Id.*

In response, HRI argues that this allegation is without merit because the NRC has already determined in the FEIS that these mining activities pose no significant threat to nearby water sources or neighboring communities, and the SEP is located 2 miles upgradient from the southern restricted site boundary of Section 17 and even further from that of Section 8.⁵⁰ Further, HRI asserts that Intervenor's affiant, Mr. Wallace, ignores existing site geological and hydrological data showing that the Dakota and Westwater aquifers could not provide the postulated amount of water needed for use by the SEP.⁵¹ With respect to the Cow Springs aquifer, HRI points to findings in the FEIS that indicate the existence of an estimated 55-meter-thick layer of Recapture Shale, an aquiclude between the Cow Springs and the Westwater aquifers at the Church Rock site, the existence of which, the NRC concluded, greatly minimizes the risk that an excursion into the Cow Springs aquifer could occur.⁵² Because there is little hydraulic connection between these two aquifers, HRI's affiant, Mr. Bartels, states that "any potential affect [*sic*] from pumping the Cow Springs at the SEP site on HRI's Church Rock project would be insignificant."⁵³

Further, even if it accepts the assumptions of the Intervenor's affiant regarding the viability of the Westwater aquifer as a water source for the SEP, HRI contends that its modeling shows that these concerns are without merit. Putting aside the fact that the Church Rock sites are downgradient of the SEP and the groundwater flows in a north-northeasterly direction, Mr. Bartels asserts that his groundwater model indicates that a particle starting within the Section 17 site 2 miles from the SEP pumping wells would take 869 years to travel the simulated distance to the pumping wells.⁵⁴ He states that if the hydraulic gradient and directional flow factors are taken into account during the modeling, the particle never reaches the pumping wells.⁵⁵

In support of its position, the Staff identifies the failure of the EA on the proposed development to establish which aquifer would supply water to the SEP, but focuses on the distance between the HRI mining project and the proposed housing project even without the EA locating any specific wells for the SEP.⁵⁶ Relying on the FEIS, the Staff notes that the tilt (i.e., dip) of the rock formations underlying Church Rock Sections 8 and 17 causes the groundwater in that area to

⁵⁰ See HRI Response at 8.

⁵¹ See *id.* at 9. The Westwater is the aquifer for which HRI claims water rights and in which the HRI mining operations will take place. See *id.* at 10 n.10.

⁵² See *id.* at 9-10.

⁵³ Bartels Affidavit ¶ 9.

⁵⁴ See *id.* ¶ 19.

⁵⁵ See *id.* ¶ 20.

⁵⁶ See Staff Answer at 5-6.

flow to the north-northeast, which is directly away from the SEP.⁵⁷ This being the case, the Staff's affiant, Mr. Linton, states that the assumed groundwater usage of the SEP would have to reverse the potentiometric surface and groundwater flow direction at the Church Rock sites by some 180 degrees, a "highly unlikely" occurrence.⁵⁸ Additionally, the Staff asserts that for any contamination to occur at the SEP as a result of a lixiviant excursion, the groundwater would have to flow upgradient toward the proposed housing site, also an unlikely event.⁵⁹

At the outset it should be noted that the SEP is, at best, in a conceptual stage and that it is totally speculative as to which, if any, aquifer would supply the SEP with water should the housing development ever be built. Indeed, the Intervenor are not able to identify which aquifer will serve this purpose.⁶⁰ In addition, I find compelling the analysis by the affiants for both the Staff and HRI, raising grave doubt as to the viability of the three aquifers identified by the Intervenor as potential water source options based upon the existing conditions of each.⁶¹

Notwithstanding the speculative nature of the proposed SEP and the questionable viability of the aquifers as water sources at the location of the SEP, the existing hydrologic and geological characteristics of the sites make it highly unlikely that excursions and migrations due to combined groundwater pumping at the SEP and Church Rock sites would occur, even if it is assumed that the aquifers are viable water sources for the proposed SEP. First, as the FEIS indicates, the three aquifers identified by the Intervenor, the Dakota, the Westwater, and the Cow Springs, have no hydraulic connection because of the rock formations between each of the aquifers.⁶² Second, Church Rock Sections 8 and 17 lie to the north-northeast of the proposed location of the SEP, and the FEIS shows that the potentiometric surface and approximate groundwater flow direction at these HRI mining sites is also north-northeast, meaning that this flow moves in a direction away from the SEP.⁶³ To have an effect on any future SEP wells, as Staff affiant Mr. Linton notes, this flow would have to be reversed by nearly 180 degrees, a "highly unlikely" event, as any such SEP wells would be both upgradient from Sections 8 and 17 and, if drilled in the location closest to the Section 17 site, no less than 1.5 miles away.⁶⁴ Indeed, a modeling of the potential impacts of the HRI

⁵⁷ See *id.* at 7; FEIS Fig. 3.11.

⁵⁸ Linton Affidavit ¶ 10.

⁵⁹ See *id.*; Staff Answer at 7-8.

⁶⁰ See Tr. at 53.

⁶¹ See Bartels Affidavit ¶¶ 11, 13-17; Linton Affidavit ¶¶ 6-8.

⁶² See FEIS at 3-31, 3-35. As the Staff points out, the lack of any connection must be demonstrated by HRI prior to any uranium mining as part of license conditions 10.32b and 10.25, further mitigating Intervenor's concern in this regard. See *also* Linton Affidavit ¶ 4; Bartels Affidavit ¶ 26.

⁶³ See FEIS Fig. 3.11 at 3-37.

⁶⁴ See Linton Affidavit ¶ 10.

mining on the SEP site from the Westwater aquifer performed by Mr. Bartels, taking into account the direction of the groundwater flow in the area, shows that a particle starting at the southern edge of Church Rock Section 17 two miles from the SEP never reaches the housing development's pumping wells.⁶⁵ To further mitigate this concern, HRI's license requires vertical and horizontal excursion monitoring wells, as well as mechanical integrity tests on injection wells at HRI's Church Rock operations.⁶⁶

In light of the above discussion, I find that no supplementation of the FEIS is required regarding the horizontal excursion issue raised by the Intervenor. The FEIS already has analyzed (i.e., taken a "hard look" at) each of the environmental consequences related to the groundwater gradient from the HRI uranium mining operations. Additionally, the Intervenor has not brought forth any additional plausible concerns related to the groundwater gradient that present a seriously different picture of the environmental impact of solution mining of Church Rock Sections 8 and 17.

b. Vertical Excursions/Pipeline Fault

The Intervenor also claims that an additional adverse consequence of the combined groundwater pumping could be vertical excursions⁶⁷ through a purported nearby fault coinciding with the Pipeline Canyon.⁶⁸ In this regard, the Intervenor's affiant, Mr. Wallace, is concerned that any change to the groundwater flow due to combined groundwater pumping could potentially cause lixiviant containing uranium to flow toward the postulated Pipeline fault, which allegedly trends southwest through Section 17.⁶⁹ According to Mr. Wallace, if water flows toward the fault, vertical excursions could result, causing contamination to the overlying and underlying aquifers.⁷⁰

In addition to evidence indicating a lack of hydraulic connection between the three aquifers, the affiants for both HRI and the Staff respond by pointing to the fact that the FEIS has called into question the very existence of the alleged Pipeline fault.⁷¹ In this regard, the FEIS states:

⁶⁵ See Bartels Affidavit ¶ 20.

⁶⁶ See Linton Affidavit ¶ 11 (*citing* License Conditions 10.12, 10.17, 10.20, and 10.24).

⁶⁷ Vertical excursions occur when existing vertical pathways allow mining solutions to migrate up or down into neighboring aquifers. These pathways can result from thin or missing confining units (geologic material with low permeability), open faults and fractures, broken mining well casing, and injection wells operating at excessive pressures. See FEIS at 4-17.

⁶⁸ See Intervenor's Section 8 Motion at 8.

⁶⁹ See Wallace Affidavit ¶¶ 20-21.

⁷⁰ See *id.* ¶ 21.

⁷¹ See Bartels Affidavit ¶ 25; Linton Affidavit ¶ 12.

A more recent detailed geologic map (Kirk and Zech 1987) indicates that the fault does not occur at all. This geologic map indicates no offset structural contours in the area. This interpretation is repeated by several regional geological studies including Sears and others (1936), O'Sullivan and Beaumont (1957), and Cooley and others (1969). No evidence for the fault is found in any of the site drilling data, and HRI indicates that if it exists, it is probably found some distance to the east.⁷²

HRI and the Staff argue that Mr. Wallace offers no geologic evidence, only speculation, to refute this finding and lend support to these concerns.⁷³ Further, the Staff's affiant, Mr. Linton, notes that the "subject of vertical lixiviant migration due to structural shears, fractures, and joints, has previously been raised in this proceeding," where such vertical excursions were said to be unlikely "due to the projected thickness and rock type of the overlying confining units."⁷⁴

The supposed Pipeline fault has been analyzed and addressed by the FEIS. Indeed, the findings of the FEIS, based upon extensive resources including site drilling data, a detailed geological map and several geological studies, dispute the very existence of this fault.⁷⁵ Moreover, Judge Bloch, the former Presiding Officer in this proceeding, previously held that the Staff had dealt "adequately with the question of vertical excursions through faults, fractures, shears, joints, etc.," and determined that the "danger of lasting damage [from such excursions] is very small."⁷⁶ The Intervenor's affiant offers no technical data to counter the findings in the FEIS. Absent a showing by the Intervenor of significant new circumstances or information related to the purported Pipeline fault and its relation to potential vertical excursions, I find that no supplementation of the FEIS on this matter is required.

c. Vertical Excursions/Mine Workings

The Intervenor next allege that additional vertical pathways for excursions could be caused from the collapse of underground mine workings located on the HRI site.⁷⁷ The Intervenor's affiant, Mr. Wallace, notes that the FEIS indicates that groundwater pumping by HRI's solution mining could change the pressure within the abandoned underground mine workings found on Section 17, causing

⁷² FEIS at 3-21.

⁷³ See Bartels Affidavit ¶ 25; Linton Affidavit ¶ 12.

⁷⁴ Linton Affidavit ¶ 12 (citing NRC Staff Response to Questions Posed in April 21 Order (May 11, 1999), Staff Exh. 1, Affidavit of William H. Ford (May 11, 1999), ¶¶ 27-36).

⁷⁵ See FEIS at 3-21.

⁷⁶ LBP-99-30, 50 NRC 77, 93 (1999).

⁷⁷ See Intervenor's Section 8 Motion at 8.

their collapse and creating vertical pathways for groundwater flow.⁷⁸ Mr. Wallace argues that simultaneous pumping on the part of the SEP could “further complicate HRI’s ability to mitigate underground mine workings collapse.”⁷⁹ Further, he asserts that past dewatering of the old mine workings may have retarded the natural reducing conditions of the aquifer so that natural attenuation may not prevent uranium from moving farther than projected by the FEIS. According to Mr. Wallace, groundwater pumping by the SEP could increase the distance uranium travels before encountering reducing conditions, thereby making more difficult the restoration efforts of HRI and potentially jeopardizing the SEP’s drinking water source.⁸⁰

In response, HRI and the Staff argue that the FEIS has addressed extensively the old uranium mine workings in Section 17 and HRI’s proposed operations.⁸¹ Additionally, both state that the Intervenor’s concerns are mitigated by the fact that HRI is required by their license to place excursion monitoring wells near the old mine workings for detection purposes, and that the FEIS concluded that such monitoring would provide adequate protection against the possibility of vertical excursions.⁸² With regard to Intervenor’s claims that past dewatering of the abandoned mine workings may have diminished the reducing conditions in the aquifer, HRI’s affiant, Mr. Bartels, agrees and points to extensive discussion of the subject within the FEIS.⁸³ He asserts, however, that this condition exists currently, will continue to exist without regard to HRI’s operations, exists at all previously dewatered uranium mines, and that the Intervenor has presented no new information in this regard.⁸⁴ The Staff’s affiant, Mr. Linton, concurs, asserting that no well in the SEP would be threatened by any Section 17 groundwater because, as found in the FEIS, uranium is quickly absorbed and removed from local groundwater due to the reducing conditions in the rock commonly surrounding uranium ore bodies.⁸⁵ Mr. Linton asserts that the Intervenor has provided no evidence showing that such reducing conditions do not exist in relation to the uranium body located on the HRI site.⁸⁶

Both concerns related to the old mine workings located at Church Rock Section 17 have been adequately addressed in the FEIS, and absent any new circumstances, do not warrant a supplement to the current environmental evaluation. Clearly,

⁷⁸ See Wallace Affidavit ¶ 23 (*citing* FEIS at 4-55 to 4-56).

⁷⁹ *Id.* ¶ 24.

⁸⁰ See *id.* ¶¶ 25-26.

⁸¹ See Bartels Affidavit ¶ 26; Linton Affidavit ¶ 13.

⁸² See Bartels Affidavit ¶ 26; Linton Affidavit ¶ 13.

⁸³ See Bartels Affidavit ¶ 27.

⁸⁴ See *id.*

⁸⁵ See Linton Affidavit ¶ 14 (*citing* FEIS at 4-57).

⁸⁶ See *id.* ¶ 14.

the FEIS already has taken a “hard look” at the environmental impacts of the old mine workings and uranium mining at Church Rock. The FEIS specifically discusses these concerns, noting that it is probable that a number of the mine workings have already collapsed because of the type of mining utilized at the site previously.⁸⁷ In light of this situation, pumping tests were conducted in the area and detected no aquifer interconnection.⁸⁸ Moreover, HRI has committed to conducting monitoring near the old mine workings to detect any potential excursions. And, as stated in the FEIS, such monitoring “should provide adequate detection of potential vertical excursions.”⁸⁹ The Intervenor has presented no factual basis or other credible evidence supporting their claim that the potential construction of the SEP renders the above analysis inadequate. This being the case, I find that a supplement to the FEIS on this score is unnecessary.

Similarly, with regard to the Intervenor’s specific claim regarding reducing conditions in the aquifer, I am satisfied that the FEIS also has taken the requisite “hard look” at this issue and that no new circumstances have been presented justifying an update to the environmental study. First, it is clear that the FEIS recognizes the possible existence of the very issue raised by the Intervenor.⁹⁰ As the FEIS indicates, however, research shows that reducing conditions in rock formations commonly surrounding bodies of uranium ore quickly absorb and remove uranium from local groundwater.⁹¹ Absent any evidence from the Intervenor to the contrary, or that these conditions are not present at the Church Rock site, the existing FEIS is adequate. Further, as is the case with other previously dewatered uranium mines, the same condition would exist whether or not HRI mines Section 17. Again, the Intervenor provides no data or credible support for the claim that this is not the case or that the problem would be exacerbated by the HRI operations. Finally, I note that this perceived problem could, in fact, be improved by HRI’s presence at Church Rock, as it will conduct monitoring to prevent any mining solution from escaping site boundaries. Accordingly, I find that the FEIS need not be supplemented in this regard.

2. Radiological Issues

a. Airborne Emissions

The Intervenor argues that because the SEP was not considered as part of the original receptor inventory when the radiological effects of Church Rock Sections

⁸⁷ See FEIS at 3-40, 4-54.

⁸⁸ See *id.* at 3-35, 4-54.

⁸⁹ *Id.* at 4-56.

⁹⁰ See *id.* at 4-58.

⁹¹ See *id.* at 4-57.

8 and 17 were examined, the FEIS must be supplemented to include such a study.⁹² They assert that airborne particulate emissions from each emission point should be modeled for the SEP because of the locations of the proposed housing development in relation to the Church Rock sites.⁹³

In response, HRI and the Staff state that the FEIS evaluated the radiological dose estimates for Church Rock's restricted site boundaries as well as the nearest downwind residence, and found them to be well within regulatory limits. For this reason, coupled with the fact that the SEP is located approximately 2 miles upwind from these boundaries, both assert that supplementation to the FEIS in this regard is not necessary.⁹⁴

The Intervenor's argument with respect to the airborne emissions of the HRI uranium mining operations is without merit. The FEIS modeled seventeen airborne receptors near the Church Rock sites, including the nearest downwind residence, and found that the exposures with emission controls are a "small fraction of the regulatory limits."⁹⁵ Further, as HRI and the Staff point out, the proposed location of the SEP is approximately 2 miles southwest of the Section 17 restricted site boundary, and generally upwind of both Church Rock sections.⁹⁶ As Mr. Pelizza, HRI's affiant, states, "[b]ecause the FEIS analysis shows no adverse radiological impact at boundaries and residences that are far more susceptible to potential exposure, it is unreasonable . . . that more distant receptors upwind would be impacted by radiation to a larger degree."⁹⁷ I find, therefore, that this concern fails to meet the standards necessary to warrant supplementation of the FEIS.

b. Emissions Due to Facility Type

The Intervenor also claim that the current radiological assessment is inadequate because it is based upon an untested type of commercial processing facility, rather than one based on an "industry standard processing plant."⁹⁸ According to the Intervenor's affiant, Dr. Eggleston, the utilization of this "unproven technology," would be "particularly important in terms of airborne emissions during groundwater restoration" for the two Church Rock Sections.⁹⁹ Should the HRI processing plant have no emissions during production as claimed by the Licensee,

⁹² See Intervenor's Section 8 Motion at 8.

⁹³ See *id.*

⁹⁴ See HRI Response at 12-14; Staff Response at 6-7.

⁹⁵ FEIS at 4-83 to 4-85.

⁹⁶ See *id.* at 3-3, Fig. 3.1 at 3-4, Fig. 4.5 at 4-84.

⁹⁷ Pelizza Affidavit ¶ 28.

⁹⁸ Intervenor's Section 8 Motion at 9; see Eggleston Affidavit ¶ 11.

⁹⁹ Eggleston Affidavit ¶ 12.

Dr. Eggleston states that gases such as radon and other recirculated particulates will be then released during the restoration phase.¹⁰⁰

These claims are rejected by the affiants for both HRI and the Staff. As pointed out by Mr. Pelizza, the pressurized downflow ion exchange system that will be used by HRI is not experimental and, in fact, is employed at other ISL sites in Wyoming licensed by the NRC.¹⁰¹ Further, according to both these parties' affiants, the process to be employed by HRI will serve to reduce significantly radon release during the production phase of the facility.¹⁰² As stated by Mr. Linton, HRI plans to use a vacuum pump to remove and compress the radon in intermediate holding tanks, dissolve it in the lixiviant injection system, and then recirculate it back into the wellfield.¹⁰³ He states that the primary emissions of radon will occur when excess vapor pressure is vented by relief valves at outdoor locations, when ion exchange columns are opened for resin transfer and elution, and when wastewater is treated, and each of these scenarios has been sufficiently modeled in the FEIS.¹⁰⁴ The Staff also declares that particulate emissions are of no concern. In this regard, Mr. Linton states:

[A]ny particulate matter generated by HRI's operations would be trapped by a bag filter — with a 99 percent efficiency — and would be returned to the uranium production circuit in the processing plant. The remaining one percent would be trapped by condensing and cooling all water vapor from the drying chamber. The vapor would be drawn through a water jacket and condensed, thereby capturing virtually all of the particulate matter escaping the bag filter. The condensate would then be returned to the uranium precipitation circuit in the processing plant.¹⁰⁵

The Intervenors' position with respect to the type of processing facility to be used by HRI is without merit. First, the Intervenors present no evidentiary support for their claims. Second, the FEIS adequately evaluates the processes to be utilized by HRI to minimize the emission of airborne effluents. Finally, as discussed in Section II.B.2.a, above, the FEIS also examines the radiological levels of airborne emissions at various, higher-risk locations and finds them to be within regulatory limits. Thus, because the FEIS has taken the requisite "hard look" at the possible effects of airborne effluents from the Church Rock operations and HRI's actions to mitigate them, I find that no further supplementation of the FEIS is necessary.

¹⁰⁰ See Intervenors' Section 8 Motion at 9; Eggleston Affidavit ¶ 12.

¹⁰¹ See Pelizza Affidavit ¶ 22.

¹⁰² See *id.*; Linton Affidavit ¶ 18.

¹⁰³ See Linton Affidavit ¶ 18.

¹⁰⁴ See *id.* ¶ 19 (*citing* FEIS at 2-15, 4-82 to 4-85).

¹⁰⁵ *Id.* ¶ 18 (*citing* FEIS at 2-15).

3. *Other Issues*

a. *Traffic Patterns/Accident Rates*

The Intervenors maintain that the existing FEIS takes neither the new traffic patterns nor the resulting accident rates related to the SEP into account, requiring further supplementation.¹⁰⁶ The additional 4400 individuals in the area due to the SEP,¹⁰⁷ the Intervenors claim, would cause significant changes to the traffic load on the roads that provide access to the housing development, increasing the likelihood of accidents involving HRI's transport of hazardous materials.¹⁰⁸

I am satisfied that the issue of traffic patterns and accident rates has been adequately addressed by the FEIS. As pointed out by HRI's affiant, Mr. Pelizza, the FEIS in its current form evaluates the transportation route from the Church Rock facility northward, as well as the risks for communities located along this route, including Crownpoint because that is the transportation route for the Church Rock product (i.e. yellowcake slurry).¹⁰⁹ Additionally, the FEIS indicates that the HRI mining operations at Church Rock will not significantly increase the transportation risk to the regional population that exists currently.¹¹⁰ Further, as the Staff indicates, there will be relatively infrequent shipments of radioactive wastes from the HRI facilities.¹¹¹

Absent any contrary evidence to support the Intervenors' claims, it is reasonable to conclude that the alleged risks to the SEP, which lies south of the Church Rock site and thus not along the transportation route of the Church Rock product, will not exceed those already contemplated in the FEIS. I find, therefore, that supplementation of the FEIS in this regard is not necessary.

b. *Environmental Justice*

In addition to the traffic pattern and accident concerns, the Intervenors believe that the SEP raises new environmental justice concerns not previously addressed that require further supplementation of the FEIS.¹¹² The basis for the Intervenors'

¹⁰⁶ See Intervenors' Section 8 Motion at 9.

¹⁰⁷ The Intervenors arrive at their estimated population figure by multiplying the proposed size of the SEP (1000 single-family units) and the average size of a Navajo family as determined by the 2000 Census (4.36 persons). See Eggleston Affidavit ¶ 9.

¹⁰⁸ See Intervenors' Section 8 Motion at 9.

¹⁰⁹ See Pelizza Affidavit ¶¶ 43-45; see also FEIS Fig. 2.6 at 2-13, 3-45 to 3-46, 4-69 to 4-70.

¹¹⁰ See FEIS at 4-124.

¹¹¹ See Weller Affidavit ¶ 8.

¹¹² See Intervenors' Section 8 Motion at 9-10.

claim is the fact that the SEP will be constructed in an area largely populated by Native Americans and will provide housing for low-income families.¹¹³

The Intervenors' claim with regard to environmental justice is also without merit. As noted by HRI, the FEIS addresses in substantial detail the minority and low-income population located in the same area as the Church Rock sites.¹¹⁴ Indeed, the FEIS evaluates the impact of the HRI operations within an 80-kilometer radius of the site — an area predominately inhabited by Native Americans.¹¹⁵ This being so, the SEP presents no additional environmental justice concerns not already addressed by the FEIS in its current form and the Intervenors have presented no evidence to the contrary. Accordingly, I find that there is no need to supplement the FEIS concerning environmental justice.

III. CONCLUSION

For the foregoing reasons, the Intervenors' motions to supplement the FEIS with respect to Church Rock Sections 8 and 17 are denied, and their motion to reopen the record pertaining to Section 8 is dismissed.

It is so ORDERED.

BY THE PRESIDING OFFICER¹¹⁶

Thomas S. Moore
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 22, 2004

¹¹³ *See id.*

¹¹⁴ *See Pelizza Affidavit* ¶ 51.

¹¹⁵ *See FEIS* at 3-78 to 3-79.

¹¹⁶ Copies of this Memorandum and Order were sent this date by Internet e-mail or facsimile transmission to all participants or counsel for participants.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 52-007-ESP

EXELON GENERATION COMPANY, LLC
(Early Site Permit for the Clinton
ESP Site)

November 10, 2004

The Commission denies Intervenors' petition for interlocutory review.

INHERENT SUPERVISORY AUTHORITY

**RULES OF PRACTICE: INHERENT SUPERVISORY AUTHORITY;
DISCRETIONARY INTERLOCUTORY REVIEW**

DISCRETIONARY INTERLOCUTORY REVIEW

REGULATIONS (10 C.F.R. § 2.341(f))

Section 2.341(f) is part of our new Part 2, but “essentially restates” our prior interlocutory appeal practice. *See* Final Rule: “Changes to Adjudicatory Process,” 69 Fed. Reg. 2181, 2225 (Jan. 14, 2004). We continue to disfavor such appeals (*see, e.g., Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-9, 55 NRC 245, 248 (2002)), largely due to our general unwillingness to engage in “piecemeal interference in ongoing Licensing Board proceedings.” *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213 (2002). Thus, our new section 2.341(f) authorizes petitions for interlocutory review in three circumstances only: (1) where the Board decision works “immediate and serious irreparable impact”; (2) where it “affects the basic structure of the proceeding in

a pervasive or unusual manner’’; or (3) where the Board refers a ruling, or certifies a question, that ‘‘raises significant and novel legal or policy issues.’’ See 10 C.F.R. § 2.341(f)(1), (2). In addition, ‘‘we sometimes take interlocutory review as an exercise of our inherent supervisory authority over agency adjudicatory proceedings.’’ *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 26-27 (2004). See also *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-1, 49 NRC 1, 2 (1999); *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129, 130 (1998); *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 20 (1998). But here the Board’s routine ruling on contention admissibility provides no occasion for us to invoke our ‘‘inherent supervisory authority.’’ And Intervenors’ petition for review plainly does not satisfy section 2.341(f)’s interlocutory review standards.

DISCRETIONARY INTERLOCUTORY REVIEW (SERIOUS IRREPARABLE IMPACT)

RULES OF PRACTICE: DISCRETIONARY INTERLOCUTORY REVIEW

REGULATIONS (10 C.F.R. § 2.341(f))

Additional potential costs associated with delaying Commission consideration of Intervenors’ NEPA argument until after a final Board decision do not amount to a ‘‘serious irreparable impact’’ warranting immediate Commission review. Such costs are no different in kind from the financial burdens (i.e., monetary ‘‘impact’’) that in past cases we repeatedly have found insufficient to justify immediate review of interlocutory board rulings on contention admissibility. See, e.g., *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374 & n.13 (2001), and cited cases; *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 378 n.11 (1983). The possibility that later appellate review will result in a reversal, and the prospect of extra litigating costs, are inevitable byproducts of our doctrine disfavoring interlocutory, piecemeal appeals. As our Appeal Board once explained:

We have noted . . . the obvious fact that once the hearing is held, the time and money expended in the trial of an issue cannot be recouped by any appellate action. . . . The same is true, however, any time a contention is admitted over a party’s objections and the hearing proceeds. The added delay and expense occasioned by the admission of [a] contention — even if erroneous — . . . does not alone distinguish this case so as to warrant interlocutory review.

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1114 (1982) (citation, brackets, and internal quotation marks omitted). While the Appeal Board made this comment in connection with an effort to appeal a Board decision admitting a contention, the same rationale covers attempted interlocutory appeals of contention denials. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 80 (2000) (internal quotation marks omitted). Interlocutory rulings on contentions, we have said, ordinarily must “abide the end of the case” before undergoing appellate review. *Id.*

DISCRETIONARY INTERLOCUTORY REVIEW (AFFECTING BASIC STRUCTURE OF PROCEEDING)

RULES OF PRACTICE: DISCRETIONARY INTERLOCUTORY REVIEW

REGULATIONS (10 C.F.R. § 2.341(f))

As for the other ground for interlocutory review under section 2.341(f)(2) — permitting appeals concerning a proceeding’s “basic structure” — the “mere expansion of issues [such as Intervenor’s seek here] rarely, if ever, has been found to affect the basic structure of a proceeding in a pervasive or unusual manner so as to warrant interlocutory review.” *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93-94 (1994). Claims that a board has wrongly rejected a contention, or portions of a contention, are commonplace; such claims cannot be said to affect a proceeding’s “basic structure” within the meaning of section 2.341(f). Our “basic structure” standard comprehends disputes over the very nature of the hearing in a particular proceeding — for example, whether a licensing hearing should proceed in one step or in two (*see Savannah River*, CLI-02-7, 55 NRC at 214 & n.15) — not to routine arguments over admitting particular contentions. Under longstanding NRC jurisprudence, mere potential legal error does not justify review. *See Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320 & n.4 (1998). Indeed, we have declined interlocutory review even where we concluded that “aspects of the Licensing Board’s decision . . . appear highly questionable.” *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-15, 40 NRC 319, 321 (1994). *See also id.* at 322 (“we do not sit simply to correct erroneous interlocutory licensing board rulings”).

DISCRETIONARY INTERLOCUTORY REVIEW (SIGNIFICANCE OR NOVELTY OF BOARD RULING)

RULES OF PRACTICE: DISCRETIONARY INTERLOCUTORY REVIEW

REGULATIONS (10 C.F.R. § 2.341(f))

Nor, without a good deal more, does the significance or novelty of a board ruling render it suitable for interlocutory review. *See, e.g., Hydro Resources*, CLI-98-8, 47 NRC at 320 (acknowledging the “significan[ce]” of certain rulings by the Licensing Board, but nonetheless concluding that “the mere issuance of an important ruling does not, without more, merit interlocutory review”). Section 2.341(f)(1) does not say that the significance or novelty of issues independently justifies discretionary interlocutory Commission review. Rather, the provision says that the Commission will consider such issues when the *Board* refers one of its rulings, or certifies an issue, as warranting immediate Commission attention. Here, the Board has issued no referral or certification. In considering whether to take up issues in cases at an interlocutory stage, we give weight to the Board’s view. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 28-29 (2000).

REGULATIONS (10 C.F.R. § 2.311)

RULES OF PRACTICE: MANDATORY INTERLOCUTORY REVIEW

Section 2.311 does allow interlocutory appeals as of right, but in three situations only: (1) where a petitioner for intervention challenges a board decision “denying” a petition to intervene in its entirety; (2) where a party argues that, rather than granting a petition to intervene, the Board should have “wholly denied” it; and (3) where a party claims that the Board’s selection of the appropriate hearing procedure was in “clear contravention” of Commission rules. 10 C.F.R. § 2.711(b), (c), (d). None of these three scenarios describes the procedural posture of the instant case. Petitioners’ intervention request was granted, not denied; no one claims that the petition should have been “wholly denied”; and there is no current dispute over the Board’s selection of the hearing procedure.

MEMORANDUM AND ORDER

Intervenors in this early site permit proceeding seek interlocutory review of a Licensing Board order excluding “energy efficiency” issues from the “clean

energy alternatives’’ contention that the Board admitted for litigation.¹ Intervenor claim that the Board’s decision is inconsistent with NEPA’s requirement that the Commission and Exelon “rigorously explore and objectively evaluate” all reasonable alternatives to Exelon’s proposed new Clinton 2 nuclear power plant. They also assert that the Board reached clearly erroneous factual conclusions regarding Exelon’s and its affiliates’ collective ability to implement energy efficiency efforts.² Although Intervenor seek interlocutory review under 10 C.F.R. § 2.341(f), they appear to appeal alternatively under 10 C.F.R. § 2.311 as well.³

Intervenor claim that we should waive our usual objections to interlocutory review and consider their appeal because we would thereby avoid unnecessary delay and the waste of the NRC’s and the parties’ resources.⁴ Although Intervenor do not expressly say so, they appear to raise this as a claim of “immediate and serious irreparable impact” under 10 C.F.R. § 2.341(f)(2)(i). Intervenor also maintain, citing 10 C.F.R. § 2.341(f)(2)(ii), that the Board’s ruling will have “a pervasive effect” on the proceeding, given the interrelated nature of the excluded “energy efficiency” issue and the admitted “renewable energy alternatives” issue.⁵ And they assert that the impact of the issue’s exclusion cannot “as a practical matter . . . be alleviated” by a petition for review after the Board’s final decision⁶ because reversal at that point would require a separate new analysis of all clean energy alternatives.⁷

In addition, invoking 10 C.F.R. § 2.341(f)(1), Intervenor argue that their petition presents a “significant and novel legal issue” whose resolution would materially advance the orderly disposition of this proceeding.⁸ That issue, say Intervenor, is “whether NEPA requires the consideration of reasonable alternatives such as energy efficiency in situations where the project applicant is operating in a partially deregulated electric services market.”⁹

Section 2.341(f) is unhelpful to Intervenor. It is part of our new Part 2, but “essentially restates” our prior interlocutory appeal practice.¹⁰ We continue

¹ LBP-04-17, 60 NRC 229 (2004).

² Intervenor’s Petition for Interlocutory Review, dated Aug. 23, 2004, at 1-2.

³ *Id.* at 13-14. *But see* Intervenor’s Reply Brief, dated Sept. 7, 2004, at 2 (section “2.341(a) specifically provides that where, as here, a party is not appealing under Section 2.311, review of a Board decision should proceed under Section 2.341”).

⁴ Petition for Interlocutory Review at 2.

⁵ *Id.* at 12-13.

⁶ *See* 10 C.F.R. § 2.341(f)(2)(i).

⁷ Petition for Interlocutory Review at 13.

⁸ *Id.*

⁹ *Id.* at 13-14.

¹⁰ *See* Final Rule: “Changes to Adjudicatory Process,” 69 Fed. Reg. 2181, 2225 (Jan. 14, 2004).

to disfavor such appeals,¹¹ largely due to our general unwillingness to engage in “piecemeal interference in ongoing Licensing Board proceedings.”¹² Thus, our new section 2.341(f) authorizes petitions for interlocutory review in three circumstances only: (1) where the Board decision works “immediate and serious irreparable impact”; (2) where it “affects the basic structure of the proceeding in a pervasive or unusual manner”; or (3) where the Board refers a ruling, or certifies a question, that “raises significant and novel legal or policy issues.”¹³ In addition, “we sometimes take interlocutory review as an exercise of our inherent supervisory authority over agency adjudicatory proceedings.”¹⁴ But here the Board’s routine ruling on contention admissibility provides no occasion for us to invoke our “inherent supervisory authority.” And Intervenors’ petition for review plainly does not satisfy section 2.341(f)’s interlocutory review standards.

Additional potential costs associated with delaying Commission consideration of Intervenors’ NEPA argument until after a final Board decision do not amount to a “serious irreparable impact” warranting immediate Commission review. Such costs are no different in kind from the financial burdens (i.e., monetary “impact”) that in past cases we repeatedly have found insufficient to justify immediate review of interlocutory board rulings on contention admissibility.¹⁵ The possibility that later appellate review will result in a reversal, and the prospect of extra litigating costs, are inevitable byproducts of our doctrine disfavoring interlocutory, piecemeal appeals:

We have noted . . . the obvious fact that once the hearing is held, the time and money expended in the trial of an issue cannot be recouped by any appellate action. . . . The same is true, however, any time a contention is admitted over a party’s objections and the hearing proceeds. The added delay and expense occasioned by the admission of [a] contention — even if erroneous — . . . does not alone distinguish this case so as to warrant interlocutory review.¹⁶

¹¹ See, e.g., *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-9, 55 NRC 245, 248 (2002).

¹² *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213 (2002).

¹³ See 10 C.F.R. § 2.341(f)(1), (2).

¹⁴ *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 26-27 (2004). See also *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-1, 49 NRC 1, 2 (1999); *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129, 130 (1998); *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 20 (1998).

¹⁵ See, e.g., *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374 & n.13 (2001), and cited cases; *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 378 n.11 (1983).

¹⁶ *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1114 (1982) (citation, brackets, and internal quotation marks omitted).

While the Appeal Board made this comment in connection with an effort to appeal a Board decision admitting a contention, the same rationale covers attempted interlocutory appeals of contention denials.¹⁷ Interlocutory rulings on contentions, we have said, ordinarily must “abide the end of the case” before undergoing appellate review.¹⁸

As for the other ground for interlocutory review under section 2.341(f)(2) — permitting appeals concerning a proceeding’s “basic structure” — the “mere expansion of issues [such as Intervenor’s seek here] rarely, if ever, has been found to affect the basic structure of a proceeding in a pervasive or unusual manner so as to warrant interlocutory review.”¹⁹ Claims that a board has wrongly rejected a contention, or portions of a contention, are commonplace; such claims cannot be said to affect a proceeding’s “basic structure” within the meaning of section 2.341(f). Our “basic structure” standard comprehends disputes over the very nature of the hearing in a particular proceeding — for example, whether a licensing hearing should proceed in one step or in two²⁰ — not to routine arguments over admitting particular contentions. Under longstanding NRC jurisprudence, mere potential legal error does not justify review.²¹ Indeed, we have declined interlocutory review even where we concluded that “aspects of the Licensing Board’s decision . . . appear highly questionable.”²²

Nor, without a good deal more, does the significance or novelty of a board ruling render it suitable for interlocutory review.²³ Section 2.341(f)(1) does not say that the significance or novelty of issues independently justifies discretionary interlocutory Commission review. Rather, the provision says that the Commission will consider such issues when the *Board* refers one of its rulings, or certifies an issue, as warranting immediate Commission attention. Here, the Board has issued

¹⁷ See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 80 (2000) (internal quotation marks omitted).

¹⁸ *Id.*

¹⁹ *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93-94 (1994).

²⁰ See *Savannah River*, CLI-02-7, 55 NRC at 214 & n.15.

²¹ See *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320 & n.4 (1998).

²² *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-15, 40 NRC 319, 321 (1994). See also *id.* at 322 (“we do not sit simply to correct erroneous interlocutory licensing board rulings”).

²³ See, e.g., *Hydro Resources*, CLI-98-8, 47 NRC at 320 (acknowledging the “significan[ce]” of certain rulings by the Licensing Board, but nonetheless concluding that “the mere issuance of important rulings does not, without more, merit interlocutory review”).

no referral or certification. In considering whether to take up issues in cases at an interlocutory stage, we give weight to the Board's view.²⁴

Finally, Intervenors' desultory reference to section 2.311 is unavailing. That provision does allow interlocutory appeals as of right, but in three situations only: (1) where a petitioner for intervention challenges a Board decision "denying" a petition to intervene in its entirety;²⁵ (2) where a party argues that, rather than granting a petition to intervene, the Board should have "wholly denied" it;²⁶ and (3) where a party claims that the Board's selection of the appropriate hearing procedure was in "clear contravention" of Commission rules.²⁷ None of these three scenarios describes the procedural posture of the instant case. Petitioners' intervention request was granted, not denied; no one claims that the petition should have been "wholly denied"; and there is no current dispute over the Board's selection of the hearing procedure.

For all the reasons set forth above, we deny Petitioners' request for interlocutory appeal. We express no view on the merits of Petitioners' claim that the Board incorrectly excluded their "energy efficiency" issues.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 10th day of November 2004.

²⁴ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 28-29 (2000).

²⁵ 10 C.F.R. § 2.711(b).

²⁶ 10 C.F.R. § 2.711(c).

²⁷ 10 C.F.R. § 2.711(d).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

**Docket No. PAPO-00
(Pre-Application Matters)**

**U.S. DEPARTMENT OF ENERGY
(High-Level Waste Repository)**

November 10, 2004

In connection with a planned application by the U.S. Department of Energy for a license to construct a high-level waste repository at Yucca Mountain, Nevada, DOE appealed a portion of a Licensing Board order regarding pre-application discovery. The Commission holds the appeal in abeyance.

APPELLATE REVIEW: ADVISORY OPINIONS

COMMISSION AUTHORITY

The holding that DOE challenges has theoretical and future significance only. A decision now — unnecessary in the current posture of the adjudication — would amount to an advisory opinion. Although there is no legal bar to our issuing advisory opinions in appropriate circumstances, we are reluctant to do so where, as here, answering the questions left open would be a “mere academic exercise.” *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 94 (1983).

APPELLATE REVIEW: ABEYANCE OF APPEAL

RULES OF PRACTICE: APPELLATE REVIEW

It is not sensible or productive to analyze the legal issue the appellant raises and to issue a Commission decision on a controversy that may not arise at all. Instead,

we will hold the appeal in abeyance. *Cf. Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 NRC 203 (2004) (dismissing premature appeal without prejudice); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-5, 57 NRC 279 (2003) (holding Commission review in abeyance, where a related Board inquiry might obviate the need for Commission review).

MEMORANDUM AND ORDER

This proceeding concerns pre-application discovery in connection with a planned application by the U.S. Department of Energy (DOE) for a license to construct a high-level waste (HLW) repository at Yucca Mountain, Nevada. The Licensing Board granted the State of Nevada's motion to strike DOE's certification of its production of documentary material, and DOE appealed a portion of that decision. The Commission holds DOE's appeal in abeyance.

I. BACKGROUND

The Nuclear Waste Policy Act, 42 U.S.C. §§ 10101-10270, charged DOE with the responsibility of constructing and operating a geologic repository for high-level radioactive waste. DOE is now preparing a license application to construct such an HLW repository at Yucca Mountain, Nevada. Under the statute, the NRC would decide whether a license should be issued.

The adjudicatory procedures governing the licensing proceedings are set out in 10 C.F.R. Part 2, Subpart J. Review of an application likely will prove an immense undertaking. DOE has generated millions of Yucca Mountain-related documents since Congress charged it with responsibility for the repository. What's more, Congress has imposed a 3-year deadline for the licensing proceeding. Because of the sheer volume of relevant documentary material, Subpart J includes provisions to expedite the licensing process. One such provision is 10 C.F.R. § 2.1003, a requirement that parties "make available" their documentary material before DOE submits its license application. For each party, a responsible official must certify that "the documentary material specified in § 2.1003 has been identified and made electronically available."¹ NRC regulations provide that DOE certify its document production no later than 6 months before submitting its license application, that the NRC certify its document production no more than 30 days

¹ 10 C.F.R. § 2.1009(b).

later, and that other potential parties do so no later than 90 days after DOE.² Thus, under this first-of-a-kind provision, initial discovery will precede a license application and should enable the parties to get off to a running start before the statutory 3-year period begins.

To accomplish this pre-license application document discovery, the NRC established a Licensing Support Network (LSN). NRC regulations define the LSN as

the combined system that makes documentary material available electronically to parties, potential parties, and interested governmental participants to the proceeding for a license to receive and possess high-level radioactive waste at a geologic repository operations area . . . , as part of the electronic docket or electronic access to documentary material, beginning in the pre-license application phase.³

The regulations provide for an LSN Administrator, a person within the NRC who is “responsible for coordinating access to and the integrity of data available on the [LSN].”⁴

On June 30, 2004, DOE certified to the Secretary of the Commission that it had made its documentary material electronically available as specified under our Subpart J rules. On July 12, 2004, the State of Nevada moved to strike DOE’s certification on three grounds. First, Nevada alleged that DOE failed to make all of its documentary material available. Second, Nevada maintained that placing the documents on DOE’s server was insufficient because the documents must be available on the central LSN Web portal. Third, Nevada challenged the wording of DOE’s certification and asserted that the certification was unlawful on its face.

DOE filed an answer stating that both its certification and documentary production complied with the regulations. The Nuclear Energy Institute (NEI) supported DOE’s actions. A group consisting of Public Citizen, the Nevada Nuclear Waste Task Force, and the Nuclear Information and Resource Service (NIRS) supported Nevada’s motion.

The Licensing Board (i.e., the Pre-License Application Presiding Officer, or PAPO, described in 10 C.F.R. §§ 2.1001 and 2.1010) heard oral argument on July 27, 2004. Daniel J. Graser, the LSN Administrator, testified at the hearing. On August 31, 2004, the Board granted Nevada’s motion to strike

² See 10 C.F.R. § 2.1003(a).

³ 10 C.F.R. § 2.1001.

⁴ *Id.* The LSN Administrator “shall not be in any organizational unit that either represents the U.S. Nuclear Regulatory Commission staff as a party to the high-level waste repository licensing proceeding or is a part of the management chain reporting to the Director, Office of Nuclear Material Safety and Safeguards.” *Id.*

DOE's certification.⁵ The Board ruled in favor of Nevada on each of the three independent grounds Nevada had raised in its motion.

DOE appealed one part of the Board's decision — the Board ruling that DOE's documents are not "available" under Subpart J until indexed and placed in the LSN. Nevada opposed the appeal. Public Citizen, the Nevada Nuclear Waste Task Force, and NIRS filed a letter supporting Nevada's position.⁶ For the reasons we give below, the Commission holds DOE's appeal in abeyance.

II. DISCUSSION

DOE appealed only the portion of the Board's decision holding that DOE's documentary material must be indexed by the LSN Administrator before DOE can make an initial certification under 10 C.F.R. § 2.1009(b). According to DOE, making its documents available on its own server is all that Subpart J requires. DOE maintains first that, under principles of regulatory construction, section 2.1009(b) requires DOE only to certify as to its own actions and that having to depend on actions within the control of the LSN Administrator would be fundamentally unfair. Second, DOE asserts that the absence of an indexing requirement does not prejudice the other participants in the high-level waste adjudication.

DOE says that the Board's holding raises a question of law that is of "substantial importance" to the licensing proceeding.⁷ But on the very next page of its brief, DOE says: "DOE will continue to provide the LSN Administrator with documents on a rolling basis for indexing, as it has been doing since the beginning of May, with the expectation that the LSN Administrator will have indexed DOE's documentary material before DOE is ready to make a new certification."⁸ With this sentence, DOE appears to be saying that the issue currently on appeal does not matter *now*. A Board decision that DOE admits makes no difference now and is unlikely to make any difference later does not raise a question of substantial importance to this licensing proceeding.

The holding that DOE challenges has theoretical and future significance only.⁹ Because DOE has not challenged the Board's other two independent

⁵ See LBP-04-20, 60 NRC 300 (2004).

⁶ The NRC Staff did not take a position in the appeal.

⁷ See "The Department of Energy's Brief on Appeal from the PAPO Board's August 31, 2004 Order" at 1 (Sept. 10, 2004) ("DOE Brief").

⁸ *Id.* at 2 (emphasis added). The LSN Administrator has testified that the system can index approximately 40,000 documents (two batches of 20,000) in a 24-hour cycle. See Transcript at 102-03 (July 27, 2004).

⁹ See 10 C.F.R. §§ 2.1003(a) and 2.1012(a).

bases for striking the document certification, DOE will have to make another certification regardless of any decision we make on the portion of the decision DOE has challenged. The Board's holding will become significant only if DOE's second certification precedes the LSN Administrator's completion of indexing the documents by a nonnegligible period of time. Given DOE's stated expectation that it will not certify prior to completion of the LSN indexing, it is unclear whether any delay at all is at stake.¹⁰ A decision now — unnecessary in the current posture of the adjudication — would amount to an advisory opinion.¹¹

Although there is no legal bar to our issuing advisory opinions in appropriate circumstances,¹² we are reluctant to do so where, as here, answering the questions left open would be a “mere academic exercise.”¹³ Without affecting the critical path of a high-level waste adjudication, there will be “time enough to reach [these questions]” when and if they “arise[] in a non-academic context.”¹⁴ The parties have already fully briefed the issue, and there is, at a minimum, a 6-month window between DOE's next certification and NRC's docketing of a license application.¹⁵ It is simply not sensible or productive to analyze the legal issue DOE raises and to issue a Commission decision on a controversy that may not arise at all or, even if it does arise, may have a *de minimis* effect on both the timing of NRC's review of a license application and resolution of this adjudication. Instead, we will hold DOE's appeal in abeyance.¹⁶

If future circumstances necessitate a decision on DOE's challenge to the Board's decision, DOE may reinstate its appeal by filing a motion with the Commission. At that time, the Commission will expeditiously consider the briefs the parties have already filed.

¹⁰ DOE does, however, qualify its statement by asserting that no one knows “what unexpected circumstances *might* arise or what technological challenges the LSN Administrator *might* encounter.” DOE Brief at 2 (emphasis added). The word “might” reinforces our conclusion that the need for a decision on DOE's appeal is, at best, speculative.

¹¹ And, because this is a one-of-a-kind proceeding, a Commission decision would not have any precedential value.

¹² See *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-467, 7 NRC 459, 463 (1978).

¹³ *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 94 (1983).

¹⁴ *Duke Power Co.* (Amendment to Materials License SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-651, 14 NRC 307, 323 (1981).

¹⁵ See 10 C.F.R. § 2.1012(a).

¹⁶ Cf. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 NRC 203 (2004) (dismissing premature appeal without prejudice); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-5, 57 NRC 279 (2003) (holding Commission review in abeyance, where a related Board inquiry might obviate the need for Commission review).

III. CONCLUSION

For the foregoing reasons, the Commission holds DOE's appeal in abeyance.
IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 10th day of November 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Michael C. Farrar, Presiding Officer
Dr. Charles N. Kelber, Special Assistant

In the Matter of

Docket No. 30-36239-ML
(ASLBP No. 03-814-01-ML)
(Materials License)

CFC LOGISTICS, INC.

November 4, 2004

In response to a request to grant approval of the Settlement Agreement entered into by certain participants in the materials licensing proceeding involving the CFC Logistics irradiator, the Presiding Officer approves the Settlement Agreement and provides further guidance for other participants involved in the litigation, either to terminate their involvement, or to proceed to the next phase; additionally, the Presiding Officer dismisses the Petitioners' decommissioning financial assurances contention because it fails to meet the "special circumstances" requirement of 10 C.F.R. § 2.1239(b) that justifies certifying to the Commission the issue of a waiver of the bond requirements contained in 10 C.F.R. § 30.35.

RULES OF PRACTICE: SETTLEMENT

The Commission's policy of encouraging settlement not only can lead to reducing the costs and burdens of litigation, but can also bring more satisfying outcomes than those produced by litigation, allowing both sides to a controversy to reconcile their philosophical differences by reaching mutually agreeable practical resolutions. Unlike litigation, which can leave underlying disputes among the parties festering even after a decision producing "winners" and "losers" is

rendered by an adjudicator, settlement produces a result shaped by, and acceptable to, the parties themselves.

RULES OF PRACTICE: STANDING

Courts routinely find it unnecessary to evaluate the standing of all participants on one side if one of them is found to have standing. *See Environmental Action v. Federal Energy Regulation Commission*, 996 F.2d 401, 406 (D.C. Cir. 1993); *U.S. Department of Labor v. Triplett*, 494 U.S. 715, 719 (1990); *National Mining Association v. U.S. Department of the Interior*, 70 F.3d 1345, 1349 (D.C. Cir. 1995). The reason for this approach at the appellate court level is, of course, that analyzing the standing of the others may involve more difficult questions that will have no practical effect on the course and outcome of the appeal. A similar rationale can guide licensing boards to limit treatment of standing issues.

RULES OF PRACTICE: STANDING (PROXIMITY PRESUMPTION)

Except for power reactors, for a neighbor to have presumptive standing depends upon three factors: (1) proximity to the facility, (2) the presence of a “significant source” of radioactivity at the facility, and (3) that source’s “obvious potential” to cause offsite damage due to its radioactive properties.

RULES OF PRACTICE: STANDING (PROXIMITY PRESUMPTION)

Petitioners not having presumptive “proximity-plus” standing are not necessarily to be turned away. Under traditional standing doctrines, they are entitled to demonstrate standing based on establishing a viable potential pathway for “injury-in-fact.” *See Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994). (In addition, they must show how the factors set out in 10 C.F.R. § 2.1205(h) come into play). Here, residents residing beyond $\frac{3}{4}$ mile must make a more specific showing than those residing closer.

RULES OF PRACTICE: INJURY-IN-FACT

For determining the “obvious potential for offsite consequences” in evaluating standing, licensing boards may take into account not just the raw size of the source but at least any passive shielding that is always present during installation, operation, or removal of that source. Depending on circumstances, it may also be appropriate to consider the method of operation of the facility, and the nature of the equipment or shielding that surrounds the source during operations. The

“obvious potential” aspect of “proximity-plus” standing, however, is not a concept that can be applied with engineering or scientific precision, and any attempt to fix a boundary, no matter how thoughtful, can be viewed by one side or the other as arbitrary.

RULES OF PRACTICE: PROXIMITY PLUS

While the Agency’s “obvious potential” precedents are instructive as to distance, they do not set definitive restrictions. The $\frac{3}{4}$ -mile range adopted in this proceeding is not immune from any charge of arbitrariness, but in the circumstances of this proceeding, given the passive shielding afforded by the pool’s underwater design, limiting the distance that provides presumptive standing to considerably less than the 3 miles that was determined for the Armed Forces Radiobiology Institute panoramic irradiator is permissible, even though the sources here are authorized to be three times larger.

RULES OF PRACTICE: CONTENTIONS (SPECIFICITY AND BASIS)

While it was relatively easy for Petitioners to obtain a ruling that their concerns were sufficiently germane to be considered, it is much more difficult to present evidence to establish that those concerns are so meritorious as to warrant a determination that the Company is not entitled to a license, or at least that its license needs to be conditioned in the interests of safety. At the evidentiary stage, vague allegations complying with norms for pleading will not suffice — specific evidence meeting scientific/engineering norms will ordinarily be needed to have any chance of prevailing on the merits.

DECOMMISSIONING: CONTENTIONS (ADMISSIBILITY)

The general rule is that a party may not challenge a Commission regulation in a licensing proceeding. A party may petition that a regulation not be applied in certain instances, however, by establishing a “special circumstance.” *See* 10 C.F.R. § 2.1239(a) and (b). To establish a “special circumstance” warranting certification to the Commission, a petitioner must be able to point to unusual facts that make the situation at hand peculiar enough to take it out of the regulation’s contemplation. When a party is challenging the sufficiency of the decommissioning bond and the absence of a decommissioning plan for a facility, instances where similar facilities were extremely costly to decommission may provide grounds for waiving the regulation setting the bond amount. Upon

examination, however, the apparent similarity between the facilities was found not to exist.

MEMORANDUM AND ORDER
(Concerning Settlement Agreement and Further Proceedings)

We have before us a request that we grant formal approval to a Settlement Agreement entered into by certain of the participants in this proceeding, which involves the application of CFC Logistics (the Company) for an NRC materials license to operate an underwater cobalt-60 irradiator to process food and other substances at its cold storage facility just outside Quakertown, Pennsylvania. The license was opposed by a number of the facility's neighbors.

In Part I of this ruling, we cover the proceeding's procedural background. In Part II, we address the settlement process, scope, and terms, as a prelude to *approving the agreement* as presented to us.

That agreement by some of the facility's opponents to settle and to discontinue the litigation creates, in turn, the need to *address the future role of other participants*. They may choose also to settle; alternatively, if they have the legal standing to do so, they may elect to continue the litigation.

Depending on the situations of those remaining participants, and the choices they make, the future course of this proceeding can vary widely — ranging from withdrawal of the litigation altogether, to an evidentiary presentation on the merits of particular concerns. In Parts III through VI, we provide the framework within which those choices are to be exercised, set out the standards and process for moving forward, and outline the timing and the nature of (and the limitations upon) the evidentiary presentations that may result.

I. PROCEDURAL BACKGROUND

After the Company filed its license application in early 2003, petitions were submitted to the Commission by a number of residents of the Quakertown area (the Petitioners) requesting a formal hearing to challenge the Company's proposal. Notwithstanding the pendency of the petitions, and as is permitted by NRC regulations, the NRC Staff issued the requested license on August 27, 2003, subject to the outcome of any hearing that might later be held.

In the meantime, the above-named Presiding Officer and Special Assistant had been duly appointed. As has been stressed here and elsewhere, we carry out our adjudicatory role independently of the NRC Staff, which, in the exercise

of its customary regulatory duties, reviewed the Company's application before awarding the license.¹

On September 10, 2003, we heard the parties' oral arguments regarding: (1) the Petitioners' legal "standing" to proceed, (2) whether they had proffered any germane "areas of concern," and (3) their motion to stay the Company's use of the then recently awarded license. Two weeks later, we denied the stay motion (without prejudice), thereby allowing the Company to begin installing the cobalt sources. LBP-03-16, 58 NRC 136 (2003).

We subsequently found that at least three of the neighboring Petitioners (Kelly Helt, Tom Helt, and Andrew Ford) did have standing to proceed based on their proximity to the site (they lived within 1/3 of a mile of the CFC facility). LBP-03-20, 58 NRC 311, 317-22 (2003). We also found that some of the areas of concern they had proffered were indeed germane. *Id.* at 323-33.

As we indicated at that point, there then appeared no practical reason to rule upon the standing of other Petitioners who lived farther from the facility.² Rather, we expected that the opposition of all of them, who had filed together through the same counsel, would be channeled through those who had been granted formal party status.³

After admitting the Helts and Mr. Ford as Intervenors, we issued a formal *Federal Register* notice of hearing⁴ (since the NRC Staff had elected not to do so), as required under the NRC Rules of Practice (10 C.F.R. § 2.1205(j)).⁵ This extended for an additional 30 days the time period for facility opponents to petition to intervene. A number did so, thus joining as pending Petitioners the earlier individuals who had not yet had their standing evaluated.

¹For the difference between our role and the Staff's, see Sept. 10, 2003 Tr. at 124-25; see also *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), April 8, 2002 Tr. at 2977-80, and LBP-03-4, 57 NRC 69, 92 n.28 (2003).

²LBP-03-20, 58 NRC at 322-23; see also note 15, below.

³In that connection, the Petitioners had the support of an organization known as the Concerned Citizens of Milford Township, which itself had the opportunity to seek to participate herein on the basis of its representational standing, but declined to do so. Thus, we noted on the first page of our first published decision that "[a]lthough for purposes of appearing in other venues the facility's opponents have apparently coalesced in an organization called 'Concerned Citizens of Milford Township' (CCMT), that group as such has not yet sought to appear before us." LBP-03-16, 58 NRC at 137 n.1. In our second published decision, we again emphasized this possibility, stating that the forthcoming Notice of Hearing "could lead to additional . . . entities" filing petitions to intervene and speaking of the "possibility that additional . . . organizations may later seek to join . . ." LBP-03-20, 58 NRC at 323.

⁴See 68 Fed. Reg. 62,638 (Nov. 5, 2003).

⁵All references herein to our Rules of Practice are to the version that existed before the adoption of the extensive amendments published in 69 Fed. Reg. 2181 (Jan. 14, 2004), which by their terms did not apply to pending proceedings like this one.

As noted above, at the time we determined that at least some Petitioners had standing to request a hearing, we admitted several germane areas of concern. The effect of that action was to establish that the Petitioners had pointed out relevant concerns with enough specificity to be permitted a later opportunity to make a written evidentiary presentation on the merits of those concerns. *See* 58 NRC at 326. Depending on developments, the time for full merits presentations on certain of those concerns may be upon us (*see* Part IV and pp. 496-97, below).

Two of these concerns are *not* to be addressed now. As to one — the adequacy of the financial provisions made to assure that the facility could eventually be properly decommissioned (*see* 58 NRC at 333, ¶7) — we hold later in this decision (*see* Part V, below) that, regardless of what course the proceeding follows, litigation on that concern is *precluded by Commission regulation*. As to the other concern, involving plant security, any determinations that may prove necessary as to the nature and extent of any litigation on that matter will *abide a later ruling* (*see* note 43, below).

In addition to ruling on standing and areas of concern, we set forth in LBP-03-20 the possibility of holding another site visit to the irradiator followed by a prehearing conference in the vicinity. *See* 58 NRC at 335. In line with the exhortations of the Commission (expressed in 10 C.F.R. § 2.759 and in adjudicatory decisions and policy statements), we also noted that those activities might foster the possibility of a settlement between the parties. *Id.* at 336.⁶

We and the parties indeed visited the irradiator facility on December 11, 2003, and later that day held a prehearing conference in Quakertown. Beyond touching on settlement possibilities (Tr. 415-24), that conference had two main purposes: to hear oral arguments on the Petitioners/Intervenors' renewed motion to "stay" the effect of the existing license and on their pending discovery request (Tr. 339-415), and to guide a discussion on narrowing and focusing the Petitioners/Intervenors' areas of concern (Tr. 428-58, 464-68).

Although the parties had previously briefed certain legal issues underlying the concern regarding the sufficiency of financial resources for decommissioning, we did not entertain oral argument on that issue at the December 11 conference because the NRC Staff, which was participating in that matter but not in others, was unable to be present. We subsequently (in late February) asked for additional briefing on that matter. *See* unpublished February 17, 2004, Prehearing Order (Regarding NRC Staff Participation and Other Matters) at 3-4; and unpublished February 26, 2004 Order (Regarding Responses on Financial Assurances) at 1.

After hearing oral argument at the prehearing conference, we denied the renewed stay motion. *See* unpublished May 28, 2004, Memorandum and Order

⁶ *See also* unpublished November 19, 2003, Prehearing Order (Scheduling Further Proceedings) at 4 (noting discussion during November 12 prehearing conference call of the possibility of settlement).

(Ruling on Requests for Stay and Related Relief). In denying the motion, we concluded, among other things, that the Petitioners/Intervenors had not demonstrated that they would suffer immediate and irreparable injury if the stay motion was not granted, and that the Company's actions did not warrant the sanctions the movants sought.

II. SETTLEMENT PROCESS, TERMS AND APPROVAL

We first mentioned the possibility of settlement to the parties during an early conference call (*see* Aug. 7, 2003 Tr. at 84-85), then focused on it again when we admitted the several Intervenors and their areas of concern. *See* LBP-03-20, 58 NRC at 336. After briefly discussing settlement again during another conference call,⁷ we made a special point at the December 11 prehearing conference of asking the parties whether they would be open to the idea of having a Settlement Judge (who has no role vis-à-vis the merits of the litigation) appointed in an effort to resolve this case amicably instead of through costly litigation. *See* Tr. at 415-24.

After some delay, the reasons for which need not be recited here, a Settlement Judge (our colleague Paul Abramson) was appointed on March 16, 2004. After both sides confirmed their willingness to enter into settlement negotiations, the parties began such discussions under the guidance of the Settlement Judge.

We are informed that among the active participants on behalf of the facility opponents in the settlement negotiations were not only Intervenor Kelly Helt but also others, including Kimberly Haymans-Geisler and her husband Max Geisler, who although not Petitioners were leaders in CCMT. While Ms. Haymans-Geisler had her contributions noted here early on,⁸ neither she and her husband nor (as noted previously) the CCMT organization ever sought to petition to intervene formally in this proceeding (*see* note 3, above).

The Settlement Judge met with both sides, separately and together, on numerous occasions over an extended period of time in an attempt to reach a settlement agreement satisfactory to both sides. In response to the Settlement Judge's informing us that settlement then appeared likely, we issued in late June a detailed anticipatory notification indicating that if such a settlement were to be reached by those participating in the negotiations, all other Petitioners would then be called upon to express their approval or disapproval of it. *See* unpublished June 28, 2004, Memorandum and Order (Regarding Possible Settlement) at 6.

To that end, we directed that counsel for the Petitioners/Intervenors send his clients a copy of our June 28 alert to put them on notice that, if a settlement was

⁷ *See* Nov. 12, 2003 Tr. at 271, 317-18.

⁸ *See* LBP-03-16, 58 NRC at 139 n.6; *see also* unpublished June 28, 2004, Memorandum and Order (Regarding Possible Settlement) at 4, ¶2.

reached, they would be provided a relatively short time to indicate either their approval of the settlement agreement, or their willingness to continue with the next stage of litigation. *Id.* at 5. We also asked the Petitioners' counsel to confirm that each Petitioner remained at his or her previously listed residence and was still interested in participating in the case. *Id.* at 6.

On August 23, 2004, the Settlement Judge submitted to us for approval an executed Settlement Agreement, attached hereto as Appendix A, coupled with an August 23, 2004 letter from the NRC Staff indicating that the facility changes outlined in that agreement were such that they could be implemented without NRC Staff review or approval.⁹ On behalf of the Company, the agreement is signed by its President, James Wood. For the erstwhile facility opponents, the agreement is signed by the only remaining admitted Intervenor (the Helts)¹⁰ and by an individual who, we are advised, while not a Petitioner himself, has been providing material financial support to litigation on behalf of the Petitioners. By its terms, the Settlement Agreement provides that it is subject to our approval.

The Settlement Agreement addresses two matters reflected in the germane "areas of concern" Petitioners/Intervenor presented.¹¹ First, the Company agreed *to install a backup generator* to provide a continuous power supply for the pump that drives the air flow through the chamber containing the cobalt-60. In so agreeing, the Company did not make any representation that this step was indeed necessary to assure safety if the facility lost its regular electric power source. Second, to respond to the Petitioners/Intervenor's concern about a "cask drop" accident, the Company also agreed — again without any representation as to the necessity of this addition — *to install a light-beam trip-switch* to trigger an audible and visual alarm if a cask containing a replacement cobalt source is positioned so that it will traverse over the existing sources.

In exchange for the Company's agreeing to add these features to the facility, the other side's signatories agreed to drop their opposition and to withdraw from the case. Additionally, they agreed not to support, in any manner, either CCMT or any individual in further pursuit of the issues raised here against the Company, with respect either to this irradiator or to any additional similar irradiators (with the same add-ons) that the Company may later wish to install at the same warehouse.

Both sides to the agreement are bound by a standard *nondisclosure clause that generally prevents them from revealing the content of any of the settlement*

⁹ See note 12, below (explaining the reasons that the issuance of such a letter advanced the settlement discussions).

¹⁰ According to information provided us (Tr. at 545), the other admitted party, Mr. Ford, has moved away and thus is no longer to be treated as an Intervenor in the case.

¹¹ If there is any inadvertent disparity between the terms of the Agreement itself and our description of it herein, the terms are, of course, controlling. In other words, nothing said here about the Agreement is in any way intended to alter the meaning and import it has as written.

discussions. The one exception is that the parties are not precluded from disclosing discussions relating to physical security at the irradiator facility. Additionally, the agreement contains several provisions regarding press releases and press conferences. The agreement contains a number of other standard provisions that we need not recite here.

As mentioned previously, for its part the NRC Staff — which did not participate in the settlement discussions — has indicated that the changes the Company is agreeing to make to its facility as a result thereof do not require Staff review or approval. Nor must they be incorporated in a formal license modification.¹²

The proposed Settlement Agreement reflects the Company's commitment to make changes to its facility that respond to certain of the safety concerns raised by the neighboring residents. The Company apparently holds the view that facility safety does not depend on those changes, but — in recognition of the neighbors' belief that safety will be enhanced thereby — is willing to undertake them.

Having reviewed the Settlement Agreement in that light, we hereby APPROVE its content. In doing so, we extend our compliments to both sides for their willingness to take up, under Judge Abramson's guidance, our suggestion that the matter seemed amenable to settlement. They are to be further commended for their commitment to exploring the matter in depth and to repeatedly considering and responding to the values and beliefs of the other side.

As has been seen here, the Commission's policy of encouraging settlement not only can lead to reducing the costs and burdens of litigation, but can also bring more satisfying outcomes than those produced by litigation, allowing both sides to a controversy to reconcile their *philosophical* differences by reaching mutually agreeable *practical* resolutions. Unlike litigation, which can leave underlying disputes among the parties festering even after a decision producing "winners" and "losers" is rendered by an adjudicator, settlement produces a result shaped by, and acceptable to, the parties themselves. Because, by definition, both sides have agreed to abide by that result, a more harmonious future is in the offing for all involved.

¹²In the Fall of 2003, the Petitioners/Intervenors challenged the Company about the manner in which it had replaced a valve in the irradiator. As previously discussed in more detail (*see* unpublished May 28, 2004 Memorandum and Order at 4-5), when the NRC Staff was advised that the change had been made, it decreed that changing the valve had safety overtones that required evaluation of the need for an amendment to the Company's license (in response to which the Company's contractor restored the valve to the original configuration). In contrast, the NRC Staff has assured us that the modifications proposed in the Settlement Agreement do not require further Staff analysis or approval.

III. PARTICIPATION BY REMAINING PETITIONERS

In terms of those who might oppose the facility, the Settlement Agreement of course binds only the three signatories — the admitted Intervenor and the other individual referred to earlier. Although as indicated above we are advised that other individuals were also involved in the settlement discussions (our June 28 notice anticipated, incorrectly, that all of them and CCMT would endorse the settlement), nothing that may have taken place thus far in any way limits the options available to those whose petitions are pending and, for whatever reason, have not had the opportunity to support, or perhaps even to examine, the Settlement Agreement. In accordance with our June 28 directive, they are now to be given that opportunity, which they are to exercise with some dispatch.

A. Petitioners' Choices

All those with pending petitions now have to determine whether or not to accept the compromises made by the existing Intervenor. Although the pending Petitioners have not yet been granted formal Intervenor status (*see* p. 479, above, and pp. 486-89, below), if they wish to accept the principles of the Settlement Agreement and withdraw from their role as Petitioners, they now have the opportunity to do so.

1. To that end, any Petitioner *wishing to so follow that course* need only sign the attached ELECTION form to that effect (*see* Appendix B, ‘‘Election To Not Continue Litigation’’). Counsel will therefore need to supply them that document in short order.

By signing that document, a Petitioner will simply be withdrawing from the litigation and stating that he or she finds ‘‘that settlement agreement satisfactory.’’ Such persons would not be bound by any of the limiting terms of that agreement, which apply only to its signatories. In effect, though, they will be conceding the Company’s right to operate under its license (in return for the facility enhancements, described at p. 482, above, obtained from the Company through the settlement process).

2. Some Petitioners *may decide not to accept the compromises embodied in the settlement.* We can envision them falling into *two categories*:

(a) Some may no longer be interested in actively pursuing their opposition to the Company’s irradiator operations through this litigation, but may not be willing to sign, or to do, anything that could be taken as expressing approval of, or consent to, the Company’s current or future activities. As will be seen, *any Petitioners in that category need take no action*, for once the time periods (set out at p. 495, below) for taking action expire, they will no longer be involved in this litigation (but they will *not* be considered as among those

who *affirmatively* withdrew from the litigation as part of their support of the settlement).

(b) Others remaining opposed to the Company's operations may wish to actively pursue that opposition *by continuing with this litigation*. They, too, can be thought of as falling into two categories:

(i) Some will live close enough to the facility to have the benefit of the "*proximity-plus*" doctrine that confers legal standing upon them, as it did upon the Helts and Mr. Ford (*see* p. 479, above). As we explain below (*see* pp. 487-89), we are today extending that "close enough" distance, from the $\frac{1}{3}$ of a mile we used when preliminarily addressing this issue, to $\frac{3}{4}$ of a mile, thus multiplying by more than a factor of five the circular area around the plant within which residents will be granted automatic standing.¹³ As a result, *any Petitioners still residing within $\frac{3}{4}$ mile of the CFC irradiator need, initially at least, simply notify us (through counsel) that they wish to pursue the litigation*. They will thereupon be admitted as Intervenors. As soon as the standing of any Petitioners outside that area is determined (*see* (ii), below), all Intervenors will be called upon to make their written presentations on the merits of the admitted concerns.

(ii) Any Petitioners residing more than $\frac{3}{4}$ mile from the facility (which is too far, in our view, to take advantage of "proximity-plus" standing) must, if they wish to participate in the litigation, demonstrate their standing in the classic "injury-in-fact" fashion (*see* pp. 487, 489, and 496, below). Upon receipt of their written materials seeking to demonstrate their standing, we will decide that issue, very likely on the papers alone without calling for oral argument.¹⁴

In the above fashion, we will ascertain whether there exist any Petitioners with standing who wish to pursue the litigation.¹⁵ Once again, any such Petitioners will be admitted as Intervenors.

¹³ Specifically, the area around the facility within which residents will automatically have standing will go from some 0.35 square mile to slightly more than 1.75 square miles.

¹⁴ We recognize that the parties filed briefs on standing at an earlier stage. We think, however, that the focus of those briefs will now be sharpened (*compare* LBP-03-20, 58 NRC at 318-19) in light of our subsequent exposition of the applicable standing doctrines (*id.* at 317-22).

¹⁵ As noted above, we had thought at the outset it would be efficient simply to let the litigation proceed, on behalf of all under the CCMT umbrella, through those Intervenors who lived closest to the facility. *See* LBP-03-20, 58 NRC at 322-23. As we explained further in our unpublished June 28, 2004, ruling:

(Continued)

In that role, given the current stage and status of this litigation, the next step will be for the newly admitted Intervenors, if any, to file their written evidentiary presentations detailing the full merits of the matters that they only briefly outlined in the “areas of concern” they filed at the outset. *We set forth in Part IV, below, the matters those presentations should address.*

B. Petitioners’ Standing

In LBP-03-20, 58 NRC at 317-22, we went into considerable detail to explain the principles that govern whether a petitioner has standing to participate in a proceeding. While we need not repeat what we said there, an overview of the law of standing is in order here, given the guidance we must now provide in this case.

In order to establish standing in the classic fashion, a petitioner must allege a concrete injury that would be caused by the challenged action, and could be redressed by a favorable decision in litigation.¹⁶ Under the Agency’s precedents, however, there are circumstances in which petitioners may be *presumed* to have standing based on their geographic proximity to the facility.¹⁷

In power reactor licensing proceedings, proximity alone is enough. But in proceedings involving nonpower reactors or materials licensing, something more is needed.¹⁸ Specifically, in those instances proximity must be coupled with a showing that the facility’s activities involve a “significant source of radioactivity producing an obvious potential for offsite consequences.”¹⁹ In other words, except for power reactors, for a neighbor to have presumptive standing depends upon

Courts routinely follow a similar approach in this regard, finding it unnecessary to evaluate the standing of all participants on one side if one of them is found to have standing. *See Envtl. Action v. FERC*, 996 F.2d 401, 406 (D.C. Cir. 1993); *U.S. Dept. of Labor v. Triplett*, 494 U.S. 715, 719 (1990); *Nat’l Min. Ass’n v. U.S. Dept. of Interior*, 70 F.3d 1345, 1349 (D.C. Cir. 1995). The reason for this approach at the appellate court level is, of course, that analyzing the standing of the others may involve more difficult questions that will have no practical effect on the course and outcome of the appeal. A similar rationale guided our decision to limit our treatment of the standing issues before us.

Given that CCMT did not seek to intervene, and that the closest residents have since settled their concerns and withdrawn from the proceeding, it has now become necessary to address the question of the standing of other Petitioners.

¹⁶ *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

¹⁷ *See Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994).

¹⁸ *See Georgia Tech*, CLI-95-12, 42 NRC at 116; *see also International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 n.1 (1998).

¹⁹ *Sequoyah Fuels*, 40 NRC at 75 n.22 (citing *Armed Forces Radiobiology Institute* (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 153-54 (1982); *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 45 (1990)).

three factors: (1) proximity to the facility, (2) the presence of a ‘‘significant source’’ of radioactivity at the facility, and (3) that source’s ‘‘obvious potential’’ to cause offsite damage due to its radioactive properties.

Those not having presumptive ‘‘proximity-plus’’ standing are not necessarily to be turned away. Under traditional standing doctrines, they are entitled to demonstrate standing based on establishing a viable potential pathway for ‘‘injury-in-fact.’’²⁰ (In addition, they must show how the factors set out in 10 C.F.R. § 2.1205(h) come into play).

Applying these standing principles, we admitted the three Intervenors last October based on their living in close geographic proximity (in this case within 1/3 of a mile) to a facility that was seeking to operate with up to 1 million curies of cobalt-60. We reasoned that it was not too great a ‘‘stretch of the imagination’’ to envision that, with that amount of radiation, some injury could occur (however unlikely) within the vicinity of the CFC irradiation facility.²¹ We found that the combination of the short distance and the large sources made the Petitioners within 1/3 of a mile from the facility ‘‘significantly more susceptible to being affected by the CFC facility’’ than were petitioners who had been admitted in an analogous proceeding.²² We left open the possibility, however, that a petitioner who lived at a greater distance than 1/3 of a mile might be found to have standing, either based on geographic proximity or by establishing a viable potential pathway for a release of radiation from the cobalt-60 sealed source to cause them injury.

In the course of that initial consideration of standing doctrines, the question had arisen as to whether, for purposes of determining the ‘‘obvious potential for off-site consequences,’’ we should view the source as in its protected condition or, as Company counsel aptly dubbed the alternative, in ‘‘splendid isolation,’’²³ i.e., with no shielding or protective mechanisms to prevent radioactive or other releases. The Company argued that it makes no sense to analyze the sources in such ‘‘splendid isolation’’ because the manufacturer of the source assures that it is sealed according to NRC requirements (September 5 Response at 12-13) and because the sealed sources stay at the bottom of the pool except when in casks.

²⁰ See *Sequoyah Fuels*, 40 NRC at 75 n.22.

²¹ LBP-03-20, 58 NRC at 320 (citing to and quoting from *Georgia Tech*, 42 NRC at 117).

²² See *id.* at 322.

²³ See Aug. 7, 2003 Tr. at 79; see also the Company’s September 5, 2003 ‘‘Response to NRC Staff’s Brief on Standing and Petitioners’ Areas of Concern’’ at 11-12; and LBP-03-16, 58 NRC at 138-39 n.5. (Originally coined to refer to British Prime Minister Lord Salisbury’s late-19th-century attempt to avoid British alignment in European affairs, the ‘‘splendid isolation’’ phrase has since found widespread application in other fields, so that by now it has been used in such diverse contexts as by psychoanalyst Sigmund Freud, paleontologist George Gaylord Simpson, and pop singer Warren Zevon.)

Upon analysis, we agree with the Company to this extent — we think it permissible to take into account not just the raw size of the source but at least any passive shielding that is always present during installation, operation, or removal of that source. Depending on circumstances, it may also be appropriate to consider the method of operation of the facility, and the nature of the equipment or shielding that surrounds the source during operations. We hasten to add, however, that the “obvious potential” aspect of “proximity-plus” standing is not a concept that can be applied with engineering or scientific precision, and that any attempt to fix a boundary, no matter how thoughtful, can be viewed by one side or the other as arbitrary.

In this instance, the “significant source of radioactivity,” the cobalt-60, is a solid, not a powder, and even if it escaped would not be soluble in water. In addition, any such escape is sought to be prevented by sealing the source: the cobalt-60 is nickel-plated, contained within two concentric stainless steel tubes. A further barrier to radiation release is provided by those sources being at all times either in a cask or under water, i.e., at the bottom of a tank filled with 22 feet of water.²⁴

We note, however, that while the Agency’s “obvious potential” precedents are instructive as to distance, they do not set definitive *restrictions* (*compare* the 3 miles *allowed* for the *Armed Forces* panoramic irradiator with the 1/2 mile *allowed* for the *Georgia Tech* research reactor). And, as indicated above, we do not pretend that the new 3/4-mile range we are adopting herein is immune from any charge of arbitrariness. But in the circumstances of this proceeding, given the passive shielding afforded by the pool’s underwater design, *we are comfortable with limiting the distance that provides presumptive standing to considerably less than the 3 miles that was determined for the Armed Forces panoramic irradiator, even though the sources here are authorized to be three times larger.*

Moreover, it is long past time to get to the merits of this case, if indeed it is to go to trial, and there is a large group of Petitioners who, their addresses suggest, live in a neighborhood at or inside a 3/4-mile distance from the facility. To be sure, they may find themselves satisfied with the settlement proposal. But if not satisfied they should — given the time that has elapsed with their petitions pending and all the other circumstances of this case — now be afforded the opportunity to present the detailed evidence underlying and supporting their concerns.²⁵ Accordingly, without attempting to establish a definitive “proximity-plus” distance reflecting the “obvious potential” for all underwater irradiators, we believe that a distance of 3/4 of a mile is appropriate here.

²⁴ A safety monitor tracks for any presence of radioactive material in the tank.

²⁵ Likewise, the Company, which has expressed the desire to demonstrate the merits and safety of its irradiator’s design, will now have the opportunity to make such a showing, if any Petitioners go forward with the litigation.

As indicated above, *those residing beyond that distance are not necessarily to be denied standing, but they must make a more specific showing than those residing closer.* To repeat, they must make a specific “injury-in-fact” showing under classic standing principles, and with express reference to the factors set out in our Rules of Practice, in order to participate. *Alternatively, if they cannot make such a showing, they are not precluded from providing financial, intellectual, logistical or other support to those who do have standing.*

IV. PRESENTATIONS ON THE MERITS

Any of the *pending Petitioners who*, in accord with Part III, *wish to move forward* with the litigation and *have standing* to do so, will be granted Intervenor status. They must then, as their next task, address the merits of the litigation. On that score, they *must file*, pursuant to 10 C.F.R. § 2.1233(a),

written presentations of their arguments and documentary data, informational material, and other supporting written evidence

In the course of that submission, they must, pursuant to 10 C.F.R. § 2.1233(c),

describe in detail any deficiency or omission in the license application, . . . give a detailed statement of reasons why any particular sections or portion is deficient or why an omission is material, and describe in detail what relief is sought with respect to each deficiency or omission.

All this is to be done “at the time or times and in the sequence the presiding officer establishes by appropriate order.” 10 C.F.R. § 2.1233(a). We set forth those timing/sequencing directives in Section E of Part VI, below.

As to substance, we draw the Petitioners’ attention to the converse of what we said in admitting their areas of concern. At that juncture, we pointed out that triggering a Subpart L hearing was “a relatively simple process” involving a “minimal” or “very limited threshold pleading obligation.” LBP-03-20, 58 NRC at 323, 326.

The opposite is true now. For while it was relatively easy for Petitioners to say enough to obtain a ruling that their concerns were sufficiently germane to be *considered*, it is now much more difficult to present evidence to *establish* that those concerns are so meritorious as to warrant our determining that the Company is not entitled to a license, or at least that its license needs to be conditioned in the interests of safety. At this juncture, *vague allegations complying with norms*

*for pleading will not suffice — specific evidence meeting scientific/engineering norms will ordinarily be needed to have any chance of prevailing on the merits.*²⁶

Such written presentations must be filed for each previously admitted germane area of concern that the new Intervenors wish to pursue. As we now explain, prior consideration of those matters in this proceeding has helped refine the matters to be covered:

- After analyzing in LBP-03-20 all the proposed areas of concern Petitioners had submitted (in documents presumably still available to them),²⁷ we summarized our rulings. 58 NRC at 333 n.31. For the litigants' convenience, we reprint that summary in Appendix C.
- In that same decision, we provided brief comments on each of the areas we there found germane. 58 NRC at 329-33. These comments also bear repetition; a reprint is attached as Appendix D.
- During the December 11, 2003, prehearing conference, we discussed the areas of concern with the parties to determine whether the Petitioners/Intervenors, who at that point had more information before them than they had had when the concerns were filed, were able to add more specificity or focus. After lengthy discussion, in which the Petitioners/Intervenors' expert participated, we and the parties retailored the areas of concern to the extent it was feasible to do so at the time. The changes discussed are summarized in Appendix E.

Taken together, the material in Appendices C through E should provide useful guidance to any Intervenors as to how to focus their written presentations.

In addition, we have several questions that any Intervenors need to address in order to create a thorough record for decision (see 10 C.F.R. § 2.1233(a) (second sentence)). Those questions, attached as Appendix F, are to be answered in the course of the written presentations on the merits of the area of concern to which they relate.

²⁶Because the pleading of "germaneness" requires so little specificity, we have chosen to have the Intervenors proceed first, presenting the evidence that will detail the nature of their challenges (*see* p. 496, below). To do otherwise would be to create the risk that the Company's written presentation would, inefficiently, not be able to focus on what will turn out to be the real challenges to the license. In effect, then, the burden of going forward is on the Intervenors, while the ultimate burden of proof remains with the Company.

²⁷In those pleadings, the Petitioners furnished for each concern a statement of: (1) the "event" of concern; (2) the projected "impact" of that event; (3) "substantiation" in terms of a chain of causation that could be a trigger for, or the result of, the event in question; and (4) a "source" in terms of scientific literature or expert opinion.

Any Intervenors are, of course, free to elect, for whatever reason, *not to pursue* particular areas of concern. To the extent, if at all, that they wish to follow that course, they need simply notify us at the time of filing their written presentations that they are abandoning particular areas.²⁸

On the other hand, we must stress that the written presentation on the merits does *not* provide an opportunity to submit or to *raise new areas of concern*. That stage of this proceeding has long passed; once again, the process going forward is to *examine* in close technical detail the merits of the *previously raised germane concerns*.

V. RESOLUTION OF FINANCIAL ASSURANCE

The Settlement Agreement does not address the matter of financial assurance, one of the Petitioners' areas of concern that we held was germane. Because that matter raised legal issues distinct from the other concerns being raised, we directed the parties to file a series of briefs thereon.

Specifically, the concern was over the sufficiency of the decommissioning bond and the absence of a decommissioning plan for the facility. Earlier in the proceeding, we deferred deciding whether Commission regulations apparently on point — particularly 10 C.F.R. § 30.35, which sets the amount of the bond — were controlling in precluding us from considering the financial matters the Petitioners sought to raise in this proceeding. The principal motivation for that deferral was our concern that remediation developments at another Pennsylvania irradiator site, known as PermaGrain, might have a bearing on the matter before us. *See* LBP-03-20, 58 NRC at 333, ¶ 7.²⁹

Accordingly, at a prehearing conference call soon thereafter, we asked the parties for briefs on that and other aspects of the decommissioning issue (*see* unpublished Nov. 19, 2003 Memorandum and Order at 3). The parties duly

²⁸ For example, Petitioners may have become aware — through document examination, site visits, or settlement discussions — of facts that alleviated a concern originally expressed or convinced them that a concern was not meritorious. Or, for an area covered by the settlement, the changes agreed upon may have addressed the concern. Or there may be instances where they have found it not possible to document their concerns. In any of these or similar instances, withdrawal or nonprosecution of a concern could be appropriate; such action will, of course, have no negative impact upon their prosecution of other concerns.

²⁹ We said there that we wanted the parties “to address the significance, if any, of (1) the apparently multi-million-dollar cost recently incurred under NRC and Environmental Protection Agency auspices to remediate a site elsewhere in the Commonwealth on which was located an abandoned cobalt-60 irradiator [citing “Radioactive Material Removed from Bankrupt Central Pa. Site,” NRC News Release, September 29, 2003, and the related September 29 news release issued by the Pennsylvania Department of Environmental Protection] and (2) an apparently impending NRC rule change regarding the size of decommissioning bonds.”

submitted those initial briefs within the next month. Finding that those briefs left certain questions unanswered, we later called for further briefs and responses (*see* unpublished February 17, 2004 Memorandum and Order at 3-4);³⁰ the last of those briefs was submitted in early April.

Throughout that briefing process, we foresaw the possibility that information relating to the remediation of the PermaGrain irradiator might, if the situation was analogous to that of the CFC irradiator, provide the “special circumstances” that would justify us in certifying the issue to the Commission for review. We are now able to say that such similarities do not exist, and that nothing about the financial assurance concern would lead us to do anything but apply the regulation as written.

On that score, the general rule is that a party may not challenge a Commission regulation in a licensing proceeding. *See* 10 C.F.R. § 2.1239(a). In most instances, those regulations thus provide us the law that governs our proceedings. A party may, however, petition that such a regulation not be applied in certain instances. *See* 10 C.F.R. § 2.1239(b). To avoid a regulation’s ordinary impact, a party must demonstrate that “special circumstances exist so that application of the regulation to the subject matter of the proceeding would not serve the purposes for which the regulation was adopted.” *Id.* A “special circumstance” may be established, for example, by a petitioner’s demonstrating that facts unique either to the applicant or the facility were not contemplated in the regulation’s adoption, and thus that the regulation should not apply in that instance.³¹

The Petitioners/Intervenors attempted to argue here that the “unique, prototypical design” of the CFC irradiator generated “special circumstances”: because of the new design, and general security risks, the Petitioners/Intervenors believe that the facility is at high risk for a serious accident and an unusually expensive cleanup that would warrant the Board certifying the issue to the Commission.³²

The situation at the PermaGrain facility initially seemed to us to lend credence to the Petitioners/Intervenors’ arguments that neither the \$75,000 bond the Company has already posted nor the increased \$113,000 bond the Company will eventually post (under a regulation amendment) would be sufficient to assure cleanup of the facility. On its face, the situation — involving an apparently

³⁰There, we noted that the critical matters were “(1) what had transpired on that other site during its lifetime that had brought about the need to incur decommissioning expenses that are so disproportionate to the amount of the initial bond sought of the Company here, and (2) what are the similarities, if any, between that site/facility and the site/facility before us.” *Id.* at 4 n.6.

³¹*See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988), *reconsideration denied*, CLI-89-3, 29 NRC 234 (1989).

³²*See* Intervenors’ Reply to Supplemental Briefs of NRC Staff and CFC Logistics on Area of Concern Regarding Decommissioning Financial Assurance (Apr. 2, 2004) at 1.

similar irradiator, located in the same State, requiring cleanup expenditures some 25 times larger than the amount of the CFC bond — demanded further inquiry.

As it turns out, that inquiry has served to put the matter to rest, based on the additional facts the inquiry brought to our attention. In its submission, the Company pointed to several factors that distinguish the two Pennsylvania facilities' irradiators from each other.

As the Company puts it, PermaGrain's irradiator operated under "different site-specific conditions, types of contamination, and activities."³³ That irradiator site required additional decommissioning costs because of the prior uses that occurred there. The PermaGrain irradiator pool, for instance, had been used to house research reactor pool assemblies containing uranium-235, which led to residual contamination in the irradiator assembly.³⁴ Additionally, the PermaGrain facility had a license covering residual contamination and source material left at the site by prior tenants, so the site had various materials, including strontium-90 and cobalt-60, located in the "six on-site hot cells, isolation rooms, radiochemistry laboratory, decontamination laboratory, fan room, stationary overhead transport system, waste-water holding tanks, waste-water treatment plant, and other miscellaneous areas."³⁵

The PermaGrain facility also used *unregistered* cobalt-60 sources. Because the sources were unregistered, they could not be reused by the source supplier and had to be packed in a transportation cask along with the other residual contaminants and shipped for disposal at a low-level radioactive waste facility in South Carolina.³⁶

None of these types of problems, and their concomitant remediation costs, can be encountered at the CFC facility as presently licensed. The CFC irradiator assembly will use only cobalt-60 as the irradiation source,³⁷ so the contamination seen in the PermaGrain pool would not be seen in the CFC pool. Additionally, CFC will use only *registered* cobalt-60 "sealed sources."³⁸ Because the sources are registered, they can (and are expected to) be reused by the source supplier and will not require the same costly transportation and disposal fees that the PermaGrain sources required.³⁹ Finally, CFC is not employing any of the complex of features, mentioned above, that had to be decontaminated at the PermaGrain

³³ See Reply of CFC Logistics, Inc. to NRC Staff's Supplemental Brief on Area of Concern Regarding Decommissioning Financial Assurance (Mar. 12, 2004), Exh. A, Affidavit of Sharon Turner, ¶ 10.

³⁴ See *id.* ¶ 11.

³⁵ See *id.* ¶ 15.

³⁶ See *id.* ¶ 20.

³⁷ See *id.* ¶ 11.

³⁸ See *id.* ¶ 20.

³⁹ See *ibid.*

facility,⁴⁰ nor will the facility deal with any source material other than the cobalt-60 “sealed sources” installed in the irradiator’s plenum.⁴¹

Thus, the Company concludes, the differences between the two facilities should preclude either drawing any adverse conclusions about CFC’s financial assurance arrangements or referring the issue of financial assurance to the Commission.⁴² In short, the Company claims, the original use of the research reactor at the PermaGrain facility created a type of residual contamination that led to the extraordinary cleanup costs at that facility. No such use has taken place, and no such contamination would be possible, at the CFC site. Additionally, the sources used at the PermaGrain facility did not comply with current NRC registration requirements, and the nature and condition of those sources created disposal problems, further escalating the costs of decommissioning. These factors, which significantly drove up the cost of decommissioning at PermaGrain, do not exist and will not be encountered at the CFC facility, asserts the Company, and thus do not bear on any financial assurance issues there.

We agree in substance with the Company’s reasoning. To establish a “special circumstance” warranting certification to the Commission, a petitioner must be able to point to unusual facts that make the situation at hand peculiar enough to take it out of the regulation’s contemplation. Although upon superficial initial comparison there were certain apparent similarities between the CFC facility and the PermaGrain facility, closer examination has highlighted significant differences between the two, leaving us satisfied that the CFC irradiator — unlike the PermaGrain one — is embraced within the category of facilities contemplated during the formation of the decommissioning bond regulations reflected in 10 C.F.R. § 30.35.

In this regard, we find convincing the fact that CFC does not begin its irradiator operation burdened with the residual contamination from prior operations found at the PermaGrain facility. Additionally convincing is the fact that the cobalt-60 pencils to be used at the CFC irradiator — with their uniform, regulation-conforming configuration — may, after use there, be transported by normal means back to the supplier without requiring later disposal at a costly waste facility.

We find, therefore, that the Petitioners have failed to present the “special circumstances” required by 10 C.F.R. § 2.1239(b) to justify a certification to the Commission regarding the potential waiver of 10 C.F.R. § 30.35. Having been fully briefed by the parties on the legal issues that are controlling in this matter, and with no dispute existing about the relevant factual setting of the two facilities,

⁴⁰ See *id.* ¶ 15.

⁴¹ See *id.* ¶ 9.

⁴² See Mar. 12 Reply at 12.

we not only DENY the Petitioner's request for certification but also DISMISS from further consideration herein the area of concern regarding decommissioning financial assurance. This concern is not, then, to be addressed in the merits presentations.⁴³

VI. ESTABLISHMENT OF TIME PERIODS

A. Providing Notice

Because the individuals named in the two petitions filed with us were represented by counsel in those filings, we are *directing their counsel to send a copy of this Memorandum and Order promptly to each of the Petitioners*, including those whose intervention we approved and those (from both the first and second petitions filed) whose intervention we did not previously pass upon. In that fashion, presumably aided by a brief explanatory cover letter highlighting their options, they will each be PUT ON NOTICE that they *must act promptly if they choose to remain in this litigation*.

Counsel may find it appropriate to omit such Notice to those Petitioners who have previously advised him that they are not in position, or lack the interest, to proceed. This can be done because, pursuant to our directive, counsel informed us as to the nature of the responses he had received from his clients to an inquiry we had posed. Specifically, they were asked by him at our instance whether they remained both (1) resident in the same location they had at the outset and (2) interested in pursuing the litigation if a settlement involving others opposing the license were to be approved. Counsel advised us that only eight of the Petitioners had responded by that time, all of whom indicated their residence had not changed; five of them indicated they would be interested in pursuing the litigation and three indicated they would not.⁴⁴ At his option, counsel for the Petitioners may omit contacting those who, before or since his report to us, responded negatively to either portion of the residence/interest inquiry and who can thus, without more, be taken as not intending to continue with the litigation.

B. Declaring Interest

Counsel for the Petitioners has 2 WEEKS from the date of issuance of this Order to notify the Board as to whether each of his clients does or does not wish to

⁴³ Nor will we at this point take up the pending concern about physical plant security. On that score, there is some dispute about the extent of the matters over which we have jurisdiction (*see* LBP-03-16, 58 NRC at 143), and the hearing of any matters would have to be conducted in a manner that would protect certain information from disclosure. Depending upon whether it becomes necessary to do so, we will address the process for litigating the physical security issue in a separate order.

⁴⁴ *See* August 16, 2004 letter from counsel to the Presiding Officer at 4.

go forward with this litigation. In so notifying us, counsel must state the distance that each petitioner wishing to proceed lives from the facility, if that information has not previously been provided.⁴⁵ *Any Petitioners about whom no notification of desire to proceed is received within the time period allotted will be DEEMED TO HAVE WITHDRAWN from the litigation* by virtue of nonprosecution.

C. Briefing Standing of Petitioners

On behalf of any Petitioner wishing to pursue the litigation who lives *outside* the $\frac{3}{4}$ -mile radius within which presumptive standing exists, *briefs addressing their standing are to be filed 2 WEEKS after counsel notifies us* that some such Petitioners wish to pursue this litigation. In effect, then, counsel has a total of 4 WEEKS from the time this Memorandum and Order is issued to file any necessary briefs on standing. Company counsel will thereafter have 2 WEEKS to respond to any briefs on standing that the Petitioners may file. In total, then, the maximum time for putting the standing question before us for decision will be 6 WEEKS from this date.

D. Dismissing Proceeding

If it turns out that no Petitioner has both the interest and the standing to proceed, no interventions will be recognized and this matter will be dismissed.

E. Presenting Merits of Concerns

If one or more interventions do go forward, then in line with the time periods previously discussed (*see* Dec. 11, 2003 Tr. at 468-69; Aug. 5, 2004 Tr. at 593-94), the *Intervenors' written presentations on the merits will be due 6 WEEKS after the Board rules on standing*, if any such ruling is necessary.

Of course, if no one outside the $\frac{3}{4}$ -mile “presumptive standing” radius wishes to pursue the litigation, no ruling on standing will be necessary. In that event, the *6-weeks time* set by this section for filing the merits presentation will *begin to run* from the time (2 weeks from now) that counsel for the Petitioners initially responds to the Board that only Petitioners with presumptive standing wish to proceed.⁴⁶

⁴⁵ Compare the table of addresses and distances attached to the original Petitioners' August 14, 2003, filing, with the less precise locations associated with some of the new individuals listed in the December 4, 2003 Petition for Leave To Intervene.

⁴⁶ Once again, Petitioners wishing to proceed are under no obligation to pursue all the pending areas of concern; they may choose whatever areas of concern they wish to litigate.

In any event, the *Company's reply written presentation will be due 6 WEEKS after the filing of the Intervenors' written presentation.*⁴⁷ In that response to whatever written material the Petitioners may present to support their concerns, the Company will have full opportunity to put forward its various arguments that those concerns lack merit, arguments we have held were premature at earlier stages (*see, e.g.*, LBP-03-20, 58 NRC at 329-30, ¶¶ 1.1 and 1.4).

Under Subpart L, our consideration of the merits will, at least initially, be based on the written presentations only. *See* 10 C.F.R. § 2.1233(a). If, after review of those presentations, we find we need more information, we will seek it by invoking the live witness procedures provided for in our rules. *See* 10 C.F.R. § 2.1235(a).

In sum, for the reasons expressed, the Settlement Agreement recommended to us by Judge Abramson, the product of extensive negotiations which he guided, is hereby APPROVED. Those who participated in the negotiations have our appreciation for working diligently to resolve the controversy between the Company and the community in which it is located. Further proceedings involving the remaining participants shall be as directed herein, with the request for certification to the Commission for an exception to 10 C.F.R. § 30.35 DENIED and the area of concern regarding decommissioning financial assurance DISMISSED.

⁴⁷The Staff's original election not to participate in the proceeding having been reinstated (*see* LBP-03-16, 58 NRC at 148), the hearing will, barring further developments, involve only the Company and the Petitioners. *It is likely, however, that if and when we address the security concerns* (which as indicated in note 43 above will be the subject of a separate order if this matter goes forward), *we will consider directing the Staff to participate as to both the legal issues and the factual aspects related to that matter.* *See* 10 C.F.R. § 2.1213 (last sentence).

It is so ORDERED.

BY THE PRESIDING OFFICER

Michael C. Farrar
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 4, 2004

Attachments:

- Appendix A: Executed Settlement Agreement
- Appendix B: ELECTION Form
- Appendix C: Reprint — List of Germane and Nongermane Areas of Concern
- Appendix D: Reprint — Analysis of Germane Areas of Concern
- Appendix E: Summary of Prehearing Discussion of Germane Areas of Concern
- Appendix F: Questions To Be Addressed in Written Presentations

Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) CFC Logistics, (2) Petitioners/Intervenors, and (3) the NRC Staff.

APPENDIX A

[EXECUTION COPY]

**SETTLEMENT AGREEMENT
dated as of August 23, 2004**

This Settlement Agreement is entered into as of the date first above written by and among CFC Logistics, Inc. (hereinafter referred to as the “**Company**”), Mrs. Kelly Helt and Mr. Torn Helt, of 1742 Red Bud Road, Quakertown, Pa. (Hereinafter referred to as the “**Petitioners**”), and Mr. Robert Jones (hereinafter referred to as “**Petitioner Supporter**”).

Reference is made to that certain matter, identified as Docket No. 30-36239-ML, ASLBP No. 03-814-01-ML, and commonly referred to as “In the Matter of CFC Logistics, Inc. (Materials License)”, being litigated before an Atomic Safety and Licensing Board (the “**Board**”) of the United States Nuclear Regulatory Commission’s (hereinafter referred to as the “**CFC Litigation**”).

WHEREAS, Petitioners were, together with Mr. Andrew Ford, formerly of 1730 Red Bud Road, Quakertown, Pa., the sole petitioners admitted by the Board to conduct the CFC Litigation; and

WHEREAS, the Petitioners were supported in conducting the CFC Litigation by Petitioner Supporter; and

WHEREAS, the Company, being desirous of addressing the concerns of the Petitioners which gave rise to the CFC Litigation, and Petitioners and Petitioner Supporter, being desirous of working with the Company to address their mutual concerns, have held extensive discussions and negotiations in an effort to resolve the CFC Litigation outside the forum of the formal proceedings being conducted before the Board; and

WHEREAS, Petitioners, Petitioner Supporter and the Company (each being hereinafter referred to as a “**Party**” and collectively as the “**Parties**”) have agreed to a complete settlement of the CFC Litigation, subject to the terms and conditions hereinafter set forth;

NOW THEREFORE, the Parties hereby agree in consideration of the mutual agreements hereinafter set forth, the receipt and sufficiency of which is hereby acknowledged, as follows:

1. **Agreements of the Company.** The Company, in consideration of the agreements of the Petitioners and Petitioner Supporter set forth below, agrees as follows:

- A. To add to its irradiator facility, without making any representation whatsoever regarding whether or not such additions make any additional contribution to the safety thereof, the following:
 - i. A backup power supply, through the use of a generator, for the pump which drives the air flow through the chamber containing the NRC-licensed and approved sealed sources (hereinafter referred to as the “**backup power supply**”); and
 - ii. A light beam trip switch which will be designed and implemented for utilization during loading and unloading of sealed sources (hereinafter referred to as the “**light beam trip switch**”). If the cranes which carry the sealed source cask are near a point where they would traverse over the sealed sources, the light beam trip switch will automatically trigger an audible and visual alarm prior to the cask being traversed over those sealed sources.
 - B. The backup power supply will be installed by the Company at the earlier to occur of (i) the time it adds a general backup power supply for its emergency lighting for its facility, currently estimated to occur in November of 2004, or (ii) December 31, 2004.
 - C. The light beam trip switch will be implemented by the Company by the earlier of (i) completion of the next source loading or (ii) December 31, 2004.
 - D. If, at some future date the Company shall determine to add an additional irradiator to its facilities which is substantially similar to the current irradiator, the Company will make additions to that additional irradiator which are substantially similar to those described above in Clause A of this Section 1.
2. **Agreements of the Petitioners.** Petitioners agree, in consideration of the agreements of the Company set forth above, to withdraw from the CFC Litigation, and that, for their part, the CFC Litigation shall be deemed to be irrevocably settled in full immediately upon approval of this Settlement Agreement by the Board.
3. **Agreements of Petitioners and Petitioner Supporter.** Petitioner Supporter and each Petitioner agrees, in consideration of the agreements of the Company set forth above:
- A. not to support (whether financially, through provision of work product or labor, or by consultation or any other means) or encourage any other person or entity (including, without limitation, those other

persons who have entered requests to become parties to the CFC Litigation) to carry out or pursue against the Company, through any means whatsoever, any of the topics or assertions made heretofore in the CFC Litigation; and

- B. not to support (whether financially, through provision of work product or labor, or by consultation or any other means) or encourage, and, to the extent they are practically able, to discourage, Concerned Citizens of Milford Township from continuing or pursuing against the Company, through any means whatsoever, any of the topics or assertions made heretofore in the CFC Litigation.

The foregoing agreements: (i) do not limit, in any manner whatsoever, the rights of Petitioners or Petitioner Supporter to seek, through the legislative or other public process, regulatory reform or changes regarding nuclear licensing procedures, regulations, safety or security as required by the NRC or its Agreement States, or to speak out publicly regarding perceived issues regarding this or other irradiators or the regulatory system to which they are subject; and (ii) will not apply in the event that there is a proposal to make a material change to the irradiator as currently licensed; and (iii) will not apply to additional irradiators at the facility which are materially different from the current irradiator.

4. **Agreements of the Parties.**

- A. *Non Disclosure of Confidential Settlement Discussions.* In consideration of the agreements set forth above, each of the Parties hereby agrees that it shall not discuss or make available, and it shall use its reasonable efforts to cause its consultants and attorneys not to discuss or make available, in any forum or to any person whatsoever, any information which was exchanged among the Parties during the discussions which lead to this Settlement Agreement; *provided*, that each Party may disclose discussions relating to the security at the irradiator facility.
- B. *Press Releases Regarding This Settlement Agreement.* Without limiting the agreement set forth in Section 4.A of this Settlement Agreement, *each party may, after approval of this Settlement Agreement by the Board as discussed in Section 6.A hereof, prepare and issue, after delivery of draft copies thereof to the other Parties and receipt of their prior written approval, press releases regarding this Settlement Agreement.* This Settlement Agreement may be released by either Party after the Company (on the one hand) and the Petitioner and the Petitioner Supporter (on the other hand) have each had the opportu-

nity to issue a press release regarding this Settlement Agreement; and toward that end, the Parties agree to use their reasonable efforts to cause such press releases to be released simultaneously, in which case, a copy of this Settlement Agreement may be released simultaneously therewith.

- C. *Press Releases and Press Conferences Regarding the CFC Litigation.* Except as provided in Clauses B and D of this Section 4, no Party shall issue any press release regarding the CFC Litigation or any part thereof, nor shall any Party hold a press conference relating to any of the subject matter of the CFC Litigation.
- D. *Press Conferences Regarding the Settlement Agreement.* No Party shall hold a press conference relating to this Settlement Agreement unless the other Parties are given prior written notice thereof and offered an opportunity to be present at such press conference.
- E. *Agreement Regarding Changes to Irradiator Facility.* Each Party acknowledges and agrees that the implementation of the backup power supply and the light beam trip switch are not deemed by the Company to, in any manner whatsoever, be necessary for, or improve, the safety of the irradiator facility, and that they are being implemented solely to accomplish this Settlement Agreement.

- 5. **Mutual Release.** The Company, each Petitioner and Petitioner Supporter hereby irrevocably and forever release and discharge each other of, from and against any and all claims, damages and suits of any nature whatsoever arising out of, or in any manner relating to, the CFC Litigation; *provided*, that the foregoing release and discharge shall not affect the right of any Party to seek to enforce its rights (or the obligations of another Party) under this Agreement.

6. **General Provisions**

- A. *Approval by the Board.* The Parties acknowledge and agree that, because the effect of this Settlement Agreement would be to terminate the CFC Litigation insofar as it involves the Petitioners, Petitioners and the Company will deliver to the Board a copy of this Settlement Agreement for approval by the Board. That approval process will require time, and the Parties acknowledge and Agree that *this Settlement Agreement will not be effective until (and unless) it has been fully approved by the Board.*

- B. *Entire Agreement.* Each Party declares and represents that: (a) no promise, representation, inducement or agreement not expressed in this Settlement Agreement has been made to either of them in respect of the subject matter of this Settlement Agreement; (b) it is not relying on any promise, representation, inducement or agreement in entering into this Settlement Agreement except as expressly set forth in this Settlement Agreement; (c) this Settlement Agreement contains the entire agreement among the Parties relating to its subject matter, and supersedes any prior agreements and contemporaneous oral agreements, of the Parties concerning its subject matter.
- C. *Advice of Counsel.* Each Party acknowledges and agrees that it has had the full opportunity to consult with the counsel of its own choosing prior to entering into this Agreement; and that the terms of this Agreement are contractual and not mere recitals.
- D. *Successors and Assigns: No Third Party Beneficiary.* This Agreement shall be binding on and inure to the benefit of the successors or assigns of any of the Parties. In all other respects, this Agreement shall not create third-party beneficiary rights in any nonparty hereto.
- E. *Authorized Signatory.* The person executing this Settlement Agreement on behalf of the Company represents and warrants that he has full and complete authority to do so, and to bind the Company to the promises and agreements set forth in this Settlement Agreement.
- F. *Amendments.* No amendment or modification of this Agreement or waiver of any right hereunder shall be binding on any party hereto unless it is in writing and is signed by all of the parties hereto.
- G. *Notices.* All notices, demands, requests or other communications which may be or are required to be given, served or sent by any Party to any other Party, shall be in writing and shall be deemed sufficiently given (i) if delivered personally to a Party (or to an office of the Party) to whom the same is directed, (ii) if sent by certified mail, return receipt requested, with postage prepaid, (iii) if sent by a nationally recognized express mail service which requires a receipt from the recipient, or (iv) if sent by telecopy or facsimile transmission and the recipient has verified recipient, and, in any case, addressed to the recipient Party at the address given in writing by such Party to the other Parties. Such notice shall be deemed received upon signature by the Party or its duly authorized employee or agent for of same. A Party may change the name or address for the giving of notice provided above by written notice to the other Parties.

- H. *Further Assurances.* Each Party agrees to execute and deliver to the other Parties such documents, instruments and agreements as shall be necessary to give full effect to the agreements set forth herein.
- I. *Severability.* To the extent a provision of this Settlement Agreement is unenforceable, that provision shall be modified to reflect the Parties' intention to the maximum extent permitted by applicable law. All remaining provisions of this Agreement shall remain in full force and effect.
- J. *Headings.* Section headings have been inserted in this Agreement as a matter of convenience for reference only, and it is agreed that such section headings are not a part of this Agreement and shall not be used in the interpretation of any provision of this Agreement.
- K. *Counterparts.* This Agreement may be executed in any number of counterparts and by the different parties hereto on separate counterparts, each of which, when so executed and delivered, shall be an original, but all such counterparts shall together constitute but one and the same instrument.
- L. *Governing Law.* **THIS SETTLEMENT AGREEMENT AND ANY OTHER DOCUMENT OR INSTRUMENT EXECUTED AND DELIVERED IN CONNECTION HEREWITH AND THEREWITH, SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAWS OF THE COMMONWEALTH OF PENNSYLVANIA.**

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be duly executed by their duly authorized representatives as of the day and year first above written.

CFC LOGISTICS, INC.
By: JAMES WOOD
Title: President

ROBERT JONES

KELLY HELT

TOM HELT

APPENDIX B

CFC Logistics Litigation

**ELECTION TO
NOT CONTINUE LITIGATION**

Reference is made to that certain matter, identified as Docket No. 30-36239-ML, ASLBP No. 03-814-01-ML, and commonly referred to as "In the Matter of CFC Logistics, Inc. (Materials License)," being litigated before an Atomic Safety and Licensing Board (the "**Board**") of the United States Nuclear Regulatory Commission's (hereinafter referred to as the "**CFC Litigation**").

I am one of the individuals who was indicated as a potential petitioner in the CFC Litigation. I have read the settlement agreement reached between the Company and the admitted petitioners (a copy of which is attached hereto), and I hereby notify the Board that I find that settlement agreement satisfactory and do not intend to pursue the CFC Litigation further. Therefore, I hereby withdraw from my request to become a party to that litigation.

Name (print): _____

Signature: _____

Street Address: _____

City/town: _____

State and Zip: _____

Date: _____, _____, 2004

APPENDIX C

Reprint — List of Germane and Nongermane Areas of Concern

Our recap in LBP-03-20, 58 NRC at 333 n.31, listed the “*germane* areas of concern” as including the following:

- 1.1 (pool cracking),
- 1.3 (waste collection),
- 1.4 (rod mishandling),
- 1.5 (electricity loss),
- 1.6 (air-line damage),
- 1.8 and 6 (untested design),
- 2.1*, 2.2, and 5.2 (security planning),
- 4 (neighbors’ water),
- 5.1 (transportation accidents), and
- 7 (decommissioning bond/plan).

That same footnote went on to list the “*nongermane* areas” as follows:

- 1.2 (air circulation),
- 1.7 (ozone dispersion),
- 2.1* (inadequate regulation), and
- 3 (worker exposure).

[The area numbered 2.1 was italicized to indicate that a portion was found germane and another portion nongermane.]

APPENDIX D

Reprint — Analysis of Germane Areas of Concern [indented material reprinted from LBP-03-20, 58 NRC at 329-33, footnotes renumbered from original]

We introduced the Petitioners' first set of concerns by pointing out they were grouped under an "Air Dispersion" heading, presumably referring to radioactive material or gamma radiation. This is what we had to say about those we found germane:

1.1. *Vessel Cracking.* In the circumstances of late document disclosure, we read this concern about cracking of "the vessel containing the cobalt-60" from "loss of coolant" as fairly embracing a concern about an accident — for example, one caused by dropping a heavy weight (such as a transfer cask) while it is suspended above the pool — damaging the structure of the pool holding the water in which the cobalt-60 sources would sit, possibly releasing the pool water into the ground and thus affecting the surroundings (while also losing the pool water's capacity to shield the surroundings from the sources' gamma radiation). That the Company believes this scenario far-fetched (and thus defeatable on the merits) does not make it nongermane. The NRC Staff believes it germane, and we agree.⁴⁸

1.3. *Radioactive Waste.* This concern is about radiation emission from "storage of radioactive waste at the facility." Although the Company urges that no waste as such will be "stored" there, the concern is framed broadly enough to cover emissions from materials collected periodically during "water chemistry controls," which will take place as part of the facility's operation. As so understood, the concern is germane, as the Staff agrees.

1.4. *Rod Mishandling.* Concern about the mishandling of the cobalt-60 sources during transportation, loading, and removal is plainly germane, as the Staff agrees. The Company's arguments to the contrary are entirely merits-based and thus not cognizable at this juncture.⁴⁹

1.5. *Electricity Loss.* In expressing concern about a loss of power, the Petitioners mistakenly refer to "a bell containing cobalt-60" being stuck underwater with damaging consequences. As they learned thereafter, including during the facility visit the day of oral argument, the immersible bells contain only the food and other products to be irradiated, while the cobalt-60 sources remain at the bottom

⁴⁸ For the Staff's views on each of the areas of concern, see Staff Brief at 5-11.

⁴⁹ We should note that our earlier ruling on the stay motion required us to take the standard look at whether the Petitioners had carried the heavy burden of demonstrating "probability of success on the merits" and "irreparable injury." As we indicated then (LBP-03-16, 58 NRC at 144-45, 148), no conclusions we reached there against the Petitioners are determinative on the questions now before us, dealing with whether they have carried the less rigorous burden of demonstrating "germaneness."

of the pool. The Company argues that the specific problem is thus not applicable or relevant to the application for this irradiator. But there are other problems that could stem from the concern about loss of facility electricity, and on this basis we find that broad concern germane (as does the Staff), subject to its being stated more specifically at the proper juncture

1.6. *Air-Line Damage.* We discussed in LBP-03-16 the role of the air lines, both of which are subject to damage. 58 NRC at 146. Although we there accepted the Company's arguments about the lack of sufficient showing of probability of success on the merits or of irreparable injury, that is not the test here . . . , and we agree with the Staff that concerns about damaged air lines are germane.

1.8. *Untried Installation/Assembly.* The Company believes its design is state-of-the-art and thus should present less concern to nearby residents than older designs. The Petitioners see the converse: an untried design. Although this concern is lacking in particulars, Petitioners point to the difficulty and delay they encountered in obtaining trade secret material — a view we have already indicated we share (*see* LBP-03-16, 58 NRC at 143 n.13) — that they needed to review in order to be more precise in their pleadings. On that basis, we are unwilling at this juncture to find this concern lacking in germaneness. We note, however, that a challenge to the facility design as untried or untested, uncoupled with a claim that the design fails to meet the applicable regulations, might be viewed as an impermissible collateral attack on NRC regulations. 10 C.F.R. § 2.1239. If so, it would not be within our jurisdiction to entertain, and accordingly would not be germane to the proceeding before us. In any event, to the extent this matter does move forward, it should be combined with concern 6, below.

We then moved on to the Petitioners' second category, "Neighbors' Security," under which they advanced two specific concerns. We covered those in this fashion:

2.1. [*Untitled*]. To the extent this concern puts forward an overly generalized claim of "inadequate regulation," it seems to present a challenge to the Commission's regulations that may not be entertained in our proceedings. 10 C.F.R. § 2.1239. Accordingly, this concern is not germane to any issues that can be addressed, or to any relief that can be granted, in this proceeding. To the extent, however, that this concern mentions security planning, it is germane, but should be combined with 2.2 and 5.2, below.

2.2. *Security Plan Inadequacy.* Notwithstanding the opposition of the Company, this concern, on which the Staff is willing to defer judgment, is plainly germane. The lack of specificity accompanying it was due to the Petitioners' inability to obtain the relevant documents — which were being withheld under various and changing claims of secrecy — in timely fashion. As with concern 2.1, above, this concern should be combined with 5.2, below, whose precise contours remain

to be defined (*see* p. 332, below [LBP-03-20, 58 NRC at 332], and LBP-03-16, 58 NRC at 145).

The Petitioners' fourth category (the third was found nongermane) had but a single concern. We had this to say about it:

4. *Neighbors' Water.* Petitioners express concern over possible cobalt-60 contamination of the public water system, particularly in light of the alleged closeness of the local water table to the surface. At oral argument, they expressed concern that the largely underground pool could be damaged in some kind of accident, releasing its (possibly contaminated) water into the water table, thus contaminating local wells. And in their pleadings they referred to prior incidents in which contaminated pool water was introduced into the public sewer system. The Company's and the Staff's protestations that such accidents and incidents elsewhere are not credible given the facility's design go to the merits, not to the germaneness, of the concerns, and we will therefore allow them to be considered.

With respect to their fifth category, styled "Transportation Hazards," we observed that the Petitioners had focused on both accidental and deliberate causes for hazards associated with transporting the cobalt-60 sources. This was how we described them:

5.1. *Accidents.* Petitioners note the absence in the application of emergency procedures for responding to loading and unloading accidents. The Company's and Staff's objection that the concern is stated in generalized fashion is not adequate to defeat the obvious germaneness of this concern, particularly in light of the difficulties and delays encountered by Petitioners in obtaining documents related to the application.

5.2. *Sabotage or Terrorism.* As indicated in 2.2 above, this concern is germane and the two should be addressed together.

The sixth area of concern covered but a single area. We had only the following to say at the time:

6. *Experimental Design.* Although the Staff did not agree that the similar concern already discussed in 1.8 above was germane, it does concede that the Petitioners' concern that this irradiator is "atypical, . . . experimental and unprecedented" is sufficiently germane. We agree with the Staff here and will direct that the two concerns be considered together.

An outgrowth of this concern, based on later-discovered documents, became the basis for the Intervenor's second stay motion, which we denied in an unpublished decision earlier this year. May 28, 2004 Memorandum and Order (Ruling on

Request for Stay and Related Relief). The allegations made there, and our interim decision thereon, should be examined for the bearing they have on the litigation of the merits of this concern.⁵⁰

The petitioners' final area of concern, too, covered only one topic, financial assurance. Because we have dismissed that concern, we do not repeat what was earlier said about it.

⁵⁰This concern also formed the backdrop for the Petitioners' financial assurance concern, which we have now dismissed (*see* p. 495, above). The "experimental design" concern remains in the case, however, for other purposes. We point out, though, that *any written presentation on its merits needs to address the analysis thereof that was contained in our denial of the renewed stay motion*, which motion relied on an analogous argument. *See* unpublished May 28, 2004 Memorandum and Order (above), at 3. *See also* note 51, below.

APPENDIX E

Summary of Prehearing Discussion of Germane Areas of Concern

The matters discussed at the December 11, 2003, prehearing conference may be summarized as follows:

(1.1) *Vessel Cracking*. The Petitioners/Intervenors clarified that their concerns with vessel cracking involved both the potential cracking of the pool and the potential cracking of the source material should a heavy weight, such as a transfer cask, fall into the pool. Tr. at 435. After some discussion on how the Petitioners/Intervenors could perform the transfer cask calculations to determine if a dropped cask would crack the vessel, the Board suggested that the Petitioners/Intervenors perform the necessary analysis using the data available for the heaviest potential cask the company could use. Tr. at 440-41.

After the Petitioners/Intervenors further clarified their position on vessel cracking, the Board decided that the concern about (4) Neighborhood Water should be combined with that of (1.1) Vessel Cracking because both subjects involve the potential cracking of the pool structure. Tr. at 465.

(1.4) *Rod Mishandling*. After some discussion, the Petitioners/Intervenors stated that they did not wish to narrow this issue. Tr. at 448. The Board made clear, however, that this issue was admitted solely for the purpose of challenging the Company's compliance with Commission regulations as to the handling of rods, and does not involve security issues. *Id.* The Board suggested, and the Petitioners/Intervenors agreed, that transportation and rod mishandling should be combined to the extent that they overlap. Tr. at 466.

The Board further noted that, regarding transportation, the parties should be prepared to address whether the Board had jurisdiction over any transportation concerns involving nonparties, that is, people who are not employed by the company. Tr. at 468. The Board also asked that in preparing their presentations, the parties analyze only accidents involving Type-B casks so as not to generate unnecessary analysis. Tr. at 468.

(1.5) *Electricity Loss*. The Petitioners/Intervenors explained that two specific problems could arise from a loss of electricity to the facility. The first involves cooling the cobalt-60. We asked that the evidence on that subject include the necessary detailed calculations to support the allegations that the Staff's calculations on cooling are inaccurate. Tr. at 452. Furthermore, we asked that the evidence be self-contained, that is, that the Petitioners/Intervenors include, reference by reference, the source of all the material constraint correlations and other parameters they relied upon in making the calculations. *Id.*

The second issue the Petitioners/Intervenors raised was whether the cobalt-60 would be dispersed in the pool if the facility lost its electricity, and whether this possibility creates a safety concern rather than the mere business concern of

loss of product. Tr. at 456. The Petitioners/Intervenors explained that a loss of electricity to the facility raises various concerns about pool cleanup and product cleanup. One such concern was that without electricity the pool pumps would stop working, resulting in a loss of air pressure, and potentially leading to water entering the bell. Tr. at 457.

We concluded that because (1.5) Electricity Loss also covered (1.6) Airline Damage, these topics should be combined. Tr. at 458.

(1.8) *Untried Installation/Assembly*. We also observed that (1.8) Untried Installation/Assembly and (6) Experimental Design had previously been combined. Tr. at 458.⁵¹

⁵¹This topic was the subject of the Intervenors' Renewed Motion for Stay, filed on November 10, 2003. In that motion, the Intervenors argued that the irradiator was a "prototype" and that its experimental design made the irradiator's safety doubtful. They also argued that the Company's action in altering, and then restoring, a part of the irradiator demonstrated that the irradiator's design was unsafe. Argument on the stay motion took up a considerable part of the December 11th prehearing conference, and led us to request a series of new briefs. The matter culminated when we denied the motion on May 28, 2004, concluding — for purposes of the decision on the stay — that the "prototype" classification of the irradiator was for contractual purposes only, and not demonstrative of any deficiency in radiation safety. We also found satisfactory, for purposes of the stay decision, the Company's explanation that the change to the irradiator was made to enhance production performance, not to remediate a safety problem. That we ruled this way *for purposes of the stay motion* does not preclude the Petitioners from attempting to convince us otherwise *on the merits*, but their burden appears heavy on this point.

APPENDIX F

Questions To Be Addressed in Written Presentations on the Merits of Respective Areas of Concern

Vessel Cracking (1.1/4.0)

1. For each “cask” handling event, what is the probability of dropping a cask from the crane?
2. To avoid having to deal with a wide variety of Type B casks, in answering the following questions, represent the cask as a right circular cylinder of the same diameter as the smallest dimension of a food irradiation pod, and mass W . Further assume the cask is dropped from a height of 3 feet above the pool with its normal water level. Use a drag coefficient of 1.0.
 - (A) Assuming the supporting soil is clay, what is the minimum value of W to cause a crack to occur through the entire pool lining (both steel liners and the intermediate concrete)?
 - (B) How does that value of W compare with the mass of typical Type B casks?
 - (C) What is the size of the leak, and what is the leak rate from the pool into the soil?
3. During cask loading and unloading the plenum is removed and the cobalt-60 rods are placed in the “source rack” at one side of the pool. Under these conditions:
 - (A) What is the value of W required to deform the source rack if the rack is normally oriented?
 - (B) What is the value of W required to deform the rack if it is horizontal?
 - (C) How do these values of W compare with the mass of a typical Type B cask?
4. What is the value of W required both to deform the rack and to cause a crack in the pool liner, potentially allowing contaminated water to leak into the soil?
5. If a “cask” is dropped, what is the likelihood of it striking any part of the rack in its descent, based on an analysis of trajectories in the water?

Radioactive Waste (1.3)

1. What type and amount of radiation would be emitted from the resin beds under normal operation?
2. Using the limits on operation prescribed in the license, how much cobalt-60 (in curies) would be required to be present in the circulating water to approach these limits?
3. Given that the cobalt-60 is insoluble in water, how much cobalt-60 (in curies) would be present in the resin beds if operation halts as a result of approaching the permissible limits?
4. Under either normal or accident conditions, are there any other potential sources of radiation present?

Rod Mishandling (1.4)

1. How many rod handling accidents have occurred at Type III irradiators using Type B casks?
2. If a rod is mishandled to the point that cobalt-60 is exposed, how much radiation (in curies) will be deposited in the water?
3. If cobalt-60 particles are released into the water, where do they go?
4. Given the number of irradiator transfers between source racks and casks, and the number of events listed in the answer to Question 1, what has been the historic frequency of rod mishandling per transfer event?

Electricity Loss (1.5/1.6)

1. For the following questions, assume there is a complete loss of all electricity to the site, and a full load of cobalt-60.
 - (A) Assuming that 90% of the radiation is absorbed in the water, how long does it take to evaporate enough pool water to lower the water level to the top of the plenum?
 - (B) If 10% of the radiation is assumed to be absorbed within the cobalt-60 rods or the cooling air, at what rate does the air temperature rise in the plenum, assuming normal heat transfer by conduction through the plenum wall to the water.
 - (C) How long does it take for the air to reach a temperature sufficient for the air line to fail?

2. For the following questions, assume there is electricity to the site, but that the air circulation pumps fail.

- (A) How long does it take for natural circulation of the air to occur, if the line is not blocked?
- (B) Under these conditions, what is the maximum temperature of the air?

3. If the air line is blocked, but there is electricity to the site, what is the maximum temperature of the cooling air, and how long does it take to reach that temperature?

4. Assume that, during electricity loss, water enters a food bell and that some food particles thereby enter the water.

What would inhibit the cleanup of the resin bed prefilters, if:

- (A) The source rods have been removed from the pool?
- (B) The source rods have not been removed from the pool?

Experimental Design (1.8/6.0)

1. Enumerate the functional and/or physical aspects of the design that are “experimental” or “untried” as compared with other Type III irradiators licensed to hold a mega-curie of cobalt-60.

- (A) Which of these design aspects are not covered by current regulations?
- (B) Which of these design aspects pose a high risk of failure ($>10^{-4}$ /year)?
- (C) What would be the consequences of such a failure?

Transportation Accidents (5.1)

- 1. How many transportation accidents have happened with Type B casks?
- 2. How many of the above have resulted in the release of radioactive material?
- 3. Using the answers to Questions 1 and 2 above, compare the accidents leading to a release of radioactive material with the total number of Type B cask transports to estimate the likelihood of a radioactive release consequent to transport of a Type B cask.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

E. Roy Hawkens, Chairman
Ann Marshall Young
Dr. Peter S. Lam

In the Matter of

Docket Nos. 30-5980
30-5982
(ASLBP No. 04-833-07-MLA)
(Materials License Amendment)

SAFETY LIGHT CORPORATION
(Bloomsburg, Pennsylvania Site)

November 9, 2004

In this materials license case, Safety Light Corporation seeks a renewal of its license and a continued exemption, pursuant to 10 C.F.R. § 30.11, from the decommissioning funding requirements of section 30.35. The Pennsylvania Department of Environmental Protection (PDEP) requests a hearing to oppose the license renewal to the extent Safety Light seeks a continued exemption. The Licensing Board grants the hearing request, concluding that PDEP has standing and advances an admissible contention.

RULES OF PRACTICE: STANDING REQUIREMENT FOR STATES

A state satisfies regulatory standing requirements under section 2.309(d)(2) by averring in its request to intervene that the proceeding involves a facility located within its boundaries.

RULES OF PRACTICE: ABANDONED CONTENTIONS

Where a party who previously advanced contentions thereafter expressly declines to contest the position of the NRC Staff that certain contentions are inadmissible, those contentions are deemed abandoned.

RULES OF PRACTICE: CONTENTIONS; NONBINDING REQUIREMENTS ON LICENSEES

A Commission memorandum does not impose binding requirements on a licensee; only statutes, regulations, orders, and license conditions can impose binding requirements.

RULES OF PRACTICE: CONTENTIONS; REQUESTS FOR ADDITIONAL INFORMATION (RAI)

Absent a showing to the contrary, the issuance of RAIs by the NRC Staff in the context of conducting licensing reviews is properly viewed as the Staff's conscientious performance of duties.

RULES OF PRACTICE: CONTENTIONS; DETERMINING WHETHER A LICENSEE SHOULD BE EXEMPTED FROM COMPLYING WITH DECOMMISSIONING FUNDING REQUIREMENTS

Section 30.11(a) of 10 C.F.R. establishes the standards for determining whether a licensee may be exempted from the decommissioning funding requirements of 10 C.F.R. § 30.35, namely, whether such exemption is “authorized by law, and will not endanger life or property or the common defense and security and [is] otherwise in the public interest.” In making this exemption determination, the threshold inquiry is whether, as a matter of financial fact, the licensee can comply with section 30.35. If this inquiry is answered in the negative, the next inquiry is whether an exemption, and the accompanying licensing conditions related to that exemption, will be consistent with the standards in section 30.11(a). This latter inquiry involves consideration of all relevant facts bearing on those standards, which may include a licensee's answers to RAIs, a licensee's past failure to comply with licensing conditions, and a licensee's putative misconduct.

MEMORANDUM AND ORDER
(Granting Pennsylvania's Request for Hearing)

Before the Licensing Board is the request for hearing submitted on August 30, 2004, by the Pennsylvania Department of Environmental Protection (Pennsylvania) in response to a June 23, 2004 notice of opportunity for hearing regarding a proposed amendment to the 10 C.F.R. Part 30 byproduct materials licenses of the Safety Light Corporation (Safety Light).¹ As relevant here, Safety Light seeks to renew its Materials License No. 37-0030-08, and incident to the license renewal it seeks a continued exemption from the decommissioning funding requirements of 10 C.F.R. § 30.35. Pennsylvania requests a hearing to oppose Safety Light's license-renewal application if such renewal results in a continued exemption from section 30.35. Because we find Pennsylvania has standing and advances an admissible contention, we grant its request for a hearing.

I. BACKGROUND

A. Factual Background

For purposes of this ruling, we assume the correctness of the well-pleaded facts in Pennsylvania's Request for Hearing [hereinafter Pennsylvania Hearing Request], which neither Safety Light nor the NRC Staff contests.

For over two decades, Safety Light has manufactured devices containing tritium at a facility located in Bloomsburg, Pennsylvania, pursuant to NRC License Number 37-00030-08. Safety Light's current activities at the Bloomsburg site consist primarily of the manufacture of self-luminous signs, each of which contains about 10 curies of tritium. *See* Pennsylvania Hearing Request at 3-4.²

¹The notice was published in the *Federal Register*. *See* 69 Fed. Reg. 39,515 (June 30, 2004).

²Pennsylvania states that, prior to Safety Light's acquisition of the Bloomsburg site, other companies were licensed to use radioactive materials there for manufacturing purposes. From 1950 to 1960, the previously licensed manufacturer disposed of solid radioactive waste in two underground silos, each of which had a capacity of approximately 650 cubic feet. One silo was used to dispose of radium-226, strontium-90, and possibly cesium-137. The other silo was used for strontium-90, cesium-137, and possibly radium-226. Liquid radioactive waste was disposed of in portions of an abandoned canal that ran through the site. Since 1969, tritium has been the only radionuclide used at the site, and a separate building was erected at the site to house the tritium manufacturing operations. Radiological surveys that were conducted at the site in the late 1970s and early 1980s revealed soil contaminated with radium-226, cesium-137, and strontium-90. Groundwater samples indicated levels of tritium and strontium-90 above NRC guidelines. *See* Pennsylvania Hearing Request at 4-5.

(Continued)

Effective July 27, 1990, 10 C.F.R. § 30.35(e) requires licensees to submit a plan containing a cost estimate for decommissioning. Additionally, section 30.35 requires licensees to certify that financial assurance for the estimated cost of decommissioning is provided by (1) prepayment of necessary money into a segregated fund; or (2) a surety, insurance, or other guarantee method. 10 C.F.R. § 30.35(f)(1)-(2). The NRC may exempt a licensee from the requirements of section 30.35 if it determines an exemption is “authorized by law and will not endanger life or property or the common defense and security and [is] otherwise in the public interest.” *Id.* § 30.11(a).

Safety Light sought an exemption from section 30.35, because it was unable to certify financial assurance for a decommissioning funding plan. In February 1992, the NRC denied Safety Light’s request for an exemption and, accordingly, denied Safety Light’s application to renew License 37-00030-08. The NRC thus ordered Safety Light to decommission and decontaminate the Bloomsburg site for release for unrestricted use. *See* Pennsylvania Hearing Request at 8-9.

Safety Light challenged the NRC’s denial of its application for license renewal. During the pendency of that proceeding, the parties negotiated a Settlement Agreement under which the license was renewed in August 1994 for a 5-year period, with an expiration date of August 31, 1999. As relevant here, the Settlement Agreement: (1) exempted Safety Light from the requirements of 10 C.F.R. § 30.35 for the renewal period; (2) required Safety Light to set aside funds on a monthly basis and place them in a trust account to be used exclusively for decontamination, decommissioning, and other safety purposes authorized by the NRC; and (3) required Safety Light to perform a site characterization study describing the nature, extent, quantities, and location of radioactive contaminants. *See* Pennsylvania Hearing Request at 9-10. The Agreement also provided that “it is explicitly understood and agreed that the [NRC] Staff’s determination of . . . whether to grant or deny any further request for exemption from 10 C.F.R. § 30.35, shall be binding for all purposes, and [Safety Light] . . . hereby agree[s] that such Staff determination shall not be the subject of any request for hearing or adjudicatory review.” *Safety Light Corp.* (Bloomsburg Site Decontamination), LBP-94-41, 40 NRC 340, 348 (1994).

During the next 5 years, Safety Light complied with the above terms of the Settlement Agreement. As the expiration date of the license period approached, however, Safety Light still lacked the financial ability to comply with the decom-

In this license-renewal proceeding, Safety Light — in addition to seeking to renew License 37-00030-08 — also seeks to renew License 37-00030-02, which authorizes it to possess radioactive material existing in contaminated facilities at the Bloomsburg site as of January 3, 1995, and to characterize and decommission those portions of the site, including the radioactive material discussed above. Pennsylvania does not oppose the renewal of License 37-00030-02. *See* Pennsylvania Hearing Request at 4-5 & n.2.

missioning funding requirements of 10 C.F.R. § 30.35. Accordingly, when Safety Light submitted its request for a license renewal in April 1999, it again asked the NRC to grant an exemption from section 30.35. The NRC granted Safety Light's exemption request, and it renewed License 37-00030-08 for another 5 years, or until December 31, 2004. *See* Pennsylvania Hearing Request at 9-10. Included in the renewed license were conditions governing radioactive waste disposal and financial assurance. These conditions required Safety Light to: (1) dispose of, within 2 years of generation, radioactive waste generated after January 1, 2000, if a waste disposal site is available (Condition 18); (2) dispose of or otherwise remove from the site by December 31, 2004 all radioactive waste generated from activities performed prior to January 1, 2000 (Condition 19); and (3) deposit prescribed amounts of money on a monthly basis in a trust fund to be used exclusively for decontamination, decommissioning, and safety purposes authorized by the NRC (Condition 20). *See* Pennsylvania Hearing Request, Exh. A.³

As discussed below, in its current license-renewal request, Safety Light represents that, despite its good faith efforts, it was unable to comply with these three conditions.

B. Safety Light's Pending Request for License Renewal and Exemption from 10 C.F.R. § 30.35

On April 22, 2004, Safety Light applied to renew License 37-00030-08 and requested a continued exemption from 10 C.F.R. § 30.35. *See* Pennsylvania Hearing Request, Exh. B. In its license-renewal application, Safety Light acknowledged that it had not disposed of the onsite radioactive waste as required by Conditions 18 and 19 of its current license, and it provided the following explanation:

We have tackled the remediation of the underground silos which, as agreed by all parties, represented the greatest potential threat to public safety at our site. In this effort, to date we have spent more than \$1,600,000.

While we continue to work toward a solution for the long term disposition of some of the waste, the silos and their contents have been removed from the ground, the waste has been sorted and segregated to the fullest extent possible, one truckload of waste has been removed from the site, and the balance is properly stored in appropriate containers on site. The threat to the public posed by the potential migration of this waste from the underground silos has been eliminated.

³ In granting Safety Light's license-renewal request, the NRC expressed the expectation that Safety Light would be able to demonstrate compliance with the requirements of 10 C.F.R. § 30.35 in its next license-renewal application. *See* Pennsylvania Hearing Request, Exh. F.

As outlined in our letter of December 10, 2003 regarding Condition 18 of our License, at present we have 16,731 curies of tritium waste on site. This material remains on-site due to our joint decision to concentrate our limited financial resources on the completion of the silo remediation project.

Despite the fact that it is only our . . . [manufacturing] activities [under License 37-00030-08] that generate[] any cash flow from which we contribute toward the Escrow Fund, to date all available funds have been expended on the . . . clean-up [of radioactive waste that was generated previously under License 37-00030-02]. Although we are not certain that a disposal option exists for all of the waste generated by the 08 license, this could have been addressed and can certainly be addressed in the future if we decide to use our available funds here rather than divert them for use in the 02 license remediation and disposal activities.

Id. (paragraph numbers omitted).

Safety Light also advised that it had been unable to comply fully with Condition 20 of its license, which required Safety Light periodically to deposit prescribed amounts of money in a trust fund to be used exclusively for decontamination, decommissioning, and safety purposes authorized by the NRC. At the time of its license-renewal request, Safety Light had deposited a total of \$339,000 in the trust account, which, under the license, represented about 80% of the amount it had committed to deposit. *See* Pennsylvania Hearing Request, Exh. B. Safety Light told the NRC that the deficiency was attributable to a “very difficult business environment” that rendered it “impossible” to make the prescribed deposits. *Id.* But Safety Light assured the NRC it was

working diligently to make up this shortfall and [was] committed to include additional sums with [its] current monthly payments as [it is] able. Whatever balance remains at the end of our current license period will continue to be paid with additional escrow payments during our next license period until this deficiency is made up, bringing our total contribution attributable to our current license to \$492,000.

Id.

Finally, in its license-renewal application, Safety Light recognized that — if the NRC grants another exemption from 10 C.F.R. § 30.35 — Safety Light must continue to deposit money in the trust fund. Safety Light stated, however, that it had been too aggressive with its commitment to deposit money in the trust fund during the prior license-renewal period:

The economic downturn made it impossible for us to keep up with our obligation . . . [and] we recognize that we cannot commit to the same levels of funding as before and be confident in our ability to meet our obligation. We therefore propose

to contribute \$5,000 per month for the 60 month renewal period from January 2005 through December 2009. This will add an additional \$300,000 to the Escrow Fund.

Pennsylvania Hearing Request, Exh. B.

On June 30, 2004, the NRC published notice in the *Federal Register* that Safety Light had applied for renewal of License 37-00030-08. 69 Fed. Reg. 39,515. The NRC advised the public that any person whose interest may be affected by Safety Light's request and who desires to participate as a party in the proceeding "must file a written request for a hearing and a specification of the contentions which the person seeks to have litigated in the hearing." *Id.* at 39,516.

C. Pennsylvania's Opposition to Safety Light's License-Renewal Request

On August 30, 2004, Pennsylvania filed a timely request for a hearing, arguing that Safety Light's request for an exemption from 10 C.F.R. § 30.35 should be denied and, accordingly, its license-renewal request must be denied. In particular, Pennsylvania argued it has standing to intervene in Safety Light's license-renewal proceeding, and it advanced the following six contentions in support of its opposition to Safety Light's renewal request: (1) Safety Light's application fails to comply with NRC regulations and directives; (2) Safety Light has no valid exemption from the requirements of 10 C.F.R. § 30.35 that can be renewed through this proceeding because the exemption automatically terminated when Safety Light failed to comply with its current license; (3) Safety Light should not be granted a further exemption from the financial assurance requirements or a reduced rate of contribution into the escrow funds; (4) Safety Light's exemption from financial assurance requirements gives it an unfair competitive advantage over other licensees who must comply with those requirements; (5) Safety Light's failure to contribute to the escrow funds and its request for a reduced rate of contribution show it is not a viable business and that its application should be denied; and (6) Safety Light's failure to dispose of the onsite tritium waste as required by its license constitutes a violation of that license that mandates denial of its application.

Safety Light did not respond to Pennsylvania's hearing request. On September 27, 2004, the NRC Staff submitted a Response to Request for Hearing Filed by the Commonwealth of Pennsylvania [hereinafter NRC Staff Response], opining that Pennsylvania's hearing request should be granted, because Pennsylvania has standing to intervene, and one of Pennsylvania's six contentions (i.e., contention number 3) is admissible. The NRC Staff argued, however, that the remaining five contentions are inadmissible.

On October 4, 2004, Pennsylvania submitted a Response to the NRC Staff's Response to the Commonwealth of Pennsylvania's Request for Hearing [here-

inafter Pennsylvania Response], stating that it does not contest the NRC Staff's conclusion that contentions 4 and 5 are not admissible, but arguing that the remaining four contentions (i.e., contentions 1, 2, 3, and 6) are admissible.

The participants' written submissions are sufficient for us to resolve Pennsylvania's request for a hearing without the need for oral argument. For the reasons discussed below, we grant Pennsylvania's request.

II. ANALYSIS

A requestor who, like Pennsylvania, has filed a timely request to intervene as a party in an adjudicatory proceeding must (1) establish it has standing, and (2) proffer at least one admissible contention to be litigated in the proceeding. 10 C.F.R. § 2.309(a). Pennsylvania satisfies both requirements.

A. Pennsylvania Has Standing To Intervene Pursuant to 10 C.F.R. § 2.309(d)(2)

Ordinarily, to establish standing to intervene as a party in an adjudicatory proceeding, a requestor must demonstrate: (1) the nature of its rights under the Atomic Energy Act of 1954; (2) the nature and extent of its property, financial, or other interest in the proceeding; and (3) the possible effect of the proceeding on the requestor's interests. 10 C.F.R. § 2.309(d)(1)(ii)-(iv).

However, the above requirements do not apply where a State seeks to intervene in an adjudication concerning a facility located within its borders. Under such circumstances, the State need simply indicate in its request for a leave to intervene that the proceeding involves "a facility located within its boundaries." 10 C.F.R. § 2.309(d)(2)(i). A State that satisfies this requirement "need not address the standing requirements" (*id.*), and the Licensing Board designated to rule on the request for leave to intervene "shall not require a further demonstration of standing" (*id.* § 2.309(d)(2)(ii)).

In the instant license-renewal proceeding, Pennsylvania satisfies the requirement for standing to intervene under section 2.309(d)(2), because — as indicated in Pennsylvania's hearing request — the proceeding concerns a manufacturing installation and waste-storage site in Bloomsburg, Pennsylvania, and, thus, involves "a facility located within [Pennsylvania's] boundaries." 10 C.F.R. § 2.309(d)(2)(i). The regulations require no further showing of standing from Pennsylvania.⁴

⁴The NRC Staff avers (NRC Staff Response at 3-4) that Pennsylvania has standing because it satisfies the traditional standing requirements in 10 C.F.R. § 2.309(d)(1). We agree that Pennsylvania also satisfies those standing requirements.

B. Pennsylvania Advances an Admissible Contention

A requestor must advance at least one admissible contention to participate as a party in an adjudicatory proceeding. 10 C.F.R. § 2.309(a). For a contention to be admissible — that is, for it to be cognizable by this Board — a contention must: (1) provide a specific statement of the issue of law or fact to be raised; (2) provide a brief explanation of its basis; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions that support the requestor’s position on the issue and on which the requestor intends to rely at the hearing, together with references to the specific sources and documents on which the requestor relies; and (6) provide specific information, including references to specific portions of the licensee’s application, to show that a genuine dispute exists with the licensee on a material issue of law or fact. *Id.* § 2.309(f)(1)(i)-(vi).

Pennsylvania raised six contentions in its hearing request. The NRC Staff responded that only one contention (i.e., contention 3) was admissible. In reply, Pennsylvania did not contest the Staff’s position that contentions 4 and 5 were inadmissible; however, Pennsylvania continued to argue that contentions 1, 2, 3, and 6 were admissible.

In light of Pennsylvania’s concession that it does not contest the NRC Staff’s view that contentions 4 and 5 are inadmissible, we treat those contentions as abandoned.⁵ We now address the admissibility of contentions 1, 2, 3, and 6.

1. Contention 1 Is Not Admissible

Contention 1: Safety Light’s Application Fails To Comply With Applicable Regulations and the Directives of the Commission.

Pennsylvania alleges three bases in support of its contention that Safety Light’s license-renewal application is fatally defective. Each alleged basis is legally insubstantial.

First, Pennsylvania argues (Pennsylvania Hearing Request at 17) Safety Light’s failure to include a decommissioning cost estimate or funding plan in its license-renewal application violates 10 C.F.R. § 30.35. Section 30.35 ordinarily requires a license applicant to provide the NRC with this information, but the NRC may exempt licensees from this requirement. In particular, 10 C.F.R. § 30.11 provides

⁵ Even if Pennsylvania had not abandoned contentions 4 and 5, we would have concluded they were inadmissible on the alternative grounds that they were outside the scope of the proceeding, lacked an adequate basis, and failed to establish a genuine dispute on a material issue of law or fact, as argued by the NRC Staff. *See* NRC Staff Response at 11-14.

in relevant part that the NRC “may, upon application of any interested person or upon its own initiative, grant such exemptions from the requirements of [section 30.35] . . . as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest.” 10 C.F.R. § 30.11(a). A licensee who is granted an exemption from section 30.35 need not, of course, comply with the regulatory requirements from which it has been exempted. Accordingly, insofar as Safety Light has obtained an exemption and seeks a further exemption, it is not violating section 30.35. *See* NRC Staff Response at 5-6. Regarding Pennsylvania’s contention that Safety Light no longer has a valid exemption that can be renewed, we address that contention in Part II.B.2 *infra* and reject it as inadmissible.

Pennsylvania also asserts (Pennsylvania Hearing Request at 17-18) that Safety Light’s failure to include a decommissioning cost estimate or funding plan in its application violates Commission directives. Pennsylvania grounds this assertion on a sentence from a Commission memorandum granting Safety Light’s license-renewal application in 1999. In that memorandum, the Commission approved exempting Safety Light from section 30.35, but it stated that “[t]he licensee should be put on notice in the cover letter transmitting the renewed license that the NRC expects the licensee to . . . demonstrat[e] compliance with the requirements of 10 C.F.R. § 30.35 when the licensee applies for the next renewal of this license.” Pennsylvania Hearing Request, Exh. F. A memorandum, however, cannot impose binding requirements on a licensee. *See Curators of the University of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 98 (1995) (“[o]nly statutes, regulations, orders, and license conditions can impose requirements upon applicants and licensees”). Moreover, the Commission’s use of the word “expects” indicates that the sentence was precatory; the Commission was exhorting Safety Light’s future compliance with section 30.35. Pennsylvania’s contrary argument — that the sentence constitutes an inexorable command mandating Safety Light’s compliance with section 30.35 and rescinding its regulatory right to request a future exemption — cannot be squared with the Commission’s plain language. *See* NRC Staff Response at 7.

Finally, Pennsylvania argues (Pennsylvania Hearing Request at 18) that Safety Light’s license-renewal application must be deemed defective in light of the NRC Staff’s Request for Additional Information (RAI) from Safety Light. Pennsylvania points out that the RAI asks Safety Light to provide particularized cost estimates for disposal of radioactive wastes, and to explain its proposal to reduce its monthly contributions to the escrow fund. Pennsylvania asserts that “the fact that [the NRC Staff] deemed it necessary to ask for this detailed information shows that the initial submission by Safety Light failed to conform to the Commission’s directive and the applicable regulations.” *Id.* Pennsylvania’s assertion lacks merit.

As the Commission has explained, the issuance of an RAI by the NRC Staff does not suggest that a license application is deficient:

RAIs are a standard and ongoing part of NRC licensing reviews. . . . They are a routine means for our Staff to request clarification or further discussion of particular items in the application. What would be unusual in a license renewal case is if by now no RAIs had been issued, not that some have been. . . . The NRC does not violate[] any clear legal duty by proceeding first to docket [an application] and thereafter to request additional information.

Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336 (1999) (quotation marks and citations omitted). Absent a showing to the contrary, the issuance of RAIs in the context of NRC licensing reviews is properly viewed as the Staff’s conscientious performance of its duties. See *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998).

Thus, to propound a cognizable contention, Pennsylvania “must do more than rest on the mere existence of RAIs as the basis of their contention.” *Oconee Nuclear*, CLI-99-11, 49 NRC at 336 (brackets and internal quotation marks omitted). It must provide analysis, discussion, or information showing with specificity that the RAI is evidence that the license application fails to conform with governing regulations or directives. *Id.* at 337. This Pennsylvania failed to do. Rather, it advanced a bare assertion that “lacks specificity, presents no underlying support other than a general reference to assorted RAIs issued by the Staff, and cannot be viewed as showing a genuine dispute with [Safety Light] on a material issue.” *Id.*⁶

In summary, each of the three bases relied on by Pennsylvania in support of contention 1 is insubstantial as a matter of law and, as a result, the contention does not raise a genuine dispute regarding a material issue germane to this case. Contention 1 is therefore inadmissible.

2. Contention 2 Is Not Admissible

Contention 2: Safety Light Has No Valid Exemption From the Financial Assurance Requirements of 10 C.F.R. § 30.35 That Can Be Renewed Through This License Application Because the Exemption Terminated When Safety Light Failed To Comply With Its Current License.

⁶In rejecting Pennsylvania’s invitation to equate the issuance of an RAI with a conclusion that Safety Light’s license-renewal application is deficient, we do not suggest that the answers to the RAI will be irrelevant to this proceeding. As discussed *infra* Part II.B.3, we anticipate that many of the answers will be relevant and, in all likelihood, highly probative in our adjudication of Pennsylvania’s admissible contention that Safety Light’s request for an exemption from section 30.35 should be denied. *Cf. Calvert Cliffs*, CLI-98-25, 48 NRC at 349 (“The Staff assuredly will not grant the renewal application if the responses to the RAIs suggest unresolved safety concerns.”).

In arguing that contention 2 is admissible, Pennsylvania points to Condition 20.A in Safety Light's current license, which requires Safety Light to make prescribed deposits to an escrow account and provides that Safety Light's exemption from section 30.35 "is valid [until December 31, 2004] *or until the date of any failure to comply with this license condition.*" Pennsylvania Hearing Request, Exh. A (emphasis added). Pennsylvania argues that Safety Light's failure to comply with Condition 20.A terminated its exemption from section 30.35 pursuant to the self-executing terms of the license, and its license-renewal application should therefore "be denied insofar as it requests a 'continuation' of its present exemption." Pennsylvania Hearing Request at 20.

Even if Pennsylvania is correct that Safety Light's exemption terminated when it failed to comply with Condition 20.A, that fact is not determinative of whether Safety Light should be granted an exemption incident to its current license-renewal request. A licensee's request for an exemption from section 30.35 is determined in *all* instances by applying the standards in 10 C.F.R. § 30.11(a). This is so whether a licensee seeks an initial exemption or a continuation of an existing exemption.

Accordingly, for purposes of determining whether Safety Light's exemption request should be granted, Pennsylvania's contention that Safety Light no longer has a valid exemption that can be renewed is beside the point; the salient inquiry is whether an exemption is warranted pursuant to section 30.11(a). Contention 2 is thus inadmissible.⁷

3. Contention 3 Is Admissible

Contention 3: Safety Light Should Not Be Granted Any Further Exemption From Financial Assurance Requirements or a Reduced Rate of Contribution Into the Escrow Funds.

Pennsylvania contends that Safety Light should not receive any further exemption from the decommissioning funding requirement of 10 C.F.R. § 30.35, because conditions at Safety Light's site pose serious environmental and public health hazards that will require significant funds to remediate, and Safety Light cannot effectively remediate the site at the funding levels in its current license,

⁷We nevertheless note that Safety Light's past failure to comply with licensing conditions may be relevant to our adjudication of whether it satisfies the standards embodied in section 30.11(a) for granting an exemption from section 30.35 (*infra* Part II.B.3). We do not suggest that Safety Light's noncompliance with past licensing conditions presumptively impugns its integrity or character. *See Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-02-22, 56 NRC 213, 228 (2002). However, Safety Light's inability to comply with past licensing conditions may be a pertinent factor in predicting its ability to comply with future licensing conditions of a similar nature.

much less at the reduced funding levels it proposes in its license-renewal application. Pennsylvania Hearing Request at 20-22. Accordingly, argues Pennsylvania, granting Safety Light's exemption request would lead to a situation where Safety Light would be unable to meet its obligations to properly dispose of accumulated and future tritium waste and properly decommission the site — an outcome that would “violate Pennsylvania's interests, fail to protect the public health, safety, and welfare, and would not be in the public interest.” *Id.* at 22.

We find this contention satisfies the admissibility requirements of 10 C.F.R. § 2.309(f)(1). Whether Safety Light should be granted an exemption from the decommissioning funding requirements of section 30.35 is a central issue in Safety Light's license-renewal request. Indeed, Safety Light's license-renewal request is inextricably linked to its exemption request, because the former cannot be granted unless the latter is granted. *See* NRC Staff Response at 6.

As the NRC Staff correctly observes, Pennsylvania provided a detailed description of the “history and current condition of the Bloomsburg, Pennsylvania site, to show the presence of significant levels of radiological contaminants, . . . which [Safety Light] has failed to complete its commitment to remove.” NRC Staff Response at 10. We agree with the NRC Staff that Pennsylvania has established with sufficient basis that a genuine dispute exists on material issues of law and fact that are both within the scope of the proceeding and material to the findings the Staff would need to make to support the proposed licensing action. *Id.* at 10-11. Contention 3 is therefore admissible.

In adjudicating contention 3, we will be guided by section 30.11(a), which authorizes an exemption from section 30.35 if the Commission determines such exemption is “authorized by law, and will not endanger life or property or the common defense and security and [is] otherwise in the public interest.” 10 C.F.R. § 30.11(a). In making this determination, the threshold inquiry is whether, as a matter of financial fact, the licensee is able to comply with the requirements of section 30.35. If this threshold inquiry is resolved in the negative, the next inquiry is whether an exemption, and the accompanying licensing conditions related to that exemption, will be consistent with the standards in section 30.11(a). This latter inquiry involves consideration of *all* relevant facts bearing on those standards, which — in this case — would include Safety Light's past compliance, or lack thereof, with applicable regulations and licensing conditions (*supra* note 7) and the information contained in Safety Light's answers to the RAI posed by the NRC Staff (*supra* note 6).

Specifically, we believe the following information — requested by the NRC Staff in the RAI — is illustrative of the type of facts that will be relevant to our assessment of whether an exemption is warranted: (1) Safety Light's annual generation of radioactive waste over the past 5 years, including curie content, volume, and the work-activity that generated the waste; (2) a description of the waste generated in the past 5 years that has been shipped, including shipping

date, curie content, and volume; (3) an inventory of all waste generated under License 37-00030-08 currently held in storage, including type of waste, curie content, and volume; (4) a detailed estimate of the cost for disposal of all tritium waste currently onsite, and a discussion of what waste cannot be shipped under current circumstances and why; (5) a discussion of how Safety Light handles, recycles, or disposes of returned signs containing tritium, including a statement of curie content and volume of tritium signs that have been returned in the past 5 years; (6) a discussion of Safety Light's actions to dispose of all waste generated under License 37-00030-08, any additional efforts that can be made to dispose of this waste, and actions to minimize the generation of additional waste; and (7) Safety Light's projected profits over the next 5 years to support its exemption request. *See* Pennsylvania Hearing Request, Exh. G. Ultimately, these facts, and all other relevant facts, will inform our application of 10 C.F.R. § 30.11(a) in determining whether granting Safety Light an exemption is authorized by law, will not endanger life, property, or the common defense and security, and is otherwise in the public interest.

4. Contention 6 Is Not Admitted.⁸

Contention 6: Safety Light's Failure To Dispose of the On-Site Tritium Waste as Required by Its License Constitutes a Violation of That License, and Thus Its Application Should Be Denied.

Pennsylvania grounds contention 6 on two bases. First, it asserts that Safety Light's noncompliance with the waste-disposal requirements in Conditions 18 and 19 of its current license constitutes reason for revoking the license. Pennsylvania Hearing Request at 25-26. Second, Pennsylvania argues that Safety Light's license-renewal request should be denied absent the establishment of "license conditions that set meaningful goals for waste removal and the establishment of financial assurances adequate to accomplish that removal." *Id.* at 26. We do not admit this contention, because the first basis is outside the scope of this proceeding, and the second basis is duplicative of issues we will consider in our adjudication of contention 3.

First, Pennsylvania's claim that Safety Light's current license should be revoked based on its noncompliance with Conditions 18 and 19 raises enforcement-related issues that are beyond the scope of this proceeding. Such issues may be raised in an enforcement action pursuant to 10 C.F.R. § 2.206; they may not be raised here. *See* NRC Staff Response at 14. We reiterate that Safety Light's failure to comply with past licensing conditions may be a relevant factor that

⁸ As discussed *supra* p. 524 & n.5, Pennsylvania has abandoned contentions 4 and 5, and we find them to be inadmissible in any event.

informs our resolution of contention 3 and, ultimately, may determine whether Safety Light's license-renewal request will be granted. But Pennsylvania may not inject enforcement issues into this license-renewal proceeding.⁹

However, Pennsylvania also grounds contention 6 on an admissible basis; namely, Safety Light's license-renewal request should be denied unless the new license establishes meaningful goals for waste removal and requires adequate financial assurances to effect that removal. This aspect of contention 6 is substantially identical to contention 3, which — as discussed *supra* pp. 527-29 — opposes the granting of Safety Light's license-renewal request on the ground that Safety Light should not be granted a further exemption or a reduced rate of contribution into the escrow fund, because either outcome would result in Safety Light's inability to properly dispose of waste and decommission the site. Resolving contention 3 will require us — in the context of determining whether a further exemption is warranted (and, hence, whether the license-renewal request should be granted) — to determine meaningful waste-removal goals and whether Safety Light can achieve those goals and remediation of the site at either current or proposed funding levels. Because the admissible basis of contention 6 is duplicative of issues we will adjudicate in contention 3, we do not admit it.¹⁰

III. CONCLUSION

For the foregoing reasons, we conclude Pennsylvania (1) has standing pursuant to 10 C.F.R. § 2.309(d)(2) to challenge Safety Light's request to renew NRC license number 37-00030-08, and (2) articulates an admissible contention pursuant to 10 C.F.R. § 2.309(f). Accordingly, it is ORDERED that:

1. Pennsylvania's hearing request is granted.
2. Contention 3 is admitted for litigation in this proceeding.

⁹Pennsylvania also asserts that Safety Light's failure to comply with licensing Conditions 18 and 19 mandates the conclusion that Safety Light deliberately misrepresented material facts in its license-renewal request when it said that it conducted "all operational programs in full compliance with the requirements of our licenses." Pennsylvania Response at 7. This assertion ignores that Safety Light's license-renewal request candidly explains the status of its site-remediation efforts, including the fact that its waste-removal efforts are incomplete, but ongoing. *See* Pennsylvania Hearing Request, Exh. B. Pennsylvania will nevertheless not be precluded during our adjudication of contention 3 from offering relevant evidence concerning Safety Light's noncompliance with past licensing conditions (*supra* note 7), including evidence of alleged misrepresentations regarding such noncompliance.

¹⁰Pennsylvania purports to "reserve[] its right under 10 C.F.R. § 2.309(f)(2) to timely amend its contentions and file new contentions based on [new] information provided by [Safety Light]." Pennsylvania Hearing Request at 28. We note that to amend its contentions or file new ones, Pennsylvania must obtain leave from the Board and show that it satisfies the requirements of section 2.309(f)(2)(i)-(iii).

3. Contentions 1, 2, 4, 5, and 6 are not admitted for litigation in this proceeding.
4. The hearing will be conducted pursuant to 10 C.F.R. Part 2, Subpart L. Absent contrary direction from the Licensing Board, the participants will proceed in compliance with the regulatory time limits governing Subpart L proceedings. *E.g.*, 10 C.F.R. § 2.336 (mandatory disclosures); *id.* § 2.1202(b)(2) (NRC Staff party status statement); *id.* § 2.1203 (hearing file submission).
5. The participants will set aside Wednesday, December 15, 2004, from 1:00 p.m. to 3:00 p.m., for purposes of conducting a telephonic prehearing conference. Guidance regarding the conduct and scope of the conference, as well as instructions for accessing the conference call, will be provided in a future order.

Any appeal to the Commission from this Memorandum and Order must be taken within 10 days after service of this order (10 C.F.R. § 2.311).

THE ATOMIC SAFETY AND
LICENSING BOARD¹¹

E. Roy Hawkens, Chairman
ADMINISTRATIVE JUDGE

Ann Marshall Young
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 9, 2004

¹¹ Copies of this Memorandum and Order were sent this date by Internet e-mail to (1) counsel for the Pennsylvania Department of Environmental Protection, (2) Licensee Safety Light Corporation, and (3) the NRC Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Richard F. Cole
Ann Marshall Young

In the Matter of

Docket Nos. 50-390-CivP
50-327-CivP
50-328-CivP
50-259-CivP
50-260-CivP
50-296-CivP
(ASLBP No. 04-830-01-R)
(EA 99-234)

TENNESSEE VALLEY AUTHORITY
(Watts Bar Nuclear Plant, Unit 1;
Sequoyah Nuclear Plant, Units 1 and 2;
Browns Ferry Nuclear Plant,
Units 1, 2, and 3)

November 10, 2004

In a proceeding in which the NRC Staff sought to impose a civil monetary penalty on the Tennessee Valley Authority for violation of the whistleblowing rule (10 C.F.R. § 50.7), the Licensing Board approves a settlement agreement between the parties and terminates the proceeding.

MEMORANDUM AND ORDER
(Approval of Settlement Agreement and Termination of Proceeding)

On February 7, 2000, the NRC Staff issued a Notice of Violation (NOV) citing the Tennessee Valley Authority (TVA) for a violation of 10 C.F.R. § 50.7 and in a May 4, 2001 order imposed a civil monetary penalty of \$110,000. Also on February 7, 2000, the NRC Staff issued related NOVs to two individuals, both TVA managers, for violations of 10 C.F.R. § 50.5. TVA requested a hearing before an Atomic Safety and Licensing Board. A hearing before this Board was held between April 23 and September 13, 2002. In our Initial Decision in this proceeding, LBP-03-10, 57 NRC 553 (2003), we determined (with Judge Young concurring in part and dissenting in part) that TVA had violated 10 C.F.R. § 50.7 by discriminating against an employee on account of his whistleblowing activities (i.e., his engagement in “protected activities”). The Board imposed a civil penalty of \$44,000 on TVA (reduced from the \$110,000 initially sought by the Staff).

TVA appealed the Board’s decision. In a Memorandum and Order dated August 18, 2004, CLI-04-24, 60 NRC 160, the Commission affirmed the Board’s decision in part, reversed it in part, and remanded the case to the Board for further proceedings, seeking further findings on specified questions (*see* CLI-04-24, 60 NRC at 221).

By joint motion dated November 2, 2004, the parties advised that they entered into negotiations which resulted in a proposed settlement agreement, which they submitted for our review and approval. The agreement provides in part that the NOV against TVA remains in effect and that the civil penalty and the two individual NOVs are withdrawn. Further, TVA represents that it has taken action to foster a safety-conscious work environment (SCWE), set forth in greater detail in the agreement. The NRC Staff has reviewed TVA’s actions and finds that, subsequent to the events that gave rise to the above-mentioned matters, TVA has committed to fostering SCWE and that its actions in that regard are acceptable for promoting the public health and safety. Accordingly, the NRC Staff is satisfied that its goals of identifying and effectuating lasting corrective action have been addressed by TVA’s actions. TVA and the NRC Staff state that it is in the public interest to terminate this proceeding without further litigation, subject to the approval of the Board.

The Board has reviewed the proposed settlement agreement, a copy of which is attached. We agree with the parties that it is in the public interest to terminate this proceeding. Further, the settlement accords due weight to the interest of the Staff, which has strongly backed the settlement. Accordingly, pursuant to 10 C.F.R. §§ 2.203 and 2.205(g), the Licensing Board hereby approves the settlement agreement submitted to us by the parties and thereby terminates this proceeding.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Richard F. Cole
ADMINISTRATIVE JUDGE

Ann Marshall Young
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 10, 2004

[Copies of this Memorandum and Order have been transmitted by e-mail to
counsel of record.]

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

**Docket Nos. 50-390-CivP
50-327-CivP
50-328-CivP
50-259-CivP
50-260-CivP
50-296-CivP
(ASLBP No. 01-791-01-CivP)
(EA 99-234)**

**TENNESSEE VALLEY AUTHORITY
(Watts Bar Nuclear Plant, Unit 1;
Sequoyah Nuclear Plant, Units 1 and 2;
Browns Ferry Nuclear Plant,
Units 1, 2, and 3)**

October 29, 2004

SETTLEMENT AGREEMENT

The Tennessee Valley Authority (TVA) and Nuclear Regulatory Commission (NRC) Staff, (individually, “party,” and together, “parties”) enter into this Settlement Agreement freely and voluntarily and state as follows:

1. Whereas on February 7, 2000, the NRC Staff issued a Notice of Violation (NOV) citing TVA for a violation of 10 C.F.R. § 50.7 (section 50.7) and, in a May 4, 2001, order imposed a civil monetary penalty (civil penalty) of \$110,000.
2. Whereas on February 7, 2000, the NRC Staff also issued related NOVs to two individuals, both TVA managers, for violations of 10 C.F.R. § 50.5 (section 50.5).
3. Whereas at the time of issuance of the NOVs, the NRC Staff had a good faith basis for taking such enforcement actions.
4. Whereas at the time the NOVs were issued, TVA disagreed and continues to disagree that it violated section 50.7 and that its two managers cited in the individual NOVs violated section 50.5, and, requested a hearing before the Atomic Safety Licensing Board (the Board).
5. Whereas between April 23 and September 13, 2002, the parties participated in a hearing before the Board.

6. Whereas the Board rendered a decision on June 26, 2003, LBP-03-10, in which it sustained the NOV against TVA and sustained the civil penalty, which it mitigated from \$110,000 to \$44,000.

7. Whereas after TVA appealed the Board decision, the United States Nuclear Regulatory Commission (Commission) issued a Memorandum and Order, CLI-04-24, dated August 18, 2004, affirming in part and reversing in part the Board decision and remanding the case to the Board.

8. Whereas the relevant events in this matter occurred some years ago; the employee/allegor and one of the managers named in the individual NOV are no longer employed by TVA; and the other manager named in the individual NOV no longer occupies the position he held at times relevant to the above-captioned matters.

9. Whereas subsequent to events giving rise to the above-referenced matters, TVA's nuclear organization (TVAN) has taken actions toward fostering and maintaining a safety-conscious work environment (SCWE) as follows: no discrimination complaints have been filed with NRC Staff against TVAN in the last two years; TVAN represents that it has periodically provided SCWE/employee protection training to its workforce, such as "Do What's Right" training and, during recent weeks, "Employee Protection & Promoting a Safety Conscious Work Environment" training for TVAN's supervisory managers; TVA represents that it has trained the majority of TVAN's supervisory managers and intends to complete the training of such managers in the near future; and TVAN represents that it has revised its job selection process to provide increased objectivity.

10. Whereas NRC Staff has reviewed the TVA Office of Inspector General "Audit Report: Concerns Resolution Program — TVA Nuclear 2004," dated August 16, 2004, which found that TVA employees with unescorted access to TVA's nuclear facilities generally felt free to raise nuclear safety and quality issues, which is consistent with the NRC Staff's data that no discrimination complaints were filed with NRC Staff about TVAN within the last two years; the NRC Staff has reviewed TVA guidance on job selection process and observed that it is intended to promote objectivity in the selection process; the NRC Staff has reviewed materials used by TVA in training its managers on SCWE and finds them to be appropriate; and NRC Staff plan to verify the quality of manager training by observing training sessions at a time mutually agreeable to the parties.

11. Whereas the parties have engaged in negotiation and agree that it is in the public interest to terminate this proceeding without further litigation, subject to approval of the Board.

NOW THEREFORE, IT IS STIPULATED AND AGREED AS FOLLOWS:

A. The NOV against TVA, issued February 7, 2000, remains in effect. Further, effective upon the execution of this Settlement Agreement, the NRC Staff, exercising its discretion pursuant to Section VII.B.6 of the NRC Enforcement

Policy, hereby withdraws the civil penalty against TVA as well as the February 7, 2000, NOV's issued to the two individuals.

B. Each party waives its rights to proceed on the above-captioned matters and matters that are or could be based on the facts that gave rise to the above-mentioned matters before the Board, the Commission, and in any other forum, including seeking judicial review.

C. The NRC Staff finds that subsequent to the events that gave rise to the above-captioned matters, TVA has committed to fostering a safety conscious work environment as evidenced by the recent training of managers described above, the 2004 TVA OIG Audit on employee concerns and the revised job selection process and that the NRC Staff finds that these actions are acceptable for promoting the public health and safety. Accordingly, subject to the verification of training discussed in paragraph 10 above, the NRC Staff is satisfied that its goals of identifying and effecting lasting corrective action have been addressed by TVA whose actions provide reasonable assurance that a SCWE will be maintained. Consequently, the NRC Staff finds no need for further corrective action by TVA.

D. In light of the actions taken and SCWE fostered by TVAN described in paragraphs 9 and 10 above, corrective actions by TVA that may have been otherwise warranted in connection with a matter related to the above-captioned matters are not now required and the NRC Staff agrees not to initiate further action in regard to any matter related to Office of Investigation Report Number 2-2000-035 and the letter from the NRC Staff to TVA, dated January 13, 2003.

E. The NRC Staff finds that the resolution of these matters is in the public interest.

F. TVA recognizes the importance of fostering a safety conscious work environment and affirms its commitment to do so.

G. This Settlement Agreement sets forth the entire agreement between the parties and all prior contemporaneous oral or written negotiations, representations, statements, agreements, or understandings between the parties are merged into this Settlement Agreement.

H. The parties will submit this Settlement Agreement to the Board for its approval together with a Joint Motion To Approve Settlement and Terminate Proceeding with the Board based on the resolution of matters in this Settlement Agreement. This Settlement Agreement will become effective upon its execution by both parties; however, the Settlement Agreement is contingent upon its approval by the Board and will become null and void if not approved or is changed in any manner by the Board. The parties agree that if the Board does not approve this Settlement Agreement, they will negotiate in good faith to resolve any obstacles to its approval by the Board.

IN WITNESS WHEREOF, TVA and the NRC Staff have caused this Settlement Agreement to be executed by their duty authorized representatives on the dates shown below.

James Luehman Date 10/29/04
Deputy Director, Office of
Enforcement
NRC Staff

John C. Fornicola Date 10/29/04
Manager, Nuclear Assurance and
Licensing
Tennessee Valley Authority

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alan S. Rosenthal, Chairman
Dr. Richard F. Cole
Dr. Charles N. Kelber

In the Matter of

Docket No. 50-29-OLA
(ASLBP No. 04-831-01-OLA)
(License Termination Plan)

YANKEE ATOMIC ELECTRIC
COMPANY
(Yankee Nuclear Power Station)

November 22, 2004

MEMORANDUM AND ORDER
(Granting Hearing Request)

I. INTRODUCTION

On June 22, 2004, the NRC Staff published in the *Federal Register* a notice providing an opportunity for hearing with regard to a license amendment sought by the Yankee Atomic Electric Company (Licensee) with reference to its Yankee Nuclear Power Station located in Rowe, Massachusetts (Yankee Rowe). 69 Fed. Reg. 34,707 (June 22, 2004). More specifically, the amendment addressed a license termination plan (LTP) that the Licensee had submitted to the Staff. Upon receiving Staff approval, the LTP would then be incorporated into the license as a new license condition.

In response to this notice, on August 20, Citizens Awareness Network (CAN) filed a hearing request in which it set forth the basis for its claim of standing and advanced six separate contentions. The first contention mirrored the substance

of a contemporaneously filed motion seeking a determination that the *Federal Register* notice was defective, with the consequence that a new notice should be issued. The other five contentions went to the merits of the LTP and were said to be supported by the declaration of a hydrogeologist that was appended to the hearing request as Exhibit 3.

In September 14 and 20 responses, respectively, the Licensee and NRC Staff opposed the granting of the hearing request. Although conceding CAN's standing to challenge the LTP, both maintained that the contentions set forth in the hearing request failed to satisfy the requirements of the Commission's Rules of Practice regarding admissibility.

The challenge to the adequacy of the *Federal Register* notice was undertaken by the Commission itself and, pending its ruling on the matter, the appointment of a licensing board to consider the remainder of the hearing request was held in abeyance. On October 7, the Commission rejected that challenge (CLI-04-28, 60 NRC 412 (2004)) whereupon, on October 19, this Board was established.

A preliminary review of the written submissions of the parties led the Board, by order of November 1, to schedule a prehearing conference with the parties to consider further certain questions that the submissions appeared to present. The conference was held on November 8 and was stenographically recorded.¹

On its full consideration of the parties' submissions, both in writing and oral, and for the reasons set forth below, the Board is satisfied that CAN has fulfilled the requirements for the grant of its hearing request.

II. BACKGROUND

1. The Yankee Rowe facility was permanently shut down in 1992 and is currently being dismantled. In accordance with 10 C.F.R. § 50.82(a)(9), all power reactor licensees must submit an application for termination of their licenses for facilities undergoing dismantlement and decommissioning. The application must be accompanied or preceded by a license termination plan. Section 50.82(a)(9)(ii) is most specific in setting forth the required content of that plan. Among other things, the 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.

¹ "Tr. at ___" will be employed when referring to pages of the transcript.

The significance of a license termination plan in the overall decommissioning process was made abundantly clear by the Commission in a 1998 decision involving this very reactor. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185 (1998). That proceeding involved a challenge by CAN and two other organizations to a prior LTP that the Licensee had submitted in 1997 for the Yankee Rowe facility. The case reached the Commission on an appeal by the petitioners from a licensing board determination that each lacked standing.

In the course of deciding that CAN and one of the other two petitioners had the requisite standing to question the sufficiency of the LTP then under consideration, the Commission had this to say (*id.* at 206-07 (emphasis supplied)):

The NRC's approval of the LTP would entitle Yankee Atomic to proceed with its final decommissioning activities secure in the knowledge that, absent extraordinary circumstances, the NRC would not later (at the license termination stage) second-guess Yankee Atomic's site survey methodology. . . . The LTP stage . . . is Petitioners' one and only chance to litigate whether the survey methodology is adequate to demonstrate that the site has been brought to a condition suitable for license termination. They are precluded from doing so at the license termination stage.

*In short, the time to obtain a hearing on license termination decisions comes at the LTP stage, as our rules unambiguously provide.*²

2. In 10 C.F.R. § 2.309, the Commission's Rules of Practice detail the requirements that must be met in order to obtain the grant of a hearing request or petition for intervention in an NRC adjudicatory proceeding. In a nutshell, the petitioner must establish its standing in the manner stipulated in paragraph (d) of that section and, additionally, set forth at least one admissible contention meeting the requirements set forth in paragraph (f) of the section.

²On the basis of its ruling that two of the petitioners had standing to challenge the Licensee's LTP, the Commission remanded the proceeding to the Licensing Board to determine whether the petitioners had any admissible contentions that would entitle them to a hearing. On remand, the Board accepted four of the contentions advanced jointly by the two petitioners and granted the hearing request. LBP-99-14, 49 NRC 238 (1999). While the appeal of LBP-99-14 was pending before the Commission, the Licensee withdrew its LTP, indicating it would file another substantially different LTP at another date, and moved to terminate the proceeding. The Licensing Board granted the requested withdrawal and terminated the proceeding. LBP-99-27, 50 NRC 45 (1999). The Commission then granted the Licensee's motion to terminate without prejudice its appeal of LBP-99-14. CLI-99-24, 50 NRC 219 (1999).

It being undisputed that CAN has satisfied the standing requirement,³ the focus of this decision is necessarily on the contentions requirements. According to paragraph (f), with respect to each contention sought to be admitted, the hearing request or petition to intervene must

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding; and
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding.

In addition, the requester or petitioner must provide a concise statement of the alleged facts or expert opinions supporting its position, together with references to the specific sources and documents upon which it intends to rely as furnishing that support (paragraph (v)), as well as provide sufficient information to show the existence of a genuine dispute with the applicant/licensee on a material issue of law or fact (paragraph (vi)).

As above noted, apart from its now academic first contention that challenged the sufficiency of the *Federal Register* notice, CAN advanced five contentions addressed to whether the current LTP complied with applicable Commission regulations, all of which contentions were said to be supported by the appended declaration of hydrogeologist Robert J. Ross. With respect to each contention, albeit not necessarily on common ground, both the Licensee and the NRC Staff opposed its admission for failure to meet the requirements of section 2.309(f) of the Rules of Practice.

III. ANALYSIS

1. Given the requirement that at least one of CAN's contentions meets the standard for admission prescribed in section 2.309(f), the Board decided to concentrate in the first instance upon the acceptability of the second contention, which at first blush appeared to be possibly the most substantial. That contention stated that the LTP was deficient in that the Licensee had "failed to provide documentation of the source, cause and plan for remediation of the current high

³Given the Commission's determination that CAN had standing to challenge the prior (later withdrawn) license termination plan for this facility (CLI-98-21, *supra*), it is not surprising that its standing is not in dispute here. Nonetheless, standing being a jurisdictional matter, the Board has undertaken an independent examination of CAN's showing on that matter in its hearing request and is satisfied that showing fulfills the requirements of section 2.309(d).

levels of tritium contamination in the ground water on site,” in claimed violation of 10 C.F.R. Part 20, Subpart E, and 10 C.F.R. §§ 50.52, 50.82. The contention went on to make reference to the asserted fact that samples collected in 2003 from a monitoring well following the emptying of the facility’s spent fuel pool had disclosed “an extremely high concentration of tritium (e.g., >45,000 pCi/L . . .).” According to the contention, there was a need for, among other things, a plan “for cleaning up the contamination.” [CAN’s] Request for Hearing, Demonstration of Standing, Discussion of Proceeding and Contentions (August 20, 2004) at 10 [hereinafter August 20 Hearing Request].

As support for the contention, CAN referred to the attached declaration of hydrogeologist Ross. Noting that he had reviewed several documents pertaining to the groundwater situation at the Yankee Rowe site, Mr. Ross explained in some detail the basis for his conclusion that the LTP was deficient insofar as assuring that there would not be public exposure to tritium in concentrations above the EPA action levels.

In urging in its September 14 response that Contention 2 be rejected, the Licensee maintained that the contention “fails to challenge the adequacy of the LTP.” Answer of [Yankee Atomic Electric Company] to [CAN’s] Request for Hearing and Petition To Intervene [hereinafter September 14th Response]. This was said to be so because the “LTP is not defective simply because characterization work described in the LTP identifies the need for further characterization and remediation . . . as discussed above, license termination activities represent an ongoing process. That process will continue until the appropriate criteria are satisfied.” *Ibid.* The same thesis was repeated on the following page of the response: “[C]haracterization of the scope and significance of the tritium contamination continues as part of the ongoing decommissioning process.” *Id.* at 12. And, in wrapping up its assault upon the tritium contamination contention, the Licensee offered this: “At bottom, this proposed contention does not assert how the Yankee LTP is an inadequate *plan* to meet the regulations or the NRC guidance documents. It merely faults the LTP because the process described in the LTP is not complete.” *Id.* at 14.

One difficulty with that line of attack upon the contention became apparent when consideration was given to the teachings of CLI-98-21, *supra*. Obviously, it would be far preferable for CAN to ventilate its tritium contamination concerns *following* the completion of the “ongoing process” of site characterization and the development of any remediation measures determined to be necessary on the basis of the characterization. As the Commission has squarely stated, however, such an opportunity will not be available to CAN. Once the LTP receives approval, the further activities of the Licensee leading to the termination of its Yankee Rowe license will be beyond scrutiny in an adjudicatory proceeding at the behest of CAN or any other member of the public. See p. 541, *supra*.

That being so, it seemed to us that, at least insofar as the matter of tritium contamination was concerned, acceptance of the Licensee's thesis would make a mockery of the opportunity for a hearing that ostensibly had been provided to CAN by the *Federal Register* notice. For at bottom, when taken in the context of CLI-98-21, that thesis came down to this: CAN cannot raise any questions regarding tritium contamination at this point. This is because the characterization of the scope and significance of that contamination is still ongoing, with the consequence that the matter and nature of possibly necessary remediation measures is likewise beyond present determination. Once that characterization has been completed, however, CAN will not have an opportunity to be heard regarding the results of the characterization in terms of the need for remediation of the tritium contamination.

In the circumstances, we scheduled the November 8 telephone prehearing conference for the purpose of further exploring the matter with counsel for the respective parties. At the conference, we raised with Licensee's counsel the question whether the short answer to the "ongoing process" response was to be found in the terms of section 50.82(a)(9)(ii). As we have seen, in so many words, that section requires license termination plans to contain, among other things, both "[a] site characterization" and "[p]lans for site remediation." Manifestly, if that information is contained in the LTP, there is much greater reason for ruling, as the Commission has, that the LTP — and it alone — is subject to a hearing request.

Licensee's counsel's response to our inquiry would have us rewrite the section so as to have it require the inclusion in the LTP of only a *methodology* for site characterization and the development of remediation plans (Tr. at 9-11, 15-18). That response was manifestly far wide of the mark. Apart from the fact that we are not empowered to alter the terms of Commission regulations (or even to interpret ones that lack any apparent ambiguity), counsel called our attention to nothing in the Statement of Consideration accompanying section 50.82(a)(9)(ii) that might lend support to such a drastic change in its facial meaning. In a word, it seemed clear to us then (as it does now) that, had the Commission meant that an LTP include simply a methodology for a site characterization, rather than the characterization itself, it presumably would have said so.

The significance of the Licensee's failure to have held the submission of the LTP in abeyance until after it had completed the site characterization, and thus was in a position to determine what, if any, remediation plans were in order, is also manifest. It is quite true, as its counsel maintained (Tr. at 13, 17), that a substantial amount of site characterization already has been accomplished. It also is quite possible that it will eventually be justifiably concluded that no remediation measures will be required insofar as the tritium contamination is concerned. But, on the basis of what is now before us, no such confident conclusion might be reached.

Sections 2.7 and 2.8 of the September 2, 2004 Draft Revision of the LTP describe the continuing investigations of groundwater contamination and the continuing characterization activities. With respect to the ongoing investigations, recently collected information established that some of the new monitoring wells had tritium concentrations that were higher than those measured in older existing wells — indeed, in one case, the concentration exceeded the Environmental Protection Agency’s standard for drinking water. *Id.* § 2.7.4. The Licensee is continuing its investigations, indicating that, as they progress, “actions will be taken, including further analyses or *possibly remediation*, to ensure that the site release criteria are met.” *Ibid.* (emphasis supplied).

The short of the matter thus is that, by its own admission, because the site characterization remains incomplete the Licensee is unable to state with assurance at this point that remediation of the tritium contamination will not be required. Yet, in addition to the characterization of the site, the LTP must contain any remediation plans found to be necessary in order to address the contamination disclosed during the characterization activities. *See* p. 540, *supra*.

In light of these considerations, there is little room for doubt that CAN’s second contention is admissible insofar as it challenges the LTP on the ground that it does not fulfill the requirements of 10 C.F.R. § 50.82.⁴

⁴As refined by its counsel during the November 8 conference, the position of the NRC Staff respecting the admissibility of the second contention requires relatively little discussion. When asked whether the Staff regarded the LTP as meeting the regulatory requirement that it contain a site characterization as well as plans for site remediation, counsel responded that her client “had not reached a decision on that.” Tr. at 23. She then stated that the Staff’s opposition to the contention “is purely procedural.” *Ibid.* By way of elaboration, she noted that the contention referred to “the source and cause of the tritium contamination” which is “not generally a part of a site characterization.” *Id.* at 23-24. Additionally, counsel noted that, although the contention referred to the need for a plan for remediation, the Licensee had represented in the LTP that no such plans will be necessary in order to meet site release criteria. *Id.* at 24. Finally, when asked whether the Staff agreed “that the site characterization with respect to tritium is not yet completed,” counsel responded that “there is a complete characterization in the sense that [the Licensee] has recognized the contamination.” *Id.* at 25. She went on to note the Staff’s expectation that the Licensee would continue the characterization to refine and to confirm what was already known “but not to find additional contamination.” *Ibid.*

As thus seen, despite the fact that the LTP had already been in the Staff’s hands for several months, its counsel was not prepared to state without equivocation that the document satisfied the requirements of section 50.82(a)(9)(ii) pertaining to what must be included in a license termination plan. At the same time, however, she conceded that, as the Licensee itself has stressed, site characterization activities would continue (although, for reasons not given, the Staff is said not to believe that additional tritium contamination would be found). In the circumstances then, the Staff is compelled to base its opposition to the contention upon a hyper-technical reading of what was drafted by a layperson in advance of CAN’s retention of counsel. Such a reading is not required by the applicable Rules of Practice. Rather, it is enough that the contention clearly sets forth CAN’s concern with the tritium contamination onsite

(Continued)

2. CAN's third and fourth contentions assert the absence of adequate site characterization regarding, respectively, the groundwater under the site and the vertical extent of subsurface soil contamination beneath facility structures. August 20 Hearing Request at 11-12. Because of their close relationship, we have elected to combine them into a single contention to the effect that the LTP is deficient in that it does not characterize groundwater and subsurface soil contamination on the site to the extent necessary to provide the required assurance that 10 C.F.R. Part 20 standards will be met.

As with regard to the second CAN contention, the Licensee stresses in opposing the third contention that site characterization is an "on-going process." September 14 Response at 15. For the reasons already stated in connection with the second contention, reliance upon that consideration does not advance the Licensee's cause. The Licensee further insists, however, that the fourth contention lacks the required specificity. *Id.* at 18-19. That claim equally does not withstand analysis.

Once again, what CAN is asserting is that there has not been the complete site characterization that it believes the regulations require be included in the LTP. We do not understand the Licensee to dispute that the characterization has not been completed. Nor could it. Apart from the emphasis in its response upon the ongoing nature of the characterization process, Part 2 of the LTP, entitled "Site Classification," contains a mixture of historical and survey data and then identifies continuing activities, including in section 2.8 "Continuing Characterization Activities." That being so, the challenge to the now combined third and fourth contentions squarely presents the same issue that was raised by the second contention: namely, whether the LTP had to contain a full site characterization, combined with any plans for remediation that might be required as a result of the characterization. That the Licensee, and possibly the Staff as well, might disagree with CAN's answer to that question hardly makes the contention any less specific.

3. The fifth contention, which addresses the Licensee's asserted failure to identify and to characterize mixed waste in the groundwater onsite, is plainly inadmissible because it raises matters outside of the scope of the proceeding. It is clear from Subpart E of 10 C.F.R. Part 20 that this Commission's concern with regard to license termination is limited to radiological matters. Issues pertaining to the nonradiological groundwater quality, such as those raised in the fifth contention, are within the purview of other governmental agencies.

and the basis for its belief that the LTP does not adequately address that concern. Moreover, even if the Staff is right that site characterization need not be concerned with the source and cause of the contamination, the contention also refers to the remediation plans that must also be included in the LTP. Although the Licensee and Staff might believe that no such plans will be required with regard to the tritium contamination, that remains to be seen once the site characterization is completed.

4. The sixth contention is a collection of the respects in which the hydrological sampling and studies were assertedly deficient. The contention lacks the required specificity with respect to the significance of the alleged deficiencies. For this reason, we agree with the Licensee and the Staff that the contention is inadmissible.

IV. CONCLUSION

For the reasons stated above, Citizens Awareness Network's August 20, 2004 hearing request is hereby *granted*.⁵ As provided in 10 C.F.R. § 2.311(c), a party other than the hearing requestor may appeal this Order to the Commission on the question as to whether the hearing request should have been wholly denied. The appeal must be taken within ten (10) days after service of the Order and conform to the provisions of paragraph (a) of that section. As further stipulated in paragraph (a), any party who opposes the appeal may file a brief in opposition within ten (10) days of service of the appeal.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD⁶

Alan S. Rosenthal, Chairman
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Dr. Charles N. Kelber
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 22, 2004

⁵ We do not now pass upon CAN's motion addressed to the present unavailability of the Commission's Agencywide Documents Access and Management System (ADAMS). As the parties were informed at the November 8 conference (Tr. at 46), we expect them to deal themselves with the matter of obtaining assurance that CAN has access to all relevant, nonsensitive material during the period of ADAMS unavailability.

⁶ Copies of this Memorandum and Order were sent this date by Internet electronic mail transmission to counsel for the parties.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Anthony J. Baratta
Lester S. Rubenstein

In the Matter of

Docket No. 50-271
(ASLBP No. 04-832-02-OLA)

ENTERGY NUCLEAR VERMONT
YANKEE, L.L.C., and ENTERGY
NUCLEAR OPERATIONS, INC.
(Vermont Yankee Nuclear Power
Station)

November 22, 2004

In this proceeding concerning an amendment authorizing a power increase to the operating license of the Vermont Yankee Nuclear Power Station, the Board grants the Department of Public Service of the State of Vermont (State) and the New England Coalition (NEC) petitions to intervene, finding that each of the Petitioners has satisfied the standing requirements and has submitted at least one admissible contention.

STANDING

A State may be a party to a licensing proceeding for a nuclear power plant located within its boundaries without addressing standing requirements. 10 C.F.R. § 2.309(d)(2).

STANDING

An organization whose members reside within 15 miles of the Vermont Yankee Nuclear Power Station and who assert concerns about an application for a 20% increase in its maximum authorized power, alleging that it could increase both the potential for an accident and the harmful consequences of an offsite radiological release from the plant, has representational standing.

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)

A contention challenging the quality or quantity of the review by the Advisory Committee on Reactor Safeguards of a regulatory guide that it approved is not material and not a proper subject for a licensing proceeding. 10 C.F.R. § 2.309(f)(1)(iv).

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)

The requirement of 10 C.F.R. § 50.92 that an applicant submit a no significant hazard consideration analysis concerns a procedural matter, i.e., whether an opportunity for a hearing must be provided before or after any amendment that might be granted, and thus it is not material to the merits of the licensing proceeding and does not form the basis of an admissible contention. 10 C.F.R. § 2.309(f)(1)(iv).

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)

If an application requests that containment overpressure serve as a credit to assist in demonstrating that a facility will have adequate net positive suction head to deal with a loss of coolant accident, the appropriateness of the credit is within the scope of the proceeding. 10 C.F.R. § 2.309(f)(1)(iii).

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)

Regulatory guides are not mandatory requirements and therefore disputes about whether the application demonstrates that it meets the regulatory guide preconditions of “necessity” or “impracticability” are not material to this 20% extended power uprate proceeding. 10 C.F.R. § 2.309(f)(1)(iv).

RULES OF PRACTICE: BACKFITTING

A contention alleging that a proposed license amendment is technically incompatible with a specified element of licensee’s current design or licensing basis can be admissible and does not violate the backfitting rule of 10 C.F.R. § 50.109.

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)

Even if an application for a 20% increase in maximum power proposes no modification to the facility’s current cooling towers and related systems, a contention alleging that a seismic and structural analysis is necessary to determine whether the existing towers are adequate to handle the increased loads is within the scope of the proceeding. 10 C.F.R. § 2.309(f)(1)(iii).

RULES OF PRACTICE: CONTENTIONS (SCOPE OF PROCEEDING)

In a licensing proceeding requesting a 20% uprate in the maximum power for the Vermont Yankee Nuclear Power Station, an allegation that the documentation of Licensee’s current licensing basis is noncompliant is not material or within the scope of the proceeding unless the petitioner shows that the alleged deficiencies have a plausible nexus to the grant or denial of the uprate application. 10 C.F.R. § 2.309(f)(1)(iv) and (iii).

RULES OF PRACTICE: CONTENTION DEADLINE DELAY

The pendency of an independent engineering inspection of the Vermont Yankee Nuclear Power Station commissioned by the NRC does not entitle the public or petitioners to a delay in the deadline established in the NRC notice for the filing of contentions and requests for hearing. 10 C.F.R. § 2.309(c) and (f)(2).

MEMORANDUM AND ORDER

(Ruling on Standing, Contentions, and State Reservation of Rights)

Before the Board are two petitions to intervene and requests for hearing related to the application of Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (collectively, Entergy), for an amendment to the operating license for the Vermont Yankee Nuclear Power Station in Windham County, Vermont. Entergy seeks a license amendment authorizing it to increase the maximum power level of the plant from 1593 megawatts thermal (MWt) to

1912 MWt and to modify associated technical specifications of the license. The Petitioners are the Department of Public Service of the State of Vermont (State) and an environmental organization, the New England Coalition (NEC). For the reasons set forth below, we find that each of the Petitioners has standing to intervene in this proceeding and has submitted at least one admissible contention. In addition, we deny the State's reservation of rights to extend the time for filing contentions.

I. BACKGROUND

In September 2003, Entergy submitted an extended power uprate (EPU) application to the Commission to amend Facility Operating License No. DPR-28, for operation of the Vermont Yankee Nuclear Power Station.¹ Subsequently, Entergy supplemented and amended its application several times. On July 1, 2004, the Commission issued a notice of consideration of issuance of the proposed amendment and opportunity for a hearing, 69 Fed. Reg. 39,976 (July 1, 2004).

The State and NEC each filed timely petitions to intervene, asking to be admitted as a party to any proceeding conducted on the application.² The State submitted five contentions challenging certain aspects of Entergy's application.³ NEC proposed seven contentions.

Following the designation of this Board, 69 Fed. Reg. 56,797 (Sept. 22, 2004), both Entergy and the NRC Staff submitted answers to the Petitioners' hearing requests on September 29, 2004. Entergy admitted that both Petitioners had standing to participate in this proceeding, but argued that they had submitted no admissible contentions.⁴ The Staff agreed that both the State and NEC had

¹ Letter from Jay K. Thayer, Site Vice President, to U.S. Nuclear Regulatory Commission, Document Control Desk, "Vermont Yankee Nuclear Power Station License No. DPR-28 (Docket No. 50-271) Technical Specification Proposed Change No. 263 Extended Power Uprate" (Sept. 10, 2003), ADAMS Accession No. ML032580089 [hereinafter Application].

² [State] Notice of Intention To Participate and Petition To Intervene (Aug. 30, 2004) [hereinafter State Petition]; [NEC]'s Request for Hearing, Demonstration of Standing, Discussion of Scope of Proceeding and Contentions (Aug. 30, 2004) [hereinafter NEC Petition]. Following the filing of its petition, on September 3 and 10, 2004, respectively, NEC refiled Exhibit F and also submitted Exhibit G to its petition. Letters from Raymond Shadis to the NRC Rulemakings and Adjudications Staff (Sept. 3, 2004) and (Sept. 10, 2004).

³ On October 18, 2004, the State submitted a request to file a new contention, in response to a change in Entergy's procedures to prevent core uncover. [State] Request for Leave To File a New Contention (Oct. 18, 2004). The Board's ruling related to this particular motion will be issued at a later date.

⁴ Entergy's Answer to [State] Notice of Intention To Participate and Petition To Intervene (Sept. 29, 2004) [hereinafter Entergy Answer to State]; Entergy's Answer to the [NEC]'s Request for Hearing (Sept. 29, 2004) [hereinafter Entergy Answer to NEC].

standing. The Staff asserted that although most of the Petitioners' contentions failed to meet NRC's regulatory requirements, they had each proffered at least one contention that was not objectionable.⁵ Each Petitioner filed replies to the Entergy and Staff answers.⁶

On October 21 and 22, 2004, the Board conducted a prehearing conference with the Petitioners, Entergy, and the Staff in Brattleboro, Vermont, where we heard oral argument relating to the admissibility of the twelve contentions and associated legal issues. Tr. at 61-558.

II. ANALYSIS

NRC regulations require that any individual, group, business, or governmental entity that wishes to intervene as a party in an adjudicatory proceeding addressing a proposed licensing action must (1) establish that it has standing and (2) offer at least one admissible contention. 10 C.F.R. § 2.309(a).⁷

A. Standards Governing Standing

A petition for leave to intervene must provide certain basic information supporting the petitioner's claim to standing. The required information includes (1) the nature of the petitioner's right under the governing statutes to be made a party; (2) the nature of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order on the petitioner's interest. 10 C.F.R. § 2.309(d)(1). The NRC generally uses judicial concepts of standing in interpreting this regulation.⁸ Thus, NRC requires a petitioner to

⁵ NRC Staff Answer to [State] Notice of Intention To Participate and Petition To Intervene (Sept. 29, 2004) [hereinafter Staff Answer to State]; NRC Staff Answer to Request for Hearing of [NEC] (Sept. 29, 2004) [hereinafter Staff Answer to NEC]. A week later, the Staff filed corrections to certain portions of its answers. NRC Staff's Errata to Its Answers to Request for Hearing of [NEC] and [State] Notice of Intention To Participate and Petition To Intervene (Oct. 6, 2004).

⁶ [State] Reply to Answers of Applicant and NRC Staff to Notice of Intention To Participate and Petition To Intervene (Oct. 7, 2004) [hereinafter State Reply]; [NEC]'s Reply to Applicant and NRC Staff Answers to New England Coalition's Request for Hearing, Demonstration of Standing, Discussion of Scope of Proceeding and Contentions (Oct. 11, 2004) [hereinafter NEC Reply].

⁷ The current regulation covering, inter alia, standing and contention requirements is 10 C.F.R. § 2.309, adopted on January 14, 2004, effective February 13, 2004. 69 Fed. Reg. 2182 (Jan. 14, 2004). The current regulation is, in pertinent part, substantially the same as the prior regulation, 10 C.F.R. § 2.714. The case law cited herein refers to the prior regulation or its predecessors.

⁸ The Commission and the Atomic Safety and Licensing Boards are not Article III courts and are not bound to follow judicial concepts of standing. 69 Fed. Reg. at 2200. In at least one case the Commission has imposed standing requirements more stringent than the federal courts. See *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 75 (D.C. Cir. 1999).

establish that (1) it has suffered or will suffer a distinct and palpable harm constituting injury-in-fact within the zone of interests arguably protected by the governing statutes,⁹ (2) the injury is fairly traceable to the action being challenged, and (3) the injury will likely be redressed by a favorable determination. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996). An organization seeking to intervene in a representational capacity must demonstrate that the licensing action will affect at least one of its members, must identify that member by name and address, and must show that it is authorized by that member to request a hearing on his or her behalf. *Vermont Yankee Nuclear Power Corp. and Amergen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000). In determining whether a petitioner has met the requirements for establishing standing, the Commission has directed us to “construe the petition in favor of the petitioner.” *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995). Meanwhile, “a State . . . that wishes to be a party in a proceeding for a facility located within its boundaries need not address the standing requirements.” 10 C.F.R. § 2.309(d)(2).

B. Rulings on Standing

1. State

As the Vermont Yankee Nuclear Power Station is located in Vermont, we find that the State does not need to address the standing requirements. 10 C.F.R. § 2.309(d)(2).

2. New England Coalition

NEC’s petition included the declarations of seven of its members authorizing the organization to represent their interests in Entergy’s license amendment application. NEC Petition, Exh. C. The declaration of each individual states that he or she lives within close proximity of the plant, at distances ranging from 1 to 15 miles from the nuclear facility. *Id.* The petition also included the declaration of Pamela Long, an officer of NEC, stating that its offices and property are located within 10 miles of the facility and authorizing NEC to appear, through its *pro se* representative, in this proceeding. NEC Petition, Exh. B. Both Entergy, Entergy Answer to NEC at 3, and the Staff, Staff Answer to NEC at 9, concede that NEC has standing in this matter.

We agree. If the EPU amendment is granted there would be an increase in the radioactivity in the reactor core with an obvious potential for offsite consequences.

⁹ *E.g.*, the Atomic Energy Act of 1954 or the National Environmental Policy Act of 1969.

See Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 330 (1989). NEC's representative members all state that they reside within 15 miles of the plant and assert that they are concerned that the proposed EPU could increase both the potential for an accident and the harmful consequences of an offsite radiological release from the plant.¹⁰ Based on these declarations, we find that NEC satisfies the requirements of representational standing as set out in *Vermont Yankee*, CLI-00-20, 52 NRC at 163.

C. Standards Governing Contention Admissibility

Section 2.309(f) of the Commission's regulations sets out the requirements that must be met if a contention is to be admitted to a proceeding. An admissible contention must (1) provide a specific statement of the legal or factual issue sought to be raised; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised is within the scope of the proceeding; (4) demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (6) provide sufficient information to show that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. 10 C.F.R. § 2.309(f)(1)(i)-(vi).

The purpose of the contention rule is to "focus litigation on concrete issues and result in a clearer and more focused record for decision." 69 Fed. Reg. at 2202; *see also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553-54 (1978); *Business and Professional People for the Public Interest v. Atomic Energy Commission*, 502 F.2d 424, 428 (D.C. Cir. 1974); *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974). The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing." 69 Fed. Reg. at 2202. The Commission has emphasized that the rules on contention admissibility are "strict by design." *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-1, 55 NRC 1 (2002). Failure to comply with any of these requirements is grounds for the dismissal of

¹⁰ *See, e.g.*, NEC Petition, Exh. C, Declaration of Paul Sather (Aug. 26, 2004) (residence approximately 1 mile from the plant).

a contention. 69 Fed. Reg. at 2221; *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991).

The application of these requirements has been further developed by NRC case law, as is summarized below.

1. Within the Scope of the Proceeding

A petitioner must demonstrate that the “issue raised in the contention is within the scope of the proceeding.” 10 C.F.R. § 2.309(f)(1)(iii). The scope of the proceeding is defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). Any contention that falls outside the specified scope of the proceeding must be rejected. *See Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979).

2. Concise Allegation of Supporting Facts or Expert Opinion

Contentions must be supported by “a concise statement of the alleged facts or expert opinions which support the requestor’s/petitioner’s position on the issue . . . together with references to the specific sources and documents on which [it] intends to rely to support its position.” 10 C.F.R. § 2.309(f)(1)(v). It is the obligation of the petitioner to present the factual information and expert opinions necessary to support its contention adequately. *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *and aff’d in part on other grounds*, CLI-95-12, 42 NRC 111 (1995). Failure to do so requires that the contention be rejected. *Palo Verde*, CLI-91-12, 34 NRC at 155.

Determining whether the contention is adequately supported by a concise allegation of the facts or expert opinion is, however, not a hearing on the merits. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1654 (1982). The petitioner does not have to prove its contention at the admissibility stage. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004). The contention admissibility threshold is less than is required at the summary disposition stage, where inferences that can be drawn from evidence are construed in favor of the party opposing the summary disposition. *See* 10

C.F.R. § 2.710(c).¹¹ However, as with a summary disposition motion, a ‘Board may appropriately view Petitioners’ support for its contention in a light that is favorable to the Petitioner.’ *Palo Verde*, CLI 91-12, 34 NRC at 155.

Nevertheless, “[m]ere ‘notice pleading’ is insufficient under these standards. A petitioner’s issue will be ruled inadmissible if the petitioner ‘has offered no tangible information, no experts, no substantive affidavits,’ but instead only ‘bare assertions and speculation.’” *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003) (citing *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)). And if a petitioner neglects to provide the requisite support for its contentions, the Board should not make assumptions of fact that favor the petitioner, or supply information that is lacking. *Georgia Tech Research Reactor*, LBP-95-6, 41 NRC at 305; *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001). Any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), *rev’d in part on other grounds*, CLI-96-7, 43 NRC 235 (1996).

In short, the information, facts, and expert opinion alleged by the petitioner will be examined by the Board to confirm that it does indeed supply adequate support for the contention. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990). But at the contention admissibility stage all that is required is that the petitioner provide “some alleged fact or facts in support its position.” 54 Fed. Reg. at 33,170.¹²

3. *Materiality*

In order to be admissible, the petitioner must demonstrate that a contention asserts an issue of law or fact that is “material to the findings the NRC must make to support the action that is involved in the proceeding,” that is to say, the subject matter of the contention must impact the grant or denial of a pending license application. 10 C.F.R. § 2.309(f)(1)(iv). “Materiality” requires that the petitioner show why the alleged error or omission is of possible significance to the result of the proceeding. *Portland Cement Association v. Ruckelshaus*, 486

¹¹ “[A]t 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.” 54 Fed. Reg. 33,168, 33,171 (Aug. 11, 1989).

¹² “This requirement 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. at 33,170.

F.2d 375, 394 (D.C. Cir. 1973), *cert. denied sub nom. Portland Cement Corp. v. Administrator EPA*, 417 U.S. 921 (1974). This means that there should be some significant link between the claimed deficiency and either the health and safety of the public or the environment. *See Yankee Nuclear*, LBP-96-2, 43 NRC at 75; *see also Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), *petition for review denied*, CLI-03-12, 58 NRC 185, 191 (2003).

4. Genuine Dispute Regarding Specific Portions of Application

All contentions must “show that a genuine dispute exists” with regard to the license application in question, challenge and identify either specific portions of, or alleged omissions from, the application, and provide the supporting reasons for each dispute. 10 C.F.R. § 2.309(f)(1)(vi). Any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed. *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994); *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992).

5. Brief Explanation of the Basis of the Contention

A “brief explanation of the basis for the contention” is a necessary prerequisite of an admissible contention. 10 C.F.R. § 2.309(f)(1)(ii). “[A] petitioner must provide some sort of minimal basis indicating the potential validity of the contention.” 54 Fed. Reg. at 33,170. The brief explanation helps define the scope of a contention — “[t]he reach of a contention necessarily hinges upon its terms coupled with its stated bases.” *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff’d sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 899 (1991); *see also Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002). However, it is the admissibility of the contention, not the basis, that must be determined. 10 C.F.R. § 2.309(a).

6. Challenges to NRC Regulations

With limited exceptions, “no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding.” 10 C.F.R. § 2.335(a); *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit

2), CLI-03-14, 58 NRC 207, 218 (2003). By the same token, any contention that amounts to an attack on applicable statutory requirements or represents a challenge to the basic structure of the Commission's regulatory process must be rejected. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982) (citing *Peach Bottom*, ALAB-216, 8 AEC at 20-21). Additionally, the adjudicatory process is not the proper venue for a petitioner to set forth any contention that merely addresses his or her own view regarding the direction regulatory policy should take. *Peach Bottom*, ALAB-216, 8 AEC at 21 n.33.

Applying the above-stated standards, our rulings on the various contentions are outlined below. Exercising our authority under 10 C.F.R. §§ 2.316, 2.319, 2.329, we have acted to further define and/or consolidate contentions when the issues sought to be raised by one or both of the Petitioners appear related, or when redrafting would clarify the scope of a contention.

D. Rulings on State Contentions

1. State Contention 1

Applicant Has Claimed Credit for Containment Overpressure in Demonstrating the Adequacy of ECCS Pumps for Plant Events Including a Loss of Coolant Accident in Violation of 10 C.F.R. § 50, Appendix A, Criteria 35 and 38¹³ and Therefore Applicant Has Failed to Demonstrate That the Proposed Uprate Will Not Create a Significant Hazard as Required by 10 C.F.R. § 50.92 and Will Not Provide Adequate Protection for the Public Health and Safety as Required by 10 C.F.R. § 50.57(a)(3).

The State provided three explanations of the bases for this contention. First, the State asserts that the portion of NRC Regulatory Guide 1.82, Revision 3 (Reg. Guide 1.82)¹⁴ that authorizes containment overpressure credit has never been properly evaluated or approved by the Advisory Committee on Reactor Safeguards (ACRS), in violation of 42 U.S.C. § 2039. State Petition at 6. The State argues that the containment overpressure credit element of Reg. Guide 1.82

¹³The State asserts that Vermont Yankee is committed to the draft general design criteria (Draft GDC), 32 Fed. Reg. 10,213 (July 11, 1967), and that Draft GDC 44 and 52 correspond to the current design criteria (Current GDC) 35 and 38. State Petition at 6. Entergy acknowledges that the Vermont Yankee facility was licensed to the design requirements in the Draft GDC being considered at the time the construction permit was issued, Entergy Answer to NEC at 47 n.52, and does not dispute that Draft GDC 44 and 52 from 1967 are controlling. Draft GDC 44 and Current GDC 35 cover ECCS. Draft GDC 52 and Current GDC 38 cover Containment Heat Removal. The text of the Draft GDC and the Current GDC is somewhat different. Because the Draft GDC are the relevant provisions for the Vermont Yankee plant, the text of the Draft GDC is used in this decision.

¹⁴U.S. Nuclear Regulatory Commission, Regulatory Guide 1.82, Rev. 3, "Water Sources for Long-Term Recirculation Cooling Following a Loss-of-Coolant Accident," (November 2003).

is a major policy change, that it was buried in a regulatory guide focused on a different issue, and that members of the ACRS expressed reservations about allowing such credit. State Petition at 8-11. Entergy argues that the alleged shortcomings of the ACRS review are irrelevant to this proceeding. Entergy Answer to State at 15. The Staff responds that the assertion that the ACRS did not review the containment overpressure credit element of Reg Guide 1.82 is incorrect and that the State has failed to articulate a genuine dispute on a material issue of law or fact with respect to this basis. Staff Answer to State at 7.

We conclude that the alleged shortcomings in the ACRS review are not material to the outcome of this proceeding, as is required by 10 C.F.R. § 2.309(f)(1)(iv). The ACRS approved the regulatory guide and it authorizes the use of containment overpressure to help achieve NPSH.¹⁵ Accordingly, there is no violation of 42 U.S.C. § 2039. In any event, regulatory guides are not regulations and are not binding. *Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 397 (1995). Arguments about the quality or quantity of the ACRS discussion concerning Reg. Guide 1.82 are irrelevant and not a proper subject for litigation in a licensing proceeding.

The second proffered explanation of the basis for Contention 1 again focuses on Reg. Guide 1.82, arguing its use is indefensible because the use of containment overpressure to demonstrate the net positive suction head (NPSH) required to operate emergency core cooling system (ECCS) pumps, improperly eliminates NRC safety requirements for defense in depth by multiple fission product barriers by allowing one barrier failure (containment failure) to compromise the effectiveness of two critical safety systems (containment and ECCS pump operation) and eventually compromise the two remaining fission product barriers (fuel cladding and the reactor coolant system). State Petition at 6. This “dependency,” it is argued, does not comport with Draft GDC 44 and 52 and thus the application (a) fails to demonstrate that the proposed EPU will not create a significant hazard (10 C.F.R. § 50.92) and (b) undermines the reasonable assurance that the EPU can be granted without endangering the health and safety of the public (10 C.F.R. § 50.57(a)(3)). Entergy reiterates that Reg. Guide 1.82 is irrelevant because compliance with regulatory guides is not legally required and thus not litigable. Entergy Answer to State at 16. The Staff argues that the contention lacks specificity because the State has not pointed to specific portions of the application that are deficient. Staff Answer to State at 10.

It is our assessment that State Contention 1, as supported by the State’s second explanation of basis, is admissible under 10 C.F.R. § 2.309(f). First, the State

¹⁵Letter from R.L. Seale, Chairman, ACRS, to the Honorable S.A. Jackson, “Credit for Containment Overpressure To Provide Assurance of Sufficient Net Positive Suction Head for Emergency Core Cooling and Containment Heat Removal Pumps” (Dec. 12, 1997), ADAMS Accession No. 9712300132.

makes clear that it is not citing Reg. Guide 1.82 as a legal requirement but instead as part of the rationale supporting the expert opinion of Mr. Sherman.¹⁶ State Reply at 17-18. Further, while it is clear that neither NRC nor this Board can require that Entergy comply with a regulatory guide, in this case Entergy acknowledges that it is using Reg. Guide 1.82 and its methodologies to support its application and proposed use of containment overpressure credit to achieve NPSH. Tr. at 245, 273. Thus, Reg. Guide 1.82 is at least relevant to the safety questions raised by the State. Tr. at 252-53.

The core issue of State Contention 1 is that if containment overpressure credit is granted for ECCS pump NPSH and then a single passive failure of the containment is assumed, two or more other safety systems could fail, thus undermining the protection of public safety and health. State Petition at 12-13. Draft GDC 44 requires that Vermont Yankee have at least two ECCS, “each with a capability for accomplishing abundant emergency core cooling.” 32 Fed. Reg. at 10,216. Draft GDC states that the performance of each ECCS is to be “evaluated conservatively” and that “[t]he systems shall not share . . . features or components unless it can be demonstrated that . . . (c) capability of the shared feature or component to perform its required function is not impaired by the effects of a loss-of-coolant accident and is not lost during the entire period this function is required following the accident.” *Id.* Whether the use of the containment overpressure creates an inappropriate dependency or renders the proposed EPU noncompliant with the requirements of Draft GDCs 44 and 52 and 10 C.F.R. § 50.57(a)(3) is a legitimate issue of fact and law that is in genuine dispute and is material to this proceeding.¹⁷

In contrast, however, we find that the second prong of Contention 1 — that containment overpressure credit undermines or defeats Entergy’s demonstration that the proposed EPU will not create a significant hazard as required by 10 C.F.R. § 50.92 — is not material to this proceeding. The only purpose of the analysis of

¹⁶The Board is troubled by the form of the affidavit of the State’s expert. In it, Mr. Sherman indicates that he assisted in the preparation of the State’s pleading and simply endorses “[a]ll of the information given as supporting evidence in Contentions 1 through 4” as “true and correct to the best of my knowledge.” State Petition, Sherman Declaration at 1. Such wholesale endorsement of the pleadings seriously undermines our ability to differentiate between the legal pleadings and the facts and opinions expressed by the expert. The State’s form of expert opinion contrasts with the form used by NEC. Recognizing that the State’s approach has been accepted in some prior Licensing Board proceedings, we decline to reject the State’s contentions on this basis alone. However, expert declarations submitted *hereafter* in this proceeding (e.g., in support of any late-filed contentions) must avoid the “wholesale endorsement” approach and instead separately state the expert’s substantive opinions and whatever supporting facts the expert chooses to cite.

¹⁷Although the parties expend many words debating the philosophy of “defense in depth,” we look in vain for a regulation that uses this phrase. Any hearing on State Contention 1 should instead focus on regulatory requirements and Draft GDC.

the no significant hazard consideration (NSHC) contained in the application is to assist the Staff in deciding a procedural matter, i.e., whether an opportunity for a hearing must be provided before or after any amendment that might be granted. *See* AEA § 189a and 10 C.F.R. § 50.92(a). The NRC's NSHC determination is not subject to review. *See* 10 C.F.R. § 50.58(b)(6). The current proceeding concerns challenges to the merits of the application, not the timing of a hearing, and thus the adequacy of the Applicant's NSHC analysis is not material.

As to specificity, we find that the State has met the requirement of 10 C.F.R. § 2.309(f)(1)(vi) to provide "sufficient information to show that a genuine dispute exists" including sufficient "references to specific portions of the application" necessary to support the admission of Contention 1. In particular, the State alleges that the application "uses nominal or average values of temperature, pressures, flows and other parameters, rather than conservative values" and goes on to explain why the State finds such an approach problematic. State Petition at 15. Clearly there is a genuine dispute and the State has referenced a specific portion of the application.

The State's third explanation of the basis for State Contention 1 is the assertion that the application failed to demonstrate that Entergy qualifies for the preconditions for the use of Reg. Guide 1.82 — that credit is either "necessary" or that plant operations or equipment cannot be "practicably altered." Entergy is indeed using Reg. Guide 1.82. Tr. at 245, 273. Reg. Guide 1.82 states a general rule that ECCS "should be independent of . . . containment pressure," Reg. Guide 1.82 at 8, but grants an exception where "credit for containment accident pressure may be necessary," *id.*, but only for those "reactors for which the design cannot be practicably altered." Reg. Guide 1.82 at 20; *see also* sections 2.1.1.1 and 2.1.1.2 of Reg. Guide 1.82. Entergy responds that it has met the "intent" of the necessity provision by showing that sufficient containment overpressure is "available." Entergy Answer to State at 17-18. But a showing of availability is not a showing of necessity. Entergy next baldly asserts that it has "clearly demonstrated in the Application the need for containment overpressure credit" and thus that it has shown that it is "necessary." Entergy Answer to State at 18. The State rightly characterizes this as a "meaningless tautology." State Reply at 19. Meanwhile, the Staff washes its hands of the entire necessity/impracticability precondition in Reg. Guide 1.82, saying it makes no judgment on these matters and has no role in such decisions. Staff Answer to State at 12. As to impracticability, the State points out that Entergy's own feasibility study identified practicable alternatives. State Reply at 20.

Ultimately, however, we are brought back to the proposition that regulatory guides are not mandatory requirements and conclude that disputes about whether Entergy met the prerequisites for the application of Reg. Guide 1.82, however

genuine, are not material to the issues in this proceeding.¹⁸ This is because the proper issue raised in State Contention 1 is not whether Entergy met Reg. Guide 1.82 and its preconditions, but is whether the application shows that the Vermont Yankee Power Station, if uprated by 20%, comports with Draft GDC 44 and 52 and shows that the facility will reasonably assure the protection of the health or safety of the public.

In conclusion, we find that State Contention 1, as supported by the State's second explanation of its basis and as restated in Appendix 1, is admissible.

2. *State Contention 2*

Because of the Current Level of Uncertainty Associated with the Demonstration of the Adequacy of ECCS Pumps, Applicant Has Not Demonstrated That Allowing a Radical Departure from the Defense in Depth Principle Which Prohibits Use of Containment Overpressure to Provide the Necessary NPSH for ECCS Pumps Will Not Constitute a Significant Hazard (10 C.F.R. § 50.92) and Will Provide Adequate Protection for the Public Health and Safety as Required by 10 C.F.R. § 50.57(a)(3).

The State submitted three explanations of the basis of this contention. First, the State alleges that there is no reliable evidence of the magnitude of the impact of strainer and debris losses on pressure at the ECCS pumps following a loss of coolant accident (LOCA). Second, without sufficient information to adequately bound the uncertainties associated with the reduction of pressure at the ECCS pumps following a LOCA, there is no reliable basis to justify using the equally uncertain containment overpressure to compensate for such pressure losses. Third, the State asserts that containment overpressure already serves as a safety margin in Vermont Yankee's current design and licensing basis and it is inappropriate to abandon this safety margin by allowing containment overpressure credit because the calculations and analyses for determining NPSH are uncertain and imprecise. State Petition at 20.

Entergy asserts that Contention 2 is impermissibly vague, conclusory, and "boils down to the argument that 'Defense in Depth must not be abandoned.'" Entergy Answer to State at 21. It also argues that the State has provided no legal or factual basis for the contention. The Staff attacks several of the State's references to Reg. Guide 1.82 first by reminding us that failure to comply with a regulatory guide is, without more, inadequate to meet the NRC contention pleading requirements, and then by complaining that the State has failed to identify the aspects of certain calculations that did not comply with the regulatory guide. Staff Answer to State at 15. The Staff also says that the allegation that

¹⁸ As we understand it, Entergy's proposed EPU has been referred to the ACRS. We hope that the ACRS will focus on the necessity and impracticability issues in its review.

containment leakage is frequently underestimated is without basis and bristles at the suggestion that the State may be challenging the adequacy of the Staff's review of the application. *Id.* at 17. Next, the Staff characterizes as "pure speculation," the State's assertion that Entergy modifications to the VYC-0808 calculation demonstrate that sufficient uncertainty exists to retain containment overpressure as a safety margin, rather than crediting it to help achieve NPSH. *Id.* at 18. Finally, the Staff "does not challenge the admissibility of [the] portion of Basis 3" that is supported by the evidence provided in State Petition at 24-26. *Id.* at 16. The portion in question deals with the allegedly "insufficient conservatism and margin in the values used for required NPSH or NPSHr in Applicant's demonstration of ECCS pump adequacy." State Petition at 24.

We conclude that, properly narrowed, State Contention 2 meets the requirements of 10 C.F.R. § 2.309(f) and is admissible. In short, the State has alleged that there is insufficient information to adequately bound the uncertainty associated with Entergy's demonstration that the ECCS pumps, together with the requested credit for containment overpressure, will provide adequate protection for the public health and safety as required by 10 C.F.R. § 50.57(a)(3). Contrary to Entergy's assertion that the contention boils down to "defense in depth," we find that this phrase, and arguments about the defense in depth philosophy, are surplusage to the key point — are the uncertainties adequately bounded so as to reasonably assure protection of health and safety under 10 C.F.R. § 50.57(a)(3)?

This presents a genuine and disputed issue that is material to any decision on the license amendment application. As containment overpressure credit is a key part of Entergy's EPU application, the appropriateness of this credit is clearly within the scope of this proceeding. The contention is supported by the affidavit of the State's expert, who has endorsed as his own statements, all of the allegations of uncertainties and risks set out at pages 21 to 28 of the State Petition.

The concerns raised by the Staff, challenging some of the elements that are the foundation of the expert opinion of Mr. Sherman, are misplaced because the real support is the expert opinion itself. For example, the State does not contend that Reg. Guide 1.82 must be followed, but only cites it as part of the underpinning of Mr. Sherman's expert opinion that there is an uncertainly problem. Likewise, Mr. Sherman's sworn statement that "[f]requently the as-found condition of containment isolation valves [reveals] that containment leakage is frequently underestimated," State Petition at 26, is his expert opinion which we can test in an evidentiary hearing. The criticism that the State has failed to tie particular uncertainties noted by the ACRS in the calculation of the magnitude of head losses expected from debris blockage is aptly answered by the State that its real point is that no calculation of this type can be reliable, because (it contends) there is insufficient data to bound the uncertainties of such a prediction. State Reply at 23. Arguments about the validity of the expert opinion of Mr. Sherman are for the merits, and cannot be assessed here at the contention admissibility stage.

As discussed above with regard to the second prong of State Contention 1, we find that the second prong of State Contention 2 — that uncertainties in using containment overpressure credit mean that the 10 C.F.R. § 50.92 NSHC analysis in the application is inadequate — raises a procedural issue that is not material to this proceeding.

In conclusion, we find that State Contention 2, as narrowed and restated in Attachment 1, is admissible.

3. *State Contention 3*

Because Applicant is Voluntarily Seeking a Change In Design or Licensing Basis, It Should Comply With Current, More Restrictive Practices Which Relate to the Proposed Design or Licensing Basis Change in Order to Demonstrate That it Will Provide Adequate Protection to the Health and Safety of the Public as Required By 42 U.S.C. § 2232(a).

The State’s three explanations of the bases for this contention boil down to the assertion that because Entergy is voluntarily asking for a change to its design or current licensing basis, Entergy should be required to meet current, more restrictive licensing requirements on matters that are “directly related” to the proposed change. State Petition at 28-29. Specifically, the State argues that the Vermont Yankee facility should be reviewed under modern standards and assumptions concerning single failure and simultaneous safe shutdown earthquake (SSE), both of which, it argues, are directly related to Entergy’s request for containment overpressure credit. *Id.* at 29. The State asserts that NRC’s backfit rule, 10 C.F.R. § 50.109, does not apply because Entergy has voluntarily requested the proposed license amendment.¹⁹ *Id.* at 30. The State cites section 5.1.4 of NRC Regulatory Guide 1.183, “Alternative Radiological Source Terms (AST) for Evaluating Design Basis Accidents at Nuclear Power Reactors” (July 2000) (Reg. Guide 1.183), as establishing a precedent for its argument. *Id.*

Entergy argues that State Contention 3 impermissibly challenges NRC’s regulations regarding design and licensing basis maintenance, change, and approval process and ignores 10 C.F.R. § 2.335(a) which states that “no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding.”

¹⁹ “Backfitting is defined as the modification of or addition to systems, structures, components, or design of a facility; or the design approval or manufacturing license for a facility; or the procedures or organization required to design, construct or operate a facility; any of which may result from a new or amended provision in the Commission rules or the imposition of a regulatory staff position interpreting the Commission rules that is either new or different from a previously applicable staff position after: (i) The date of issuance of the construction permit for the facility . . . , (ii) Six months before the date of docketing of the operating license application for the facility . . . , or (iv) The date of issuance of the design approval.” 10 C.F.R. § 50.109(a)(1).

Entergy Answer to State at 28-29. Entergy points out that Reg. Guide 1.183 concerns AST, an entirely different subject, and even then it only considers the use of current calculation assumptions and methods if a new dose calculation methodology proposed by the applicant is “‘incompatible’ with ‘analysis assumptions and methods currently reflected in the facility’s design basis.’” *Id.* at 30 (*quoting* Reg. Guide 1.183).

The Staff does not address the backfit issue. Instead, it argues that the single-failure element of Contention 3 should be rejected because Supplement 8 to the application shows that Entergy did indeed perform a sensitivity analysis relating to single failure (relating to residual heat removal heat exchangers) and therefore this part of the proposed contention is without factual foundation. Staff Answer to State at 19. However, based on the evidence from the Vermont State Geologist, the Staff did not oppose admission of Contention 3 “‘as to the adequacy of the current seismic analysis with respect to the VYNPS SSE in light of the request to credit containment overpressure.’” *Id.* at 21.

State Contention 3 raises the following issue — when an applicant voluntarily proposes an amendment to its license, is it appropriate for the NRC to assess (or an intervenor to raise a contention concerning) whether the proposed amendment would be incompatible with other elements in the applicant’s current design and licensing basis and, if so, to condition approval of the proposed amendment on applying more stringent current standards which are compatible with the proposed amendment?

Although there appears to be no case law on this subject, we conclude that the NRC’s evaluation of a license amendment application necessarily entails assuring its technical compatibility with the licensee’s current design and licensing basis.²⁰ If there is an incompatibility, the NRC may condition its approval of the licensee’s proposed amendment on adjustments to the current design and licensing basis to resolve the incompatibility. The licensee can then either accept these conditions, or withdraw its application to amend the license.

Section 5.1.4 of Reg. Guide 1.183 is a good example of this logic. The regulatory guide reasons that where the licensee “‘voluntarily initiated’” a “‘significant change to the design basis’” of a facility, the NRC Staff must make a “‘current finding of compliance with regulations applicable to the amendment’” including, where the revised methodology “‘may be incompatible’” with the assumptions and methods in the facility’s original design basis analysis, a “‘review of staff

²⁰For example, the NRC “‘Review Standards for Extended Power Uprates,” requires an EPU applicant to identify, in addition to the EPU itself, “‘any additional areas of review that are *affected by* the EPU.” RS-001, Rev. 0. at 2.1-1 (Dec. 2003), ADAMS Accession No. ML033640024 (emphasis added). The Staff then assesses “‘each area of review that is affected by the EPU’” and may impose additional areas not covered by the applicant. *Id.* at 2.1-2. This is not backfitting. *Id.* at “‘Purpose” page 1.

positions approved subsequent to the initial issuance of the license.’’ Section 5.1.4 states, ‘‘[t]his is not considered a backfit as defined by 10 C.F.R. § 50.109, ‘Backfitting.’ However, prior design bases that are unrelated to the use of the AST, or are unaffected by the AST, may continue as the facility’s design basis.’’ In short, if there is an ‘‘incompatibility,’’ it is permissible to review and apply the current more restrictive standards, but if the other systems are ‘‘unrelated’’ or ‘‘unaffected’’ it is impermissible.²¹

The parties acknowledge this basic principle. The State agrees that only in ‘‘those limited cases where there’s a linkage’’ should the updated standards be applied. Tr. at 288. Entergy admits that it is ‘‘not arguing that anything that is related to EPU somehow can’t be changed.’’ Tr. at 303. The Staff acknowledges that the ‘‘linkage between the seismic issue and the EPU’’ is a ‘‘close’’ question, and decided to ‘‘err on the side’’ of not objecting to the Contention 3 with regard to seismic. Tr. at 319.

The ‘‘incompatibility’’ standard is a strict one. Under the backfit rule, the NRC is prohibited from imposing new or amended licensing standards on existing licensees except under limited circumstances, such as where the NRC does a ‘‘systematic and documented analysis’’ and determines ‘‘that there is a substantial increase in the overall protection of the public health and safety or the common defense and security to be derived from the backfit and that the direct and indirect costs of the implementation for that facility are justified.’’ 10 C.F.R. § 50.109(a)(2), (3). In contrast, the incompatibility standard is not a cost-benefit analysis. Nor can it be used to impose more stringent requirements merely because they seem like a ‘‘good idea’’ or are somehow ‘‘linked’’ or ‘‘related’’ to the proposed amendment. Instead, incompatibility requires that there be an unacceptable inconsistency between the proposed license amendment and other parts of the licensee’s current design and licensing basis, such that approving the amendment must be conditioned on updating the relevant portion of the design or licensing basis in order to protect public safety and health.

Applying the incompatibility standard to State Contention 3, we find that the State has not proffered any basis to support the proposition that Entergy’s application for containment overpressure credit is incompatible with its current design and licensing basis relating to single failure. Bald statements that there is a ‘‘linkage’’ between the two, Tr. at 286, or that the latter is impacted by the former, State Reply at 34, are not sufficient. Accordingly, this portion of Contention 3 is rejected as violative of 10 C.F.R. §§ 50.109 and 2.335.

²¹ We reject the State’s argument that the backfit rule, which prohibits the NRC from ratcheting regulatory standards on a licensee, does not apply simply because the licensee has voluntarily requested an amendment to its license. Tr. at 284-85. Here, Entergy has requested one change (an EPU) and the State wants to impose another (modern seismic standards). The first is voluntary, the second is not.

Likewise, with regard to the seismic issues raised by the State, we see no incompatibility. We recognize that there is a relationship between granting a credit for containment overpressure and seismic standards. Containment overpressure is dependent on the integrity of the containment system, which in turn is dependent on its ability to withstand seismic events.²² But a relationship is not an incompatibility. The Vermont Yankee plant is already subject to stringent seismic and structural standards and the State has offered nothing to suggest an incompatibility between them and the proposed license amendment. Absent such an incompatibility, State Contention 3 is not admissible.

4. State Contention 4

The Change in Design Basis to Use the Reactor Containment as an Engineered Safety Feature to Guarantee at Least a Minimum Pressure for ECCS Pump Performance Violates the Lessons-Learned Regarding Human Factors for Operators in the Three Mile Island Event and Creates Contrary and Confusing Operating Requirements That Will Create a Significant Hazard (10 C.F.R. § 50.92) and Will Not Provide Adequate Protection for the Public Health and Safety and Required by 10 C.F.R. § 50.57(a)(3).

The State's logic for this contention is quite simple. It argues that Vermont Yankee operators are trained to reduce containment pressure during an emergency so as to *reduce* the release of radionuclides to the outside environment. The State asserts that the EPU will require a change in the Vermont Yankee emergency operating procedures (EOPs) to instruct operators to *maintain* (i.e., not reduce) containment pressure. The State concludes that it is concerned that simultaneously requiring operators to reduce and maintain containment pressure will confuse the operators, in contravention of lessons learned from Three Mile Island. State Petition at 33; Tr. at 183. The State points out that the amount of pressure that operators must maintain varies over the timeline and nature of the event (LOCA, Anticipated Transient Without Scram (ATWS), Station Blackout (SBO), and an Appendix R fire). State Petition at 35.

Entergy responds, *inter alia*, that Contention 4 is without factual foundation because Entergy does not plan to change the EOPs and that looking at the LOCA, ATWS, SBO, and Appendix R fire accident scenarios "it is clear that the EOPs do not require modifications to incorporate taking credit for overpressure." Entergy Answer to State at 36. Management and control of pressure is part of the existing EOPs. Tr. at 200.

²² "[B]ecause containment integrity is essential to the use of containment overpressure (i.e., if the containment loses integrity there may not be sufficient pressure to meet NPSH requirements) the containment integrity should be evaluated in light of current standards." State Reply at 35.

In our opinion, Entergy’s response cuts the ground from under the State’s logic and renders State Contention 4 inadmissible. On these pleadings, there is no dispute that Entergy’s application proposes no changes to its EOPs or transient procedures.²³ If there are no changes to the EOPs, how can there be confusion? The State’s contention, lacking an adequate explanation of its basis, must fail.²⁴

5. State Contention 5

To the Extent Applicant is Claiming That Use of Containment Overpressure as a Credit to Meet NPSH Is Necessary and Failure to Use it is Impracticable Because of Economic or Need for Power Considerations, its Request Should Be Rejected as Contrary to the Atomic Energy Act (42 U.S.C. § 2232).

This contention is not admissible because its factual predicate is not supported and there is no genuine issue in dispute. The contention is contingent on a factual premise — *if* Entergy is justifying the use of containment overpressure to meet NPSH on economic or power need considerations — *then* this violates the AEA. Entergy has flatly stated that it “has not based any part of its Application on, or made any claim of, ‘economic or need for power considerations’ in connection with taking credit for containment overpressure.” Entergy Answer to State at 37. The Staff agrees and reminds us that “NRC has long held that benefit and cost considerations play no part in making the safety findings required under the AEA.” Staff Answer to State at 26 (citations omitted). The State acknowledges that “[i]f, as Applicant and the Staff assert in their unsworn Answers, no effort will be made in this proceeding to justify the use of containment overpressure on the basis of economic or need for power considerations, then this Contention is moot.” State Reply at 42. Under these circumstances, we conclude that State Contention 5 is not admissible.

E. Rulings on NEC Contentions

1. NEC Contention 1

New England Coalition contends that an Extended Power Uprate license amendment approval should not be considered until the potential effect of a reduced QA/QC program is investigated and analyzed. 10 C.F.R. 50.54 details the requirement for maintaining a quality assurance program. Any changes requiring a reduction in the program must be submitted to NRC.

²³ The State asserts that this is “unacceptable,” State Petition at 38, and a violation of Entergy’s licensing basis, State Petition at 39, but does not explain why.

²⁴ If new and materially different information later comes to light, we may entertain a motion for leave to file a new contention under 10 C.F.R. § 2.309(f)(2).

NEC's explanation of the basis for this contention alleges that Entergy has reduced its quality assurance and quality control (QA/QC) program at Vermont Yankee and that these changes undermine the quality and independence of the program, thus undermining the validity of the information and accuracy of Entergy's EPU application. NEC Petition at 10. NEC's sole factual support of this proposition is an April 15, 2004 internal Entergy memorandum on the subject of "Transition of Quality Control Functions from Quality Assurance to Engineering & Maintenance for Fleet Alignment, Rev. 0." *Id.*, Exh. F (Entergy Memo).

Our review of the Entergy Memo leads us to conclude that NEC has failed to provide the facts or expert opinion necessary to support this contention. Contrary to NEC's central factual point — that there is a "reduced QA/QC program" at Vermont Yankee — the Entergy Memo indicates that the QA functions at the Vermont Yankee facility are not being changed.²⁵ Nor has NEC provided us with any support for its allegations that the current QA/QC program at Vermont Yankee does not comply with 10 C.F.R. § 50.54(a) or Part 50, Appendix B. Absent support, this agency declines to assume that licensees will contravene our regulations. *Oyster Creek*, CLI-00-6, 51 NRC at 207. And even if we assume, for the purposes of argument, that the current QA/QC program is noncompliant, to bring this contention within the scope of this EPU proceeding, NEC must point to specific portions of the EPU application that might be rendered suspect or deficient by virtue of the alleged QA/QC noncompliance. Absent such a showing, the contention lacks a genuine and litigable dispute under 10 C.F.R. § 2.309(f)(1)(vi) and is not within the scope of this proceeding under 10 C.F.R. § 2.309(f)(1)(iii).²⁶

2. *NEC Contention 2*

The license amendment should not be approved at this time because Entergy has failed to address the root cause of Main Steam Line Isolation Valve ("MSIV") Leakage but instead proposes to shift the problem downstream to catch a higher allowable leakage in the condenser. Entergy fails to pursue the root cause of a negative component performance trend that could ultimately yield failure of the MSIV safety function. MSIVs are a critical line of defense during a reactor accident.

²⁵ The Entergy Memo, covering the "transition" of certain QA/QC functions within the Entergy group, described the Vermont Yankee facility as the "outlier" where there is "no QC inspection group to transition" and indicates that "[i]f it's desired to align Vermont Yankee with the rest of the Entergy Nuclear fleet, then it would require additional resources." Entergy Memo ¶ 8.

²⁶ If NEC has information that the Vermont Yankee facility is in violation of its current design and licensing basis or any regulation or statute, NEC may file a request to the Secretary of the Commission to institute proceedings to modify, suspend, or revoke Entergy's license or for any other action that may be proper. *See* 10 C.F.R. § 2.206(a).

NEC relies upon the declaration of one of its experts, Mr. Arnold Gundersen, to support this contention. NEC Petition, Exh. D, Declaration of Arnold Gundersen in Support of Petitioner's Contentions (Gundersen Declaration). Mr. Gundersen, a nuclear engineer, states that the MSIVs have the safety function to close and maintain an essentially leak-tight barrier to the release of containment atmosphere. Gundersen Declaration at 2. His declaration recites that during the last few years the Vermont Yankee facility experienced an adverse trend in the results of the local leak rate test (LLRT) on the MSIVs. Mr. Gundersen reviewed the Entergy report analyzing the adverse trend (Entergy Condition Report -VTY-2004-0918 (CR-0918)) dated May 4, 2005, and indicates that he disagrees with that report. *Id.* Mr. Gundersen opines that "the MSIVs are failing at an increasing rate because they are aging and corroding," *id.* at 2, and that "if the power level of the Vermont Yankee plant is increased, the problem of MSIV failure will also increase," *id.* at 3.

Entergy and the Staff assert that NEC Contention 2 is not within the scope of the application for the EPU because the adverse trend in the MSIV LLRT was the subject of an entirely separate license amendment request (AST application) that was filed by Entergy on July 31, 2003. Entergy Answer to NEC at 15-16; Staff Answer to NEC at 11. The AST application identified the adverse trend and asked for a relaxation of the MSIV leakage limit. Entergy Answer to NEC at 17. The NRC published a "no significant hazards" determination with regard to the AST application in the *Federal Register*,²⁷ but NEC failed to request a hearing on the matter. *Id.* Thus, they argue that the MSIV LLRT is outside of the scope of this proceeding. Entergy also asserts that NEC has failed to show any connection between the MSIV leakage tests and the proposed EPU and that Mr. Gundersen failed to identify any factual basis for his opinions except by citing CR-0918 which, Entergy says, contradicts those opinions. *Id.* at 18-19. For its part, the Staff argues that NEC has failed to dispute any specific portion of Entergy's application or explain how any of its analyses would be invalidated if Mr. Gundersen's views were true. Staff Answer to NEC at 12-13.

We reject the argument that because the MSIV LLTR is the subject of a prior license amendment request, it is automatically outside of the scope of the EPU application. Certainly, NEC could have challenged the prior request. But once an EPU is added to the mix, the situation changes. It is entirely reasonable that a member of the public might not object to a relaxation of the leakage limit while Vermont Yankee continued to operate at a maximum authorized power level of 1593 MWt, but could object that the MSIV would not withstand the reactor conditions if the authorized power was increased to 1912 MWt. Tr. at 399. This

²⁷ 68 Fed. Reg. 66,131, 66,135 (Nov. 25, 2003).

is what NEC is doing here. NEC Reply at 31, 33; Tr. at 399. NEC's concerns are within the scope of this EPU proceeding.

That said, we are troubled by the fact that NEC and its expert have failed to point to any specific portions of the EPU application that are objectionable or to demonstrate any plausible facts supporting NEC Contention 2. The contention asserts that Entergy has "failed to address the root cause of [MSIV] Leakage" and that it "fails to pursue the root cause of a negative component performance trend." NEC Petition at 10. But this is contradicted by Mr. Gundersen's own declaration, which attaches and relies extensively on CR-0918, Entergy's analysis of the root cause of the LLTR. Gundersen Declaration at 2-3. Mr. Gundersen cites several excerpts from CR-0918 as supporting his opinion, but in context, these cites controvert his views. For example, he cites the statement that "there is also a consensus that the Wye pattern globe valve is less than optimal from a design and application point of view," *id.* at 2, but fails to finish the quoted sentence to the effect that "[however], there are few LLRT failures directly attributable to valve design," CR-0918 at 12. Likewise Mr. Gundersen cites the statement that "the seating force in the MSIVs is marginal," Gundersen Declaration at 3, but omits the end of the paragraph stating that this "does not affect the valve's ability to perform its safety function," CR-0918 at 8. Nor does Mr. Gundersen confront the point that in an actual containment isolation event the valve seating force would be greater, CR-0918 at 8, and presumably greater still (due to increased internal pressures) if the EPU is granted. Further, although Mr. Gundersen opines that aging is a factor in the MSIV LLRT, Gundersen Declaration at 3, the Entergy report states that "[s]ince MSIVs are routinely disassembled, examined, refurbished and reassembled to original manufacturer's specifications, it isn't clear what could 'age' in an MSIV," CR-0918 at 27. Clearly, the condition report cited by Mr. Gundersen is subject to scrutiny both as to those portions that purportedly support NEC's contention and those that do not. *See Yankee Nuclear*, LBP-96-2, 43 NRC at 90. In sum, we see that the MSIVs undergo periodic testing, refurbishment, and/or replacement, but we fail to see how NEC has shown how this raises a genuine dispute or material issue within the scope of the proposed EPU. Accordingly, we conclude that NEC Contention 2 does not satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iv) and (vi).

3. NEC Contention 3

The license amendment should not be approved at this time or until it is agreed by all parties that Large Transient Testing will be a prerequisite to Extended Power Uprate per the staff position on Duane Arnold Energy Center.

This contention is founded on the portion of the EPU application titled "Justification for Exception to Large Transient Testing" (EVY 03-08) where Entergy

asks for the elimination of large transient testing (LTT) at the uprated condition. Gundersen Declaration at 3. Mr. Gundersen challenges various of Entergy's assertions in EVY 03-08, discusses a May 9, 2001 NRC Staff request for additional information (RAI) in the Duane Arnold EPU licensing proceeding, and quotes the Staff, in Duane Arnold, as saying:

The NRC-approved ELTR-1 requires the MSIVC [MSIV closure] test to be performed if the power uprate is more than 10% above previously recorded MSIV closure transient data. The topical report also requires the GLR [generator load rejection] test to be performed if the uprate is more than 15% of previously recorded transient data.

Gundersen Declaration at 4. Mr. Gundersen says that the fact that the Vermont Yankee facility may have experienced full-power load rejections at 100% power does not bear on performance testing at 120% power. *Id.* at 5. Mr. Gundersen opines that, "in order to preserve the current levels of assurance of safety, Entergy should be required to test Vermont Yankee rapid shutdown capability at full uprated power." *Id.*

Entergy responds that NEC has ignored the application's detailed discussions, fails to identify specific portions of the application that are deficient, and notes that the RAI at Duane Arnold is not a Staff "decision" and is not binding. Entergy Answer to NEC at 22-25. The Staff also attacks the relevance of its Duane Arnold RAI. Staff Answer to NEC at 15. The Staff argues that the contention lacks sufficient references to disagreements with the application and is supported only by "bare assertions" and is therefore inadmissible. *Id.* at 16.

We find NEC Contention 3 to be admissible. Since the request to be relieved of LTT is part of the EPU application, this contention is within the scope of this proceeding. Mr. Gundersen's expert opinion, supported by specific references to the EPU application and citations to relevant Staff documents, provides a concise statement of the alleged facts or expert opinions which support NEC's position.²⁸ Elimination of LTT under EPU conditions raises material issues that are genuinely disputed here.²⁹ Accordingly, we admit this contention, as restated and clarified by the Board in Appendix 1.

²⁸ While we agree that the RAI concerning Duane Arnold is neither a Staff "decision" nor controlling here, Mr. Gundersen's use of it and the documents it cites provide some support for his opinion.

²⁹ Entergy acknowledges that there are differences between the current rating for Vermont Yankee and the uprate conditions, such as steam dump capability, Tr. at 441, and core configuration in terms of power distribution, temperature, and flow, *id.* at 445.

4. NEC Contention 4

The license amendment should not be approved. Entergy cannot assure seismic and structural integrity of the cooling towers under uprate conditions, in particular the Alternate Cooling System cell. At present the minimum appropriate structural analyses have apparently not been done.

The gist of this contention is that a new seismic and structural analysis should be performed to qualify the Vermont Entergy cooling towers for the additional loads that will result from increasing the maximum power by 20%. The contention is supported by the declaration of Mr. Gundersen with references to relevant Entergy documents and e-mails. Gundersen Declaration at 6-7. Entergy responds that the contention is outside of the scope of this proceeding because the application itself proposes no changes to the cooling tower structure, basin, or fans. Entergy Answer to NEC at 26. Entergy disputes NEC's claim that it has not previously performed the appropriate structural analysis of the cooling towers under current loading, *id.* at 27-29, and adds that there is no genuine dispute because Entergy "intends to perform a structural analysis of the cooling towers" to qualify the towers for additional loads. *Id.* at 30. The Staff does not object to the admission of this contention. Staff Answer to NEC at 17.

We conclude that NEC Contention 4 meets the requirements of 10 C.F.R. § 2.309(f) and is admissible. It provides a specific statement of the issue, a brief explanation of its basis, and is supported by alleged facts and an expert opinion. The contention focuses on the alleged need for Entergy to perform a seismic and structural analysis of the cooling towers under the proposed uprated conditions and is thus within the scope of the uprate proceeding.³⁰ Even if the Entergy application proposes no modification of the cooling towers and related systems, it is relevant to ask whether the unchanged structures and systems are adequate to handle the uprate. And the fact that Entergy may intend to conduct such an analysis does not eliminate this genuine dispute, because Entergy could change its intent at any time unless, as NEC argues, it is required to perform the analysis. This contention, as restated in Appendix 1, is admitted.

5. NEC Contention 5

The license amendment should not be approved at this time because Entergy has failed to maintain documentation and records, as required under 10 C.F.R. 54

³⁰ Whether Entergy's prior seismic or structural analyses of the cooling towers, basins, or fans are compliant with its *current* licensing basis is not relevant to this proceeding unless there is a clear and direct relationship to the alleged need for an analysis of these structures and systems under the *proposed* uprate conditions.

and elsewhere, and adequate [*sic*] to determine plant condition and design basis conformance as a foundation on which to build uprate analysis.

NEC supports this contention with the declaration of Mr. Gundersen who alleges a number of gaps or inadequacies in the documentation that Entergy is required to maintain under its current license, citing 10 C.F.R. § 50.54(f), and opines that Entergy’s “design basis and documentation cannot support adequate assurance that EPU calculations are rooted in as-found, plant-specific design basis or regulatory conformance.” Gundersen Declaration at 8. Entergy contends that there is no factual basis for NEC Contention 5 because, it says, the alleged documentation gaps and inadequacies do not exist. Entergy Answer to NEC at 33. More to the point, Entergy argues that this contention is outside of the scope of the EPU proceeding because NEC fails to connect any such alleged documentation problem to the proposed EPU. *Id.* at 31. The Staff also argues that NEC has failed to relate its assertions of missing documents to the EPU application and therefore the contention is outside of the scope of this proceeding. Staff Answer to NEC at 17.

We agree that NEC has failed to demonstrate how the alleged deficiencies in Entergy’s existing licensing and design documentation are connected to the grant or denial of the EPU application, i.e., are within the scope of and material to this proceeding as required by 10 C.F.R. § 2.309(f)(1)(iii) and (iv). NEC must at least allege some plausible nexus between the putative recordkeeping gaps and some specific portion of the EPU application. *See* 10 C.F.R. § 2.309(f)(1)(vi). This they have not done. Accordingly, this contention is not admissible.³¹

6. NEC Contention 6

The proposed license amendment fails to preserve defense-in-depth. By placing dependence on maintaining containment pressure to secure Residual Heat Removal and Core Spray Pump suction under accident conditions, Entergy ignores single failure criteria and violates basic tenets of reactor safety. This must not be permitted as it deprives the public of protections afforded by defense-in-depth.

This contention challenges Entergy’s proposal to use containment overpressure to help achieve NPSH and thus achieve residual heat removal (RHR) as violative of single-failure criteria and safety.³² The only regulatory citations are provided

³¹ Allegations that Entergy is not compliant with its current licensing basis are not, per se, within the scope of, or material to, this EPU proceeding. However, NEC is entitled to file a petition under 10 C.F.R. § 2.206 to request the Commission to institute a proceeding to modify, suspend, revoke, or take any other appropriate action to address any alleged noncompliance.

³² NEC Contention 6 and State Contentions 1 and 2 cover similar topics.

in the declaration of NEC's expert, Mr. Paul Blanch, who refers to the draft General Design Criteria and to Criterion 21, the definition of "single failure." NEC Petition, Exh. E, Declaration of Paul M. Blanch in Support of Petitioner's Contentions at 1-2 (Blanch Declaration). The substantive core of this contention is NEC's complaint about Entergy calculation VYC-0808, as follows:

[T]he calculation fails to address any single active or passive failures of the containment or the torus including failures of valves and penetrations which may impact the operability of redundant [ECCS]. It fails to provide the impact not only on the ability to cool the reactor core but also fails to analyze the consequences of the additional dose to the control room and the site boundary should a single failure occur while attempting to maintain this elevated pressure. Recent failures, both isolated and common mode failures [*citing* the Hatch Nuclear Plant LER 2004-02] of BWR containment valves have not been considered.

Blanch Declaration at 2.

For a number of reasons, we conclude that NEC has failed to provide the facts or law to establish the admissibility of this contention. First, it is clear that Supplement 8 to the Application does address a single failure of an RHR heat exchanger and performed a sensitivity analysis of it. Staff Answer to NEC at 21. The first sentence quoted above is flatly incorrect. Further, the Staff asserted that failure of the RHR heat exchanger is the most conservative single-failure mode, and NEC did not dispute this assertion or show why this is incorrect. *Id.* In the second sentence quoted above, NEC argues that VYC-0808 fails to assess the impact on the ability to cool the reactor. Entergy aptly responds that its Power Uprate Safety Analysis Report (PUSAR) states that such analyses have been performed and that the regulatory requirements will be met. Entergy Answer to NEC at 40; PUSAR at 4.3. Next, NEC asserts that the application "fails to analyze the consequences of the additional dose to the control room and the site boundary should a single failure occur," whereas the PUSAR states that analyses demonstrate that doses remain below regulatory limits. PUSAR at 9-3. Finally, NEC states that "[r]ecent . . . failures of BWR containment valves have not been considered," but only points us to Hatch Nuclear Plant LER 2004-02. Entergy points out that the Hatch LER does not relate to a violation of the single-failure criterion. Entergy Answer to NEC at 41. NEC's reply fails to respond to any of these issues. In sum, we conclude that NEC has failed to allege a legitimate factual foundation for the contention that Entergy has "ignored" the single-failure criterion as stated in the contention.

Finally, the first and third sentences of NEC Contention 6 take us past the single-failure issue and complain about a related issue — that the EPU application undermines "defense in depth." The only citation NEC provides on this point is Regulatory Guide 1.174. As previously stated, however, regulatory guides are

advisory in nature and do not impose legal requirements on the NRC or licensees. *Curators of the Univ. of Missouri*, CLI-95-8, 41 NRC at 397. Entergy does not even attempt to use or rely on this regulatory guide, so there is no inconsistency in concluding that we cannot impose it in this situation.

7. *NEC Contention 7*

Entergy has failed to comply with the requirements of 10 C.F.R. 50.71(E), Maintenance of Records and Making of Reports. Observance of the rule is essential to provide reviewers with accurate information about plant status. Records provide a measure upon which future activity can be predicated while maintaining safety. Without accurate and complete records, no meaningful review of the proposed uprate in its entirety can take place. Therefore, NRC should deny this amendment until Entergy can demonstrate that it has its documentation and records in order.

This contention is very similar to NEC Contention 5.³³ NEC alleges that Entergy is not in compliance with the recordkeeping requirements of 10 C.F.R. § 50.71(e) and specifically that Entergy has failed to comply with the requirements of Regulatory Guide 1.181 by mislabeling certain information as “historical.” Blanch Declaration at 3-4.

As with NEC Contention 5, NEC has failed to provide us with any meaningful nexus between the allegation that Entergy is not complying with its current license, and Entergy’s application for this uprate. While we might accept the abstract principle that in order to evaluate an application for a 20% power uprate it is necessary to understand the baseline against which the uprate is being sought, adjudicatory hearings are not designed to litigate abstract principles. In order to be admissible, NEC must point to a specific problem with the baseline documentation that is relevant to the proposed uprate. NEC must point to an error or omission in Entergy’s current records that renders NEC unable to do a “meaningful review of the proposed uprate.” The contention “must include references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute.” 10 C.F.R. § 2.309(f)(1)(vi). The contention must demonstrate that the alleged problem is “material to the findings the NRC must make to support the action that is involved in the proceeding.” 10 C.F.R. § 2.309(f)(1)(iv).

The only specific example that NEC raised was that, by using the phrase “Historical Information” in Entergy’s proposed revision 18 to the UFSAR, Entergy misapplied the intent of Regulatory Guide 1.181 and that this error is a

³³ For purposes of this analysis the Board assumes, as did Entergy and the Staff, Entergy Answer to NEC at 43 n.44; Staff Answer to NEC at 23 n.20, that NEC intended the Blanch Declaration concerning 10 C.F.R. § 50.71(e) as the support for NEC Contention 7.

proposal “to remove all commitments to these basic regulatory requirements.” Blanch Declaration at 4. There is no legal basis for this concern. First, regulatory guides are not binding or mandatory. Second, there is no plausible basis to think that any such mislabeling could change the regulatory requirements applicable to Entergy. Third, even assuming the label is incorrect, NEC has not shown us how it renders NEC unable to meaningfully review the EPU application. For the reasons stated, NEC Contention 7 is not admissible.

III. REQUEST FOR DELAY FOR FILING INITIAL CONTENTIONS

The State Petition includes a section titled “Reservation of Right To Amend,” where it points out that the NRC agreed to conduct an independent engineering inspection of the Vermont Yankee facility as part of the agency’s consideration of the EPU application³⁴ and argues that the Board should delay the date for filing of contentions and requests for hearing “until 30 days after the full report of the independent inspection and its supporting documents have been made publicly available.” State Petition at 48-49. The State asserts that it is not feasible for it to identify all of the appropriate issues until the results of the engineering inspection are public and that such a modest postponement of the deadline for initial contentions is sensible and efficient. The State argues that such contentions should not be subject to the “additional hurdles” and “unnecessary wrangle[s]” imposed on new or late-filed contentions under 10 C.F.R. § 2.309(c) and (f)(2) (e.g., whether the new contention is timely and based on information that is “materially different”). *Id.* at 49.

Entergy and the Staff oppose this request. They point out that the State has already requested such relief in this proceeding and the Commission, via a ruling by the Secretary, rejected it. Entergy Answer to State at 42; Staff Answer to State at 31 (*citing Entergy Nuclear Vermont Yankee, L.L.C. (Vermont Yankee Nuclear Power Station), unpublished Commission Order, slip op. at 2 (Aug. 18, 2004)*). The Staff asserts that the Commission’s regulations provide that late or new contentions may be considered only upon a determination by the Board that the criteria in 10 C.F.R. § 2.309(c) or (f)(2) have been met. Staff Answer to State at 31.

We conclude that the State’s request to extend the deadlines for the filing of initial contentions must be denied. Activities of the Staff occurring after the July 1, 2004 notice of opportunity for hearing do not give cause for us to delay the deadline for hearing requests specified in the notice. *See Baltimore Gas &*

³⁴ Letter from Nils J. Diaz, Chairman, NRC, to Michael H. Dworkin, Chairman, Vermont Public Service Board (May 4, 2004), ADAMS Accession No. ML041170438.

Electric Co. (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), LBP-98-26, 48 NRC 232, 243, *aff'd*, CLI-98-25, 48 NRC 325, 350-51 (1998), *petition for review denied sub nom. National Whistleblower Center v. NRC*, 208 F.3d 256 (D.C. Cir. 2000). If the independent engineering inspection report provides information “not previously available” that is “materially different,” then the State is entitled to submit a motion for leave to file a new contention “in a timely fashion.” 10 C.F.R. § 2.309(f)(2)(i)-(iii). Alternatively, the State can use the late-filed contention provisions of 10 C.F.R. § 2.309(c). While we agree that these new and late-filed contention regulations impose some additional procedural steps on the litigants and the Board, they are nevertheless the Commission’s rules and we are not authorized to dispense with them here.

IV. HEARING PROCEDURE

Having determined that the hearing requests of the State and NEC should be granted, this Board must determine, under 10 C.F.R. § 2.310, the type of hearing procedures to be used for each admitted contention. Two procedural issues are vigorously controverted. First, whether the admitted contentions meet the regulatory criteria of new 10 C.F.R. § 2.310(d), thus requiring that the hearing be conducted under the procedures of Part 2, Subpart G. Second, whether the State is entitled to “interrogate witnesses” pursuant to 42 U.S.C. § 2021(l). The Board will issue a separate memorandum and order on these novel questions. Given that the timing of initial disclosures and the availability of discovery (*see* 10 C.F.R. §§ 2.336, 2.704, and 2.705) are contingent on our determination as to whether Subpart L or Subpart G procedures apply, the parties are instructed to hold such activities in abeyance until the hearing procedure ruling is issued.³⁵

V. CONCLUSION

For the reasons set forth above, the Board concludes that the Vermont Department of Public Service and the New England Coalition each have standing and have each proffered two admissible contentions meeting the requirements of 10 C.F.R. § 2.309(f). Accordingly, their requests for hearing are granted. The text of the admitted contentions is stated in Appendix 1 to this ruling.

³⁵ NEC has submitted two additional motions, seeking both the dismissal of this proceeding and certain procedural protections from alleged prejudices resulting from the NRC’s suspension of access to ADAMS. [NEC]’s Motion To Dismiss Proceeding Due to Failure To Provide Proper Notice (Oct. 20, 2004); [NEC]’s Motion and Memorandum for Procedural Protections and Proposed Order (Oct. 26, 2004). The Board’s determination related to these two motions will be issued at a later date.

As provided under 10 C.F.R. § 2.311(c), a party, other than a hearing requestor with at least one admitted contention, may appeal this Order to the Commission on the question of whether the hearing request should have been wholly denied. All such appeals must be filed within ten (10) days following service of this Order and conform to the provisions of 10 C.F.R. § 2.311(a). Those parties opposing the appeal may file a brief in opposition within ten (10) days of service of the appeal. It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD³⁶

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

Lester S. Rubenstein
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 22, 2004

³⁶ Copies of this Order were sent this date by Internet e-mail transmission to counsel for (1) Licensees Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.; (2) Petitioners Vermont Department of Public Service and New England Coalition of Brattleboro, Vermont; and (3) the Staff.

APPENDIX 1

VERMONT YANKEE ADMITTED AND RESTATED CONTENTIONS

State Contention 1: Entergy has claimed credit for containment overpressure in demonstrating the adequacy of ECCS pumps for plant events including a loss of coolant accident in violation of draft General Design Criteria 44 and 52 and therefore Entergy has failed to demonstrate that the proposed uprate will provide adequate protection for public health and safety as required by 10 C.F.R. § 50.57(a)(3).

State Contention 2: Because of the current level of uncertainty of the calculation which the Applicant uses to demonstrate the adequacy of ECCS pumps, the Applicant has not demonstrated that the use of containment overpressure to provide the necessary net positive suction head for ECCS pumps will provide adequate protection for the public health and safety as required by 10 C.F.R. § 50.57(a)(3).

NEC Contention 3: The license amendment should not be approved unless Large Transient Testing is a condition of the Extended Power Uprate.

NEC Contention 4: The license amendment should not be approved because Entergy cannot assure seismic and structural integrity of the cooling towers under uprate conditions, in particular the Alternate Cooling System cell. At present the minimum appropriate structural analyses have apparently not been done.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 40-8968-ML

HYDRO RESOURCES, INC.
(P.O. Box 15910, Rio Rancho,
NM 87174)

December 8, 2004

The Commission affirms in part and reverses in part a Presiding Officer decision in this materials licensing proceeding.

RULES OF PRACTICE: CONTENTIONS (TIMELINESS OF CLAIMS)

If a party were free to raise new arguments once it realized that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset, NRC adjudicatory proceedings would prove endless. Intervenors have an obligation to review the record closely and to raise their arguments promptly.

RULES OF PRACTICE: PETITIONS FOR REVIEW

The Commission deems waived any arguments not raised before the Board or not clearly articulated in the petition for review. Parties are expected to identify their strongest arguments clearly and concisely in the petition for review.

REGULATIONS: INTERPRETATION (10 C.F.R. PART 40, APPENDIX A, CRITERION 9)

The terms of 10 C.F.R. Part 40, Appendix A, Criterion 9, do not require that a licensee actually obtain cost estimates from an independent contractor, but they do insist that the estimates take into account the costs associated with hiring an independent contractor to restore a site.

REGULATIONS: INTERPRETATION (10 C.F.R. PART 40, APPENDIX A, CRITERION 9)

Contractor overhead costs and profit are to be factored into the financial plan. They may be either calculated and added to the financial plan as separate, additional items, or “loaded” into the estimated hourly wage rates.

REGULATIONS: INTERPRETATION (10 C.F.R. PART 40, APPENDIX A, CRITERION 9)

An applicant that has had its own experiences in the uranium recovery field — including experience in restoration activities — may draw upon its own prior experience as a basis in estimating restoration cost estimates. In all cases, the basis for any assumptions must be adequately described by the applicant and verified by the Staff, but the Commission sees no reason, *per se*, to bar an experienced applicant from relying at least partially upon its own knowledge and experience of restoration expenses.

REGULATIONS: INTERPRETATION (10 C.F.R. PART 40, APPENDIX A, CRITERION 9)

The plain terms of Part 40, Appendix A, Criterion 9, do not require applicants to obtain information directly from an independent contractor, or to seek out and base cost estimates on the actual costs that a specific contractor spent on a project. Cost estimates must be explained and reasonable, but they need not come directly from an independent contractor. Such estimates need only take into account reasonable, commonsense judgments on costs one would incur in hiring an independent contractor.

REGULATIONS: INTERPRETATION (10 C.F.R. PART 40, APPENDIX A, CRITERION 9)

Financial assurance plans are not intended to cover every imaginable circumstance. If Criterion 9 were interpreted to demand the most conservative prediction

conceivable, based on a “worst case” type of scenario, the NRC would, as a general matter, unnecessarily and unduly burden the great majority of licensees. The cost of such an approach would significantly outweigh the potential benefit.

MEMORANDUM AND ORDER

I. INTRODUCTION

This long-pending adjudicatory proceeding concerns a license for a proposed multiple-site *in situ* leach uranium mining project in New Mexico that was issued to Hydro Resources, Inc. (HRI). Intervenors challenge the validity of the issued license in this proceeding initiated under 10 C.F.R. Part 2, Subpart L.¹ The proceeding was held in abeyance for approximately 2 years pending unsuccessful settlement negotiations, and resumed last year. Earlier this year, the Presiding Officer issued LBP-04-3,² a decision on the adequacy of HRI’s financial assurance plan for the Church Rock Section 8 site. The Commission granted two petitions for review of the Presiding Officer’s decision, one filed by HRI and the other by Intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM) and the Southwest Research and Information Center (SRIC).³ In this decision, we affirm in part and reverse in part LBP-04-3.

II. BACKGROUND

HRI applied for and received an NRC materials license to conduct *in situ* leach mining at four sites in New Mexico: Section 8 and Section 17 located in Church Rock, New Mexico, and the Unit 1 and Crownpoint sites, located in Crownpoint, New Mexico. HRI proposed and its license authorizes a phased development of the properties, beginning with operations at Church Rock Section 8. In this proceeding, the issues concerning Section 8 were litigated first. Still pending before the Presiding Officer are issues concerning the other three proposed mining sites: Church Rock Section 17, Unit 1, and Crownpoint.

Before us today is the Presiding Officer’s decision on the adequacy of HRI’s financial assurance plan. HRI submitted its financial assurance plan for Section 8,

¹ The NRC recently amended its adjudicatory procedural rules in 10 C.F.R. Part 2. *See* Final Rule: “Changes to Adjudicatory Process,” 69 Fed. Reg. 2182 (Jan. 14, 2004). The new procedural rules apply to proceedings noticed on or after February 13, 2004, and therefore have not been applied in this proceeding.

² 59 NRC 84 (2004).

³ CLI-04-14, 59 NRC 250 (2004).

termed the Restoration Action Plan (RAP), on November 21, 2000, and provided a revised plan on March 16, 2001. Intervenors ENDAUM and SRIC challenged several aspects of HRI's plan, including estimated groundwater restoration costs, estimated labor and equipment costs, and the proposed method of plugging the wells. In LBP-04-3, the Presiding Officer found that HRI's plan has several deficiencies requiring correction. Among those items, the Presiding Officer found that HRI's labor and equipment cost estimates were not properly supported and must be recalculated.

Both HRI and the Intervenors petitioned for review of LBP-04-3, and the Commission granted both petitions. HRI's petition took issue with the Presiding Officer's rulings on the estimated labor and equipment costs. The Intervenors' petition argued that the Presiding Officer improperly refused to consider arguments that they had raised challenging HRI's estimate of the volume of water that will need to be processed and circulated to restore the groundwater in Section 8, a technical issue that bears significantly on the ultimate cost of groundwater restoration.

Below, we first describe and address the water volume issue (referred to generally as the "pore volumes" issue) raised on review by the Intervenors. Next, we address the Presiding Officer's labor and equipment findings challenged by HRI.

III. ANALYSIS OF WATER VOLUME (PORE VOLUMES) ISSUE

Understanding the water volume issue requires some knowledge of: (1) technical terms, (2) relevant procedural case history, and (3) two license conditions in HRI's license. Below, we provide the necessary background before turning to our merits decision.

A. Background on Pore Volumes

The principal cost of groundwater restoration stems from the volume of water (usually expressed in "pore volumes") that must be pumped from or recirculated through the mine zone. The term pore volume is used to describe the quantity of free water in the pores of a given volume of rock.⁴ It represents the water that "fills the void space inside a certain volume of rock," and as such "is an indirect measure of the volume of water that must be pumped or processed to restore the groundwater."⁵ Thus, a pore volume is used as a parameter to describe "how

⁴ Restoration Action Plan at E-2a.

⁵ NUREG-1508, "Final Environmental Impact Statement To Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico" ("FEIS") (Feb. 1997) at 4-29.

many times the contaminated volume of water in the rock must be displaced or processed to restore groundwater quality.”⁶ Typically, the more pore volumes of water that must be pumped or processed to restore groundwater quality, the more it will cost to achieve groundwater restoration. Restoration costs, consequently, “are closely linked to the amount of water that must be processed to restore the groundwater.”⁷

HRI originally estimated that it would take 4 pore volumes of water to bring the groundwater in each of the proposed sites to restoration standards.⁸ The NRC Staff, however, found this estimate too low. Based upon the various HRI-submitted documents that it had reviewed, the Staff estimated that it would take 9 pore volumes of water to adequately restore the groundwater at the proposed project sites. Accordingly, the Staff in the FEIS “calculated groundwater impacts [at each of the proposed sites, including all of Church Rock] assuming the use of 9 pore volumes for groundwater restoration.”⁹ HRI then similarly adopted this initial 9 pore volume assumption for groundwater restoration.

In adopting 9 pore volumes as an initial estimate, the Staff relied upon data from various groundwater studies. In particular, the Staff relied upon the results of a pilot project — termed the Section 9 Pilot Project — conducted by the Mobil Oil Company in 1979, approximately 1 mile north of the Unit 1 site.¹⁰ The Staff also reviewed the results of some small-scale site-specific tests, which HRI had submitted. However, the Staff had “significant concerns,” given that the only site-specific tests that had been done were “small-scale” tests.¹¹ The Staff wanted the added confidence that would come from having the results of a large-scale site-specific groundwater restoration demonstration. Thus, in the FEIS, the Staff emphasized that more site-specific information would be necessary to actually *demonstrate* that restoration standards could in fact be achieved at the HRI sites on a large or “production-scale” level.¹² The Staff further believed it would be prudent to obtain this commercial-scale information before HRI proceeded with operations “beyond Church Rock” (which at the time of the Staff’s review included both Sections 8 and 17), and particularly before HRI “approach[ed] the town of Crownpoint.”¹³ Therefore, to address this lack of large-scale, site-specific information, the Staff imposed particular license conditions.

⁶ *Id.*

⁷ *Id.*

⁸ *See, e.g., id.*

⁹ *See id.* at 4-40; *see also, e.g., id.* at 4-58 to 4-60, 4-122.

¹⁰ *See, e.g., id.* at 4-37 to 4-40, 4-33 to 4-34.

¹¹ *See, e.g., id.* at 4-29, 4-62, 4-113.

¹² *See, e.g., id.* at 4-62, 4-113.

¹³ *See* Hearing Transcript (Nov. 8, 2001) at 304, 307.

For example, License Condition 10.28 mandates that HRI perform a large-scale groundwater restoration demonstration at the Church Rock site. This license condition bars HRI from proceeding to inject lixiviant beyond the Church Rock site — e.g., at Unit 1 or Crownpoint — unless the NRC has approved the results of the Church Rock groundwater demonstration. License Condition 10.28 requires HRI to conduct a demonstration, “on a large enough scale, acceptable to the NRC,” to determine the number of pore volumes required to restore a production-scale well field, which would include a number of production and injection wells.¹⁴ The demonstration results will act either to confirm the 9 pore volume initial estimate for restoration, or, conversely, will indicate that this estimate was off the mark and requires revision. Thus, the intent of the groundwater restoration demonstration would be, as HRI’s counsel described, “to demonstrate 9 PVs [pore volumes] on a fairly large scale.”¹⁵

Similarly, in addressing surety requirements, License Condition 9.5 specifies that surety for the restoration of HRI’s initial well fields be based on the 9 pore volumes estimate, and be maintained at this level until the number of pore volumes required to restore the groundwater quality of a production-scale well field has been established or demonstrated by the restoration demonstration in LC 10.28.¹⁶ The license condition stresses that if “at any time it is found that well field restoration requires greater pore volumes or higher restoration costs, the value of the surety will be adjusted upwards.”¹⁷

The reasonableness of 9 pore volumes as an estimate was challenged in earlier portions of this proceeding. In earlier litigation on financial assurance and on groundwater impacts, the Intervenors alleged that groundwater restoration

¹⁴ See SUA-1508, LC-10.28; FEIS at 4-15.

¹⁵ Transcript at 288. In LBP-04-3, the Presiding Officer directed the NRC Staff to revise License Condition 10.28. The terms of the original LC 10.28 prohibit HRI from injecting lixiviant at either the Unit 1 or Crownpoint sites prior to submitting NRC-approved results of a groundwater restoration demonstration at “Church Rock” generally. This would have allowed HRI to inject lixiviant at both of the Church Rock sites — Section 8 and Section 17 — prior to conducting the required groundwater restoration demonstration. At the time the license condition was written, however, Church Rock had not been divided into two separate sites (Sections 8 and 17). Because the license condition was intended to prevent HRI from proceeding beyond its initial mining site prior to conducting a commercial-scale restoration project, the Presiding Officer in LBP-04-3 directed the NRC Staff to amend LC 10.28 to restrict HRI from proceeding beyond Church Rock Section 8 prior to conducting a groundwater restoration demonstration at Section 8. See 59 NRC at 95-96. Under the revised license condition, HRI will not be able to proceed to Section 17, Unit 1, or Crownpoint until a restoration demonstration at Section 8 has been conducted, reviewed, and approved.

¹⁶ See SUA-1508, License Condition 9.5.

¹⁷ *Id.*

standards in Section 8 cannot be achieved with 9 pore volumes.¹⁸ The Presiding Officers' initial decisions on these issues went against the Intervenors. The decisions nonetheless noted that "the requirement does not end at 9 pore volumes," if in fact it is shown that more than 9 pore volumes are needed,¹⁹ and likewise that the "surety amount may be increased if 'at any time' it is determined that well-field restoration requires greater pore volumes or a higher cost."²⁰

The Commission explicitly affirmed the financial assurance ruling on pore volumes, concurring with the Presiding Officer that the Intervenors' expert had provided "unconvincing" testimony.²¹ The Commission declined review of the Presiding Officer's groundwater decision, stating that the Intervenors had not identified any "clearly erroneous" factual finding or important legal error.²² In short, the reasonableness of the initial 9 pore volume estimate for groundwater restoration at Section 8 was litigated, indeed litigated twice, in separate decisions on groundwater impacts and financial assurance.

B. No New Information Warranting Relitigation of Pore Volume Estimate

In our earlier financial assurance decision in this proceeding, the Commission found that our regulations require the submission of a financial plan that includes cost estimates, and that this plan should be submitted with an applicant's environmental report. We determined that HRI had not yet submitted the "requisite financial assurance plan, with cost estimates."²³ We therefore prohibited HRI from using its license until it had submitted and the Staff approved a "financial-assurance plan and cost estimate[s]."²⁴

Pursuant to our order, HRI submitted its Restoration Action Plan, outlining cost estimates for restoration of Section 8. In calculating the groundwater restoration costs, HRI utilized the earlier-litigated assumption that it will take 9 pore volumes

¹⁸ See, e.g., ENDAUM and SRIC's Brief (Financial Assurance for Decommissioning) (Jan. 11, 1999) at 15-16, and Attach. 1, Sheehan Affidavit at 15 n.6; Intervenors' Written Presentation with Respect to Groundwater (Jan. 11, 1999), Staub Affidavit at 39-44; Intervenors' Joint Response to HRI's and the NRC Staff's Responses to the Presiding Officer's April 21, 1999 Questions (May 25, 1999), at 12.

¹⁹ *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-99-30, 50 NRC 77, 103-06 (1999).

²⁰ *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-99-13, 49 NRC 233, 236-37 (1999) (citing License Condition 9.5).

²¹ *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-00-8, 51 NRC 227, 244 (2000).

²² CLI-00-12, 52 NRC 1, 3 (2000).

²³ CLI-00-8, 51 NRC at 241.

²⁴ *Id.* at 242.

to restore Section 8 groundwater to restoration standards. Thus, HRI's estimated restoration costs are based on the processing and circulation of 9 pore volumes of groundwater. Before the Presiding Officer, the Intervenors raised numerous challenges to the restoration plan. One argument was that the plan underestimated restoration costs because it grossly underestimated the water volume that would be necessary to restore Section 8 groundwater.

Thus, in challenging HRI's financial plan, the Intervenors challenged — again — the *same* 9 pore volume estimate that had been litigated before. The Presiding Officer in LBP-04-3 therefore declined to consider the Intervenors' arguments on the pore volume estimate, noting that the issue had been litigated earlier and indeed had been affirmed by the Commission.

Petitioning for review of LBP-04-3, the Intervenors argued before us that HRI's Restoration Action Plan contains relevant new information bearing on the pore volumes estimate. Accordingly, in granting review, the Commission emphasized that we would focus “on the limited question of whether there is any significant issue on pore volumes that the Intervenors reasonably could not have raised before HRI filed its plan.”²⁵ The Intervenors, we stressed, “are not entitled now to an additional opportunity to raise arguments that either have been or *could have been* raised previously.”²⁶ We directed that the briefs focus on this point.

Nowhere in their appellate briefs, however, do the Intervenors point to any *new* information in the Restoration Action Plan that might call into question the adequacy of the 9 pore volume estimate. While the Restoration Action Plan “connect[s] pore volumes to a cost estimate,”²⁷ as the Intervenors state, the underlying technical basis for the 9 pore volume assumption used in the plan already has been challenged and litigated. The reappearance of the 9 pore volume estimate within the context of an actual budget, this time with a price tag attached, does not provide a new opportunity to raise arguments that could have been raised before, on an underlying technical issue that was litigated previously. In challenging the financial plan, the Intervenors properly could raise questions about HRI's estimated dollar cost of processing 9 pore volumes of water, but they could not challenge anew the pore volume estimate itself, an issue they had litigated and lost. When we said in our earlier financial decision in CLI-00-8 that HRI needed to submit a financial plan, and that the plan would be subject to a hearing, we never intended to allow relitigation of matters previously decided. Our decision had already affirmed the 9 pore volume initial estimate for Section 8 groundwater restoration.²⁸

²⁵ CLI-04-14, 59 NRC at 253.

²⁶ *Id.* (emphasis in original).

²⁷ Brief of Intervenors on Review of LBP-04-3 (Intervenors' Initial Brief/Pore Volumes) (June 14, 2004) at 19.

²⁸ CLI-00-8, 51 NRC at 244.

On review, the Intervenor's argue that the Restoration Action Plan represented "the first time in the course of the proceedings where all the specific elements of [HRI's] groundwater restoration calculations were revealed for the entirety of Section 8."²⁹ But this is certainly not the case. The exact same data and formula — the exact same "elements" — used in the Restoration Action Plan for calculating the volume of groundwater expected to be processed in each zone of Section 8 were made available in this proceeding at the *latest* by February 1999. At that time, in response to the Intervenor's groundwater presentation, HRI witness Mark Pelizza submitted an affidavit with detailed information identical to that contained in the Restoration Action Plan.³⁰ Thus, contrary to the Intervenor's claim, the Restoration Action Plan is not "the first time . . . HRI presented its technical basis for its groundwater restoration cost estimates."³¹

Nor was HRI's information "buried" or in any sense hidden. In the Pelizza affidavit, HRI provided an entire section on pore volumes, prominently titled "Pore Volumes — An Important ISL Term of Art." This section, together with a referenced chart attachment titled "Church Rock Section 8 — Pore Volume Calculated By Zone," describes the factors HRI considered in calculating a pore volume, and lists the specific factors and pore volume calculations for all of Section 8, including each zone's area, thickness, volume, porosity, and the vertical and horizontal flare factors HRI will apply.³² Any concerns about the methodology that HRI used for pore volume calculation, or about any of the specific pore volume values HRI assigned for all or portions of Section 8, could have and should have been raised then — more than 5 years ago.

Indeed, in 1999 the Intervenor's requested and were granted an opportunity to reply to HRI's response to Intervenor's groundwater presentation. Yet, in a

²⁹ Intervenor's Initial Brief/Pore Volumes at 18.

³⁰ Compare Restoration Action Plan, Attach. E2(a) with HRI's Response to Intervenor's Brief (Groundwater Issues) (Feb. 19, 1999), Exh. 1, Pelizza Affidavit at 12-14 and Attach. 3.

³¹ Intervenor's Initial Brief/Pore Volumes at 20.

³² A "pore volume" itself is not a fixed or constant unit, such as 1 gallon or liter. Consequently, to estimate *how many* individual pore volumes of groundwater must be processed at any given site, one must first calculate and establish how many gallons of water are represented in 1 pore volume for the site or zone at issue. HRI used the "ore volume" method to calculate the water gallons in one pore volume. This method calculates a pore volume at an *in situ* leach mine by multiplying the mine's well-field area by the ore zone thickness, and the porosity of the rock. The result is then converted to units of measurement, i.e., gallons. Moreover, to account for the portion of the aquifer that may contain lixiviant that may have "flared," or migrated laterally or horizontally and thus migrated outside of the boundaries of the calculated ore pore volume, a lateral and a vertical "flare factor" are used as further multipliers. See generally Restoration Action Plan at E2a. Thus, the formula HRI used was: Pore Volume = Area × Thickness × Porosity × Conversion Factor (for gallons) × Horizontal Flare Factor × Vertical Flare Factor.

lengthy reply filing containing three affidavits from experts, HRI's detailed pore volume calculations were never once challenged, nor even mentioned.³³

The Intervenors further claim that relevant parts of the technical basis for the groundwater restoration were scattered “throughout the record,” requiring the “[i]ntervenors to assemble, from different parts of a voluminous record, some of the calculations HRI might have used for cost estimates.”³⁴ But all of the key factors used in the Restoration Action Plan to calculate the pore volumes for Section 8 had already been discussed by HRI, indeed in a single document: the Pelizza affidavit with its attached pore volume calculation chart.³⁵

Moreover, there is in the record earlier, very similar, information on Section 8 pore volume calculations that HRI had provided in a response to a Staff Request for Additional Information (RAI #59). This RAI response, which “tabulate[d] the restoration water quantity volumes which are contained in a pore volume” for Section 8, also could have served as a basis for challenging HRI's pore volume methodology, or as a basis for challenging any of the pore volume variables — porosity, flare factors, etc. — that HRI had specified for Section 8.³⁶ As the Intervenors themselves now point out, the RAI response calculated the “[t]otal restoration volumes in gallons . . . for each zone and for the entire Section 8.”³⁷ Notably, the Intervenors obtained this RAI response well over a year prior to filing their groundwater and financial assurance presentations, and thus had ample time to review and consider the information, and to raise any pertinent questions. On review, the Intervenors argue that “[n]either the text of the [RAI] response itself, nor the [attached table], provided any basis for the selection of the variables used to estimate water consumption.”³⁸ But as the NRC Staff states, “the Intervenors

³³ See generally ENDAUM and SRIC's Reply in Response to HRI's and the NRC Staff's Response Presentations on Groundwater Protection Issues (Apr. 8, 1999).

³⁴ Intervenors' Initial Brief/Pore Volumes at 20.

³⁵ The Intervenors stress that the 1999 Pelizza affidavit was filed in the *groundwater* portion of the proceeding, and that neither the Presiding Officer nor the Commission cited this document in their financial assurance decisions. But the fact remains that the Intervenors had opportunities to challenge the pore volume calculation in the Pelizza affidavit in both proceedings, both before the Presiding Officer and the Commission. They could have challenged it in their groundwater reply, or cited it in their petitions for review of the groundwater decision or of the financial assurance decision. Finally, it is not surprising that neither the Board nor Commission decisions bearing on pore volumes specifically cited the Pelizza affidavit's pore volume calculation chart. After all, the Intervenors never once referenced or challenged the affidavit's pore volume calculation data. They did challenge the 9 pore volume estimate, but their challenge focused on the results of the Mobil 9 study and its applicability to Section 8.

³⁶ See HRI Response to RAI #59, “Groundwater Consumption,” and Attachment 59-1, chart entitled “Groundwater Restoration Volume Calculated by Zone” for Section 8, attached to letter from M. Pelliza, HRI, to J. Holonich, NRC (April 1, 1996).

³⁷ Intervenors' Initial Brief/Pore Volumes at 8.

³⁸ *Id.*

provide no explanation why they could not have argued these same points in 1999,” when they filed their groundwater presentation.³⁹

The Intervenor further claim that HRI “changed the values” it used to calculate groundwater restoration cost estimates in different parts of the proceeding. This is true. HRI’s 1996 response to RAI #59 used a porosity factor of 0.21, the Staff’s 1997 FEIS assigned a porosity factor of 0.28, and the 1999 Pelizza affidavit used a porosity factor of 0.25. These differences, however, do not cure the Intervenor’s failure to have raised any question or concern about any of these porosity figures, or about any of the other values consistently used by HRI in its pore volume calculations. All these numbers appeared years ago in documents of which the Intervenor were well aware. Questions about the porosity values or any other specified values — be it whether they were adequately explained, supported, or inconsistently used — should have been raised long ago.⁴⁰

It was the Intervenor’s obligation to review the record carefully for any material information pertaining to the pore volume calculations. If a party were free to raise new arguments once it realized “that maybe there was something after all to a challenge it either originally opted not to make or which simply did not occur to it at the outset,”⁴¹ NRC adjudicatory proceedings would prove endless. Thus, Intervenor have an obligation to review the record closely and to raise their arguments promptly. The Commission must insist that Intervenor and all parties be disciplined in their scrutiny of the record.

We turn now to arguments inappropriately raised for the first time in the briefs on review. When we granted review of LBP-04-3, it was based on the Intervenor’s argument that HRI had never “attempt[ed] to justify its pore volume estimate” until it filed its Restoration Action Plan, and therefore that the plan contained new information on the “rationale” for the 9 pore volume estimate.⁴² Accordingly, the Commission specified that review would be “focused . . . on the limited question” of whether there is any significant issue on pore volumes that the Intervenor reasonably “could not have raised previously.”⁴³ As we have noted in this Decision, however, the Intervenor’s briefs do not point to any issue that they could not have raised earlier in this proceeding.

Perhaps realizing that the technical challenges to the pore volume estimate that they seek to raise in fact could have been raised earlier, the Intervenor

³⁹NRC Staff’s Response Brief (July 12, 2004) at 18.

⁴⁰Moreover, we do not believe that the 0.03 difference in porosity value between what the FEIS proposes and what HRI’s plan specifies would otherwise warrant our remanding this issue to the Staff for its reassessment.

⁴¹*Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003) (citations omitted).

⁴²ENDAUM and SRIC Petition for Review of LBP-04-3 (Mar. 18, 2004) at 6, 2.

⁴³CLI-04-14, 59 NRC at 253.

have used their briefs on review to present entirely new claims, not articulated in the petition for review. Indeed, the Intervenors now raise as their prime argument the claim that the 9 pore volume estimate “cannot serve as the basis” for HRI’s groundwater restoration costs for all of Section 8’s well fields because the estimate “applies only to HRI’s restoration demonstration project,”⁴⁴ which HRI has indicated is planned for the first well field, following uranium recovery operations.

As we understand it, the Intervenors’ new argument is that they have been denied the opportunity to challenge the basis for HRI’s cost estimates for the entirety of Section 8 because the pore volume estimate only applies to the first well field in Section 8. They argue that they now should be allowed to challenge HRI’s pore volume calculations “for the entirety of Section 8, not just the initial demonstration wellfield.”⁴⁵ Because License Conditions 9.5 and 10.28 require HRI to perform a large-scale restoration demonstration in Church Rock sufficient to demonstrate the number of pore volumes necessary to restore a production-scale well field, the Intervenors suggest that the initial 9 pore volume estimate for restoration was never intended to apply to all of Section 8, only to the restoration demonstration, and therefore only to an initial well field where HRI plans to conduct the demonstration.

This distinctly new argument surfaced before the Commission only in the briefs on appeal, and as such we need not address it. The Commission “deem[s] waived any arguments not raised before the Board or not clearly articulated in the petition for review.”⁴⁶ Parties are expected to identify their “strongest arguments clearly and concisely” in the petition for review.⁴⁷ Moreover, License Conditions 9.5 and 10.28, upon which the Intervenors’ new argument rests, were in place as of 1998. The Intervenors give no persuasive reason for why this argument was not made earlier in briefs before the Presiding Officer or Commission.

Thus, we do not consider the Intervenors’ new argument litigable this late in the proceeding. We will, however, take the time here to clarify a few points.

Significantly, what was *litigated* earlier in this proceeding was the reasonableness of the initial 9 pore volume estimate for groundwater restoration of Section 8 *as a whole*. The parties did not litigate whether 9 pore volumes should prove sufficient to restore simply one or two well fields in Section 8, but whether Section 8 generally could be successfully restored assuming a 9 pore volume restoration

⁴⁴ Intervenors’ Initial Brief/Pore Volumes at 23.

⁴⁵ ENDAUM and SRIC’s Reply to HRI’s and the NRC Staff’s Responses (Intervenors’ Reply/Pore Volumes) (July 26, 2004) at 4.

⁴⁶ *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001).

⁴⁷ *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 46 (2001).

effort. In short, the Intervenor already have challenged the reasonableness of the initial pore volume estimate for the *entirety* of Section 8.⁴⁸

License Condition 9.5's direction that surety for restoration of the "initial well fields" be based on 9 pore volumes and be "maintained at this level" until data from the restoration demonstration is obtained does not change the fact that 9 pore volumes remains the *initial* pore volume estimate for *all* of Section 8, and indeed for the other proposed project sites as well.⁴⁹ That the Staff set up an approach to allow the 9 pore volume estimate to be confirmed or revised does not eliminate the 9 pore volume initial estimate for HRI's proposed sites, including Section 8.⁵⁰ If the demonstration results confirm the estimate, no revision to the pore volume estimate will be necessary. Conversely, if HRI is unable to successfully complete the restoration demonstration using up to 9 pore volumes, it "can't use that same number [as the estimate] for the remaining sites,"⁵¹ as NRC Staff counsel explained to the Presiding Officer.

This proceeding, though complex, has not deprived the Intervenor of a meaningful opportunity to challenge the financial assurance plan. As we explained above, the Intervenor had a fair opportunity to challenge the 9 pore volume estimate for Section 8, which was based upon the available information to date. The fact that data from the restoration demonstration project will be reviewed for confirmation of the 9 pore volume estimate does not obviate the fact that a meaningful hearing has been provided for the adjudication of the 9 pore volume estimate.⁵²

⁴⁸ Intervenor are also wrong in claiming that "the calculations used to arrive at the 9 pore volume figure apply only to the groundwater restoration demonstration." See Intervenor's Reply/Pore Volumes at 8. The underlying technical basis for the 9 pore volume estimate is applicable to all of Section 8. The current 9 pore volume estimate for the restoration of the proposed sites is based on the results of the Mobil Section 9 demonstration project. Further, the water volume calculations for each zone of Section 8 were obtained using the same methodology and the same assumed values for porosity, flare factors, etc., with the only difference being the area of each zone. Nor has any argument been raised showing why the pore volume estimate for restoration of the initial well field(s) should be different from that of the other well fields in Section 8. Four well fields are currently planned for Section 8. See HRI's Consolidated Operations Plan at C-18, Figure 1.4-6.

⁴⁹ See FEIS at 4-29, 4-40, 4-58 to 4-60, 4-62, 4-122.

⁵⁰ Indeed, the Staff only required that the restoration demonstration results be approved before HRI proceeded to the Unit 1 or Crownpoint sites. By necessity, then, the Staff's 9 pore volume estimate for groundwater restoration clearly was intended to apply to at least to *all* of Church Rock, Sections 8 and 17.

⁵¹ See Transcript at 284-85.

⁵² Moreover, under the prudent licensing approach here, "[i]f at any time it is found that well field restoration requires greater pore-volumes or higher restoration costs, the value of the surety will be adjusted upwards." SUA-1508, LC 9.5. The Staff indicates that Intervenor will have notice of license amendments to adjust the surety amount. See Transcript at 395-96; see also *id.* at 217-18, 244-45, 392,

(Continued)

In sum, the Commission affirms LBP-04-3's finding that the pore volume estimate was litigated previously. We find no new information in the Restoration Action Plan to warrant revisiting the initial 9 pore volume estimate for groundwater restoration in this proceeding.⁵³ But we expect the NRC Staff to continue to monitor and review safety concerns, including those brought to its attention through an adjudicatory proceeding.

IV. ANALYSIS OF LABOR AND EQUIPMENT ISSUES

A. Background

In LBP-04-3, the Presiding Officer found that two cost estimates in HRI's Restoration Action Plan required either modification or reassessment. First, the Presiding Officer found unacceptable HRI's estimated costs of the equipment necessary for reclamation. Specifically, he found that HRI improperly had assumed that "the major equipment" necessary for decommissioning would remain onsite, available for an independent contractor to use for decommissioning activities in the event HRI were to abandon Section 8 prior to the site's restoration. He therefore ordered that HRI obtain costs estimates from two or more independent

407-09; NUREG-1569, "SRP, Final Report" (June 2003), App. C at C-4. Therefore, the Intervenor may have a further opportunity to participate on pore volume considerations. In addition, HRI is required to update and the NRC is to review the surety annually. See 10 C.F.R. Part 40, App. A, Criterion 9; SUA-1508, LC 9.5. All the parties in the proceeding apparently concur that HRI's annual updates may result in license amendments. See SRP, App. C at C-4; see also Transcript at 392, 399, 405, 407-09.

Further, HRI's license requires it to return groundwater quality parameters to restoration goals and applicable standards. SUA-1508, LC 10.21. If 9 pore volumes proves insufficient to meet the goals, HRI will need to use more than 9 pore volumes, and the surety will be revised accordingly. If HRI objects to using a higher number of pore volumes, an alternative would be to seek a relaxation of the restoration standards specified in the license. The Staff and HRI agree that any such request would have to be in the form of a license amendment, where again the Intervenor would have the opportunity to intervene. See Transcript at 234, 239-40, 250-51.

⁵³ Actual surety arrangements need not be made until before operations begin. See 10 C.F.R. Part 40, App. A, Criterion 9; CLI-00-8, 51 NRC at 240 n.15. Surety for well fields is typically established as they go into productions. See SRP at 6-24. The amount of surety that must be retained must be sufficient at all times to cover the costs of decommissioning and reclamation of the "areas that are expected to be disturbed before the next license renewal." In the case of HRI, which has no immediate plans to begin operations, and, the NRC Staff has said, still needs to obtain "other regulatory agency permits . . . prior to operation," it is impossible to determine what areas are "expected" to be disturbed prior to the next license renewal. See Letter to Mark Pelizza (April 16, 2001) from Daniel Gillen, NRC, Re: Acceptance of Restoration Action Plan. It could well be years before HRI begins operations in Section 8. No operations have taken place since the initial license was issued 6 years ago. Under the circumstances, the Staff has taken a reasonable approach to require a surety update prior to the commencement of mining. *Id.*

contractors, average these, and submit them in an amended financial assurance plan, for NRC Staff approval. The Presiding Officer further ordered that in determining the equipment costs, “it cannot be assumed that the major equipment necessary for decommissioning is available.”⁵⁴ The revised restoration estimates would have to include at least the cost of leasing the “major” equipment.

Second, the Presiding Officer found HRI’s projected labor costs unacceptable. He concluded that HRI had not supported its assumption that an independent contractor would have laborers capable of performing multiple functions (i.e., wearing “multiple hats”). In the Presiding Officer’s view, HRI had not complied with the language of Criterion 9, found in 10 C.F.R. Part 40, Appendix A, which directs licensees’ cost estimates to “take into account [the] total costs that would be incurred if an independent contractor were hired to perform the decommissioning and reclamation work.” He gave HRI a choice: either amend the estimated labor costs in the Restoration Action Plan to the level proposed by the Intervenor, or submit a revised plan based upon the averaged cost estimates from at least two independent contractors.

We granted HRI’s petition for review of these two rulings because both involve questions on the proper interpretation and application of Criterion 9, which requires licensee decommissioning cost estimates to “take into account” the costs that “would be incurred” by an independent contractor hired to restore a site. In addition, the Presiding Officer’s call for new cost estimates to include the costs of all “major equipment” appeared open to different interpretations on what would be considered “major” equipment. It was unclear, for example, whether this was to include the costs of replacing all existing wells, pumps, pipelines, and other stationary equipment.

On review, HRI and the NRC Staff argue that the labor and equipment assumptions are reasonable, supported by the record, and that the Presiding Officer has misapplied Criterion 9, or, as the Staff describes, “read too much into the generally-worded Criterion 9 provision.”⁵⁵ The Intervenor argues that HRI and the Staff have ignored the plain language of Criterion 9, and that “when the plain language of a statute or regulation is clear, all inquiry as to its meaning must end there.”⁵⁶ They stress that HRI’s estimates are based on its own experience and costs, not on the costs of an independent contractor, and therefore do not comply with Criterion 9. We find that the “labor” and “equipment” rulings in LBP-04-3 warrant reversal. Below, we address the two issues in turn.

⁵⁴LBP-04-3, 59 NRC at 101.

⁵⁵NRC Staff’s Brief on Labor and Equipment Issues (NRC’s Initial Brief Labor/Equipment) (June 14, 2004).

⁵⁶Intervenor’s Response to HRI and NRC Staff’s Initial Briefs on Review (Intervenor’s Response Labor/Equipment) (July 12, 2004) at 9.

B. Labor Estimates

At the heart of the disputes over the labor cost estimates is how best to interpret the requirements of Criterion 9. We therefore begin with a look at the pertinent language of Criterion 9:

[T]he licensee's cost estimates must take into account total costs that would be incurred if an independent contractor were hired to perform the decommissioning and reclamation work.

The terms of the regulation do not require that a licensee actually obtain cost estimates from an independent contractor, but they do insist that the estimates “take into account” the costs associated with hiring an independent contractor to restore a site. To better understand the intent of Criterion 9, it is helpful to look at the available NRC guidance documents on *in situ* uranium extraction facilities, including the NRC Staff's Standard Review Plan for license applications.

Although the SRP does not constitute a legally binding interpretation, the SRP explains that the purpose of the financial surety is to provide sufficient resources for reclamation of a site “by a third party, if necessary.”⁵⁷ The SRP outlines contractor-related expenses that should be provided for in the surety, including additional estimates to cover contractor profit and overhead:

All costs (unit and total) are to be estimated on the basis of third party, independent contractor costs (include overhead and profit in unit costs or as a percentage of the total).⁵⁸

Thus, contractor overhead costs and profit are to be factored into the financial plan. They may be either calculated and added to the financial plan as separate, additional items, or “loaded” into the estimated hourly wage rates.⁵⁹

Moreover, the SRP also states that applicants are to provide in the financial plan for project management costs. This category would cover such expenses as paying for the overall management of a restoration project, including engineering design and review, mobilization, quality control, and any other management-related costs that may not already be covered by other categories.⁶⁰ In addition, the financial plan should set aside a separate amount of funds to cover contingencies, or unforeseen expenses. By way of general guidance, the SRP notes that an

⁵⁷ SRP at 6-24.

⁵⁸ *See id.*, Appendix C at C-5.

⁵⁹ *See id.*, Appendix C at C-4, C-1.

⁶⁰ *See id.*, Appendix C at C-4.

acceptable “minimum” contingency figure would be 15% of the estimated restoration costs.⁶¹

As to how an applicant should base its cost assumptions, the SRP states that, “[t]o the extent possible,” cost assumptions should be based on the applicant’s “experiences with generally accepted industry practices,” “research and development activities at the site,” or “previous operating experience in the case of license renewal.”⁶² Unit costs, calculations, references, and the assumptions used in making the cost estimates are to be provided, however.⁶³

As a general matter, then, it seems neither unreasonable nor inconsistent with the SRP, for an applicant that has had experiences in the uranium recovery field — including experience in restoration activities — to draw upon its own prior experience as a basis in estimating restoration cost estimates. In all cases, the basis for any assumptions must be adequately described by the applicant and verified by the Staff, but the Commission sees no reason, *per se*, to bar an experienced applicant from relying at least partially upon its own knowledge and experience of restoration expenses. The Staff’s review includes comparing proposed unit costs with standard industry cost guides, as well as consulting with local and state authorities on local and regional costs.⁶⁴

Now we turn to the specific dispute over the labor positions proposed in HRI’s Restoration Action Plan.

For the labor estimates, HRI’s plan set forth eleven proposed positions. The salaried positions include Operations Manager, Environmental Manager, Radiation Safety Officer, Chemist, Senior Geologist, and Wellfield Foreman. Nonsalaried positions include Electrician, Plant Operator, Truck Driver, Wellfield Operator, and Pump Hoist Operator.⁶⁵ The financial plan lists estimated expenses associated with these positions, including salaries, wages, workmen’s compensation, medical expenses, and payroll taxes.

Particularly at issue, however, are introductory statements in the financial plan’s labor section, whereby HRI stated that the technical employees would wear “multiple hats”:

For the purpose of the Financial Assurance Plan, HRI assumed the employment of technical professionals whose expertise is needed on a limited basis during the restoration mode. Anticipated positions are listed in the Restoration Budget rows 1-15. However, to justify their full time status and utilize their time on the job, it is assumed that they are required to provide a multitude of services, i.e., every

⁶¹ See *id.*, Appendix C at C-4.

⁶² See *id.* at 6-24, 6-26.

⁶³ See *id.*, Appendix C at C-1.

⁶⁴ *Id.*, Appendix C at C-5; see also Transcript at 350-51.

⁶⁵ Restoration Action Plan at E-2(d).

employee will be wearing multiple hats. As such, individual job descriptions are difficult.⁶⁶

Nonetheless, the plan does go on to provide a summary of the tasks to be handled by each of the eleven budgeted positions. To give an example, we provide, below, a sample position description, that of the Environmental Manager, which has the lengthiest job description:

Environmental Manager. Responsible for the radiation health and safety, environmental compliance and quality assurance program at the Crownpoint Uranium Project. Supervise the Radiation Safety Officers to ensure that all radiation safety, environmental compliance and permitting/licensing programs will be conducted in a responsible manner and in compliance with all applicable regulations and permit/license conditions.⁶⁷

In challenging the Restoration Action Plan, the Intervenors argued that HRI had underestimated the personnel requirements for wellfield and plant operators during the restoration period, and that “neither the State nor NRC can or should assume multiple responsibilities for individual employees.”⁶⁸

In addition, the Intervenors’ expert claimed that it appeared that HRI was “planning its personnel needs around only one eight-hour shift,” instead of a continuous 24-hour operation, which he stated is important to restore an *in situ* mine safely.⁶⁹ The cost estimates, he claimed, reflected only one 8-hour shift per day for the stated positions, not the three 8-hour shifts that would be needed for continuous operation. The expert therefore stated that if, as he suspected, HRI’s cost estimates were based on only one 8-hour shift, then the labor costs needed to be tripled, to account for three shifts.⁷⁰ He also argued that HRI should have listed a full-time position for an operator of the brine concentrator and reverse osmosis units (two types of water restoration equipment), and indeed should have listed three such full-time operators, to cover three different 8-hour shifts.⁷¹

HRI responded by stating that its listed personnel would be adequate to run operations 24 hours per day using only a single 8-hour shift. Its expert described how the restoration machinery is largely automated, and that therefore, at night, restoration operations could run unmanned with automatic shutdowns in the

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Intervenors’ Response to HRI’s Cost Estimates and Restoration Action Plan (Intervenors’ First Response) (Dec. 21, 2000), Ingle Affidavit at 20-21.

⁶⁹ *Id.* at 20-21.

⁷⁰ *Id.* at 22.

⁷¹ *Id.*

case of leaks or other equipment malfunction. He stressed that it was possible to assign multiple roles to individuals because of equipment automation. For similar reasons, he specified that HRI would not need a full-time operator for the reverse osmosis/brine concentrator equipment, and detailed the limited oversight necessary to operate and maintain these units.⁷²

HRI's expert also said that the labor estimates were based on "actual operating experience in Texas, not conjecture."⁷³ He provided a chart comparing the labor positions proposed for Church Rock with the positions used for restoration work at two commercial mines in Texas, run by Uranium Resources, Inc., HRI's "sister company." An affidavit by the supervisor of operations at URI's Texas sites stated that "in the real world," the proposed staffing levels for Church Rock "are a fact of life," and that "through the use of technology" greater staffing levels were not necessary.⁷⁴ In statements before the Presiding Officer, the NRC Staff expert concurred that it was "reasonable to assume that there will be some overlap of duties" for workers involved in restoration because "[y]ou're probably not going to have one guy just sitting out there turning a well field valve and then not do something else that doesn't occupy his time full time."⁷⁵

In LBP-04-3, the Presiding Officer rejected the Intervenor's argument that HRI needed to triple its proposed personnel to account for three 8-hour shifts instead of a single 8-hour shift. He agreed with HRI that the proposed budget for one 8-hour shift per day would be "sufficient to operate the decommissioning project around the clock" because most of the machinery is largely automated:

HRI's explanation of site restoration operating continually by using a combination of manpower and machine is satisfactorily supported in the record before me. I find that HRI's intention to rely on automated machinery with automatic shutdowns to supplement its workforce, along with a budget for a single 8-hour shift per day is sufficient.⁷⁶

Nonetheless, however, the Presiding Officer found that the record did not support "HRI's decision to require employees to wear 'multiple hats,'" and that HRI's assumption of "multi-hatted" employees violated Criterion 9, which

⁷² Reply of HRI to Intervenor's Response to RAP (HRI Reply to Intervenor's) (Jan. 22, 2001), Pelizza Aff. at 19-20, Van Horn Aff. at 4-6.

⁷³ *Id.*, Van Horn Aff. at 6.

⁷⁴ *Id.*

⁷⁵ See Transcript at 349-50. Citing the example of a contractor hired to restore a site in Wyoming, the Staff's expert said that "the most likely guys that are going to come in and restore [a] well field are other uranium *in situ* leach miners," already familiar with restoration operations. See *id.*

⁷⁶ LBP-04-3, 59 NRC at 102.

requires surety estimates to be based on the total costs of an independent contractor completing the restoration:

HRI . . . has put forth no persuasive evidence that supports its assumption that an independent contractor will assign one employee to several tasks in the same manner as HRI intends to manage its employees. . . . Given that Criterion 9 specifically requires that the surety amount be based upon the total costs of an independent contractor decommissioning the site and the RAP, as it currently stands, contains no independent contractor cost estimates, I find that HRI has failed to meet the requirements of Criterion 9.⁷⁷

On review, the NRC Staff argues that the Intervenors provided no evidence that a uranium mining operation, “staffed by personnel qualified to fill the 11 labor categories identified by HRI . . . would need additional personnel in order to adequately restore a wellfield.”⁷⁸ Rather than addressing the eleven labor positions identified by HRI, the Intervenors “instead pursued their claim that HRI improperly failed to budget for restoration operations on a 24-hour basis,” the Staff claims.⁷⁹

We agree. First, notwithstanding the Presiding Officer’s contrary decision, in our view there is sufficient evidence in the record to assume that an independent contractor in the *in situ* leach field may have employees carry out related distinct tasks.⁸⁰ Moreover, as we stated in our order granting review, what is at issue is the adequacy of the eleven proposed positions for the restoration work. Thus, the key question is whether “the proposed labor categories appear reasonably sufficient in number (e.g., person-hours) and expertise for the proposed restoration tasks and volume of restoration work.”⁸¹

HRI set forth a summary of the types of tasks that each position would carry out. On their face, the position descriptions do not appear unreasonable or unduly impractical. Other than their conclusory claim that the NRC should not assume

⁷⁷ *Id.* at 103. Curiously, the Presiding Officer did not rule explicitly on the issue of whether there needs to be a full-time reverse osmosis/brine concentrator operator. Perhaps this was an issue left to be resolved by the independent contractor estimates that the Presiding Officer called for. But the rationale that the Presiding Officer accepted for the sufficiency of the single 8-hour shift — machine automation — is precisely the same rationale offered by HRI for why no full-time reverse osmosis/brine concentrator operator was needed. HRI provided detailed, unrebutted description of the automated nature of this restoration equipment. In their appellate briefs, none of the parties specifically addresses the operation of the reverse osmosis/brine concentrator equipment.

⁷⁸ NRC Staff’s Initial Brief Labor/Equipment Brief at 13.

⁷⁹ *Id.* at 14.

⁸⁰ *See supra* pp. 598-600. Criterion 9 does not require us to assume or plan for the least experienced or least efficient independent contractor.

⁸¹ CLI-04-14, 59 NRC at 251-52.

that a contractor would have an employee with “multiple responsibilities,” the Intervenor never suggested which of these positions would be unworkable as described. And apart from their initial claim — rejected by the Presiding Officer — that two additional labor shifts would be necessary, they never suggested what additional number of employees might be required to complete the proposed restoration work.

At best, the Intervenor’s expert offered some general anecdotal statements that “multiple hats does not work when you hire a third party from reclamation experience [in] Wyoming,” and the vague hypothetical example that contractors “may actually need to have one person, a geologist, who that’s what they do, and somebody else who maintains the brine concentrator.”⁸² (HRI’s plan does not propose having a geologist regularly in charge of maintaining the brine concentrator.) Simply put, in no respect did the Intervenor provide a credible challenge to the proposed labor positions in the Restoration Action Plan.⁸³

Moreover, the Intervenor’s general “multiple hats” argument was, as the NRC Staff states, connected to their more focused claim that HRI should have provided for three 8-hour labor shifts instead of a single shift.⁸⁴ HRI provided the identical rationale for the Restoration Action Plan’s proposed single 8-hour labor shift and for its assumption that employees would be capable of carrying out multiple tasks. Both assumptions rely upon machine automation. But while the Presiding Officer found reasonable HRI’s argument that a “combination of manpower and machine” would permit operations 24 hours per day with only a single 8-hour labor shift and without constant manning and supervision of the restoration equipment, he did not explain why machine automation would not, in similar fashion, permit employees to handle more than one task.⁸⁵

⁸² Transcript at 346.

⁸³ In a separate argument, the Intervenor claimed that HRI’s proposed salaries and wages were underestimated if one compared the dollar figure HRI proposed with the dollar amount spent at a restoration project in Fernald, Ohio, assuming that labor costs are “linearly” related to gallons of water processed. This salary argument, however, did not claim that the Fernald project required more labor positions for similar restoration work than that proposed for Section 8. Indeed, the argument appears to be based on an attempted rough comparison of labor positions “comparable” to those HRI proposed for Section 8. Nor is it even clear from the information provided how many workers there were at the Fernald project; only labor categories are listed, not how many employees may have been hired for each position. *See* Intervenor’s First Response, Abitz Affidavit at 13-14.

⁸⁴ *See* Intervenor’s First Response, Ingle Aff. at 20-21.

⁸⁵ HRI provided un rebutted evidence on the highly automated nature of the reverse osmosis and brine concentrator units, two major kinds of water restoration equipment. HRI’s expert explained, for example, that reverse osmosis units are so automated they essentially “run themselves and require only periodic shutdown and maintenance,” i.e., cleaning of the membranes about every 4 weeks, a 6-hour process. “[P]er the manufacturer,” the operations of the brine concentrator require only about

(Continued)

At bottom, the NRC seeks to verify whether there is a reasonable amount of labor proposed to complete the various aspects of a restoration project. The Staff thus reviews the kinds and numbers of experts and laborers proposed to perform the tasks and processes that will be necessary to complete the restoration. This includes examining the person-hours of labor proposed and the unit cost estimates proposed. Beyond that, the Staff does not speculate on how a contractor may allocate particular duties among a proposed labor force, so long as individuals tasked with a job are qualified to perform it, and the proposed labor force appears sufficient in number and expertise to complete the job. It may well be that one contractor may hire two or three individuals on a limited, part-time basis to perform single tasks, and another contractor may find it efficient and workable to hire and train one employee full-time to handle both duties. In the end, it is unclear whether the number of person-hours listed for the restoration work would be significantly different. In any event, here the Intervenors raise only generalized, conclusory allegations about the reasonableness of HRI's labor proposal.

It is true, as the Intervenors claim and as the Presiding Officer stressed, that HRI "did not identify any independent contractor whom it contacted for its estimate," and that HRI did not "identify any independent contractor on whose performance at other ISL sites its estimate was based."⁸⁶ But the plain terms of Criterion 9 do not *require* applicants to obtain information directly from an independent contractor, or to seek out and base cost estimates on the actual costs that a specific contractor spent on a project. Cost estimates must be explained and reasonable, but they need not come directly from an independent contractor. Such estimates need only "take into account" reasonable, commonsense judgments on costs one "would" incur in hiring an independent contractor.⁸⁷ Nor is it the case, as the Presiding Officer seemingly thought, that HRI presented "no information" at all associated with an independent contractor performing restoration. HRI's plan does provide for various contractor-associated expenses, such as contractor overhead and profit, etc. Indeed, the NRC Staff required HRI to revise its general contingency figure from 15% to 25% for several dirt-work and demolition activities to account for several unpredictable factors, including the Staff's concern that labor rates for earthwork personnel can be highly variable.⁸⁸

In short, we agree with the NRC Staff that the Presiding Officer, in demanding that HRI now seek out independent contractor estimates from two or more

4 hours of "general overview" per shift, HRI's expert described, explaining that such overview can be part of the shift operator's normal routine. HRI Reply to Intervenors, Pelizza Aff. at 20, Van Horn Aff. at 4-6.

⁸⁶ Intervenors' Response Labor/Equipment at 14.

⁸⁷ See 10 C.F.R. Part 40, Appendix A, Criterion 9.

⁸⁸ See, e.g., Letter to Philip Ting, NRC, from Mark Pelizza, HRI, Re: Request for Additional Information (Mar. 16, 2001), at 5; Transcript at 351; RAP § 9.

contractors, “read too much” into the requirements of Criterion 9. Accordingly, we reverse LBP-04-3’s ruling on the labor cost estimates.

C. Equipment

The Presiding Officer found HRI’s equipment cost estimates unacceptable because HRI had not budgeted for the purchase or rental of “major” equipment.⁸⁹ (Such “major” equipment presumably would include the brine concentrator and reverse osmosis units, two kinds of water restoration equipment). The Presiding Officer thus rejected arguments by HRI and the NRC Staff that the water restoration equipment likely would remain onsite and available for an independent contractor to use if HRI abandoned the site prior to restoration. The Presiding Officer based his reasoning on Criterion 9’s requirement that an applicant “take into account” the costs that would be incurred in hiring an independent contractor. He also cited evidence presented by the Intervenor’s expert, indicating that at the Bison Basin restoration project in Wyoming, new equipment, such as new reverse osmosis units, had to be ordered for site reclamation. Further, he expressed concern that in the case of a declared bankruptcy, the equipment might be seized and removed by creditors.

In addressing this novel equipment question, we begin with a few general observations. First, under Criterion 9, the NRC seeks to assure that “sufficient” resources will be available for reclamation. To further this aim, Criterion 9 calls for the conservative assumption that restoration will need to be conducted by a third-party contractor, and consequently, as we noted above, it has been the Staff’s practice to insist that licensees set aside significant additional amounts in the surety estimate to pay for the potential expenses associated with hiring a third party, i.e., contractor overhead, profit, management costs, etc., as well as additional funding for contingencies. These are all some of the ways in which the NRC seeks to ensure an adequate surety to cover independent contractor costs.

Financial assurance plans, however, are not intended to cover every imaginable circumstance. We do not, for instance, direct licensees to assume that there will be an accident — requiring special restoration activities — and to provide in the financial plan an additional category of funds specifically for accident-related restoration. If Criterion 9 were interpreted to demand the *most* conservative prediction conceivable, based on a “worst-case” type of scenario, the NRC would, as a general matter, unnecessarily and unduly burden the great majority of licensees. The cost of such an approach would significantly outweigh the possible benefit.

⁸⁹ See LBP-04-3, 59 NRC at 99-101.

On the equipment issue before us, Criterion 9 does not explicitly address equipment, and so we turn again to the available NRC guidance on *in situ* uranium extraction reclamation plans. In the Standard Review Plan for license applications, we find two conflicting provisions. On one hand, the SRP states generally that equipment owned by the Licensee should not be credited in the estimate to reduce cost calculations.⁹⁰ But more specifically, in the section on cost estimates for groundwater restoration, the SRP provides that the capital costs of “water treatment” equipment — this would include reverse osmosis and brine concentrator units — need *not* be included in the reclamation plan. Because this equipment is used in the initial stages of operations, the SRP assumes that the capital costs of the equipment will have been paid off prior to the restoration phase:

The water treatment equipment used during the uranium recovery phase of the operation is generally suitable for the restoration phase. The capital cost of this equipment is usually absorbed during the initial stages of the operation, leaving only the costs of operation, maintenance, and replacement filters for the restoration phase.⁹¹

Identical guidance is provided in an NRC Staff technical position paper on financial assurance for uranium recovery facilities.⁹² Generally speaking, then, a financial assurance plan should account for the cost to obtain the equipment that an independent contractor would need, but the NRC’s long-held assumption has been that the water treatment equipment purchased prior to operations would remain available for the decommissioning phase. HRI brought this provision to the Presiding Officer’s attention, but the Presiding Officer did not address it in his financial assurance decision.⁹³

Of course, even if one assumes that the capital costs of the water treatment equipment have been fully absorbed, there still is, conceivably, the possibility that in the event a licensee declares bankruptcy, creditors could file a claim seeking removal and sale of the equipment, and a bankruptcy court conceivably could order the equipment’s removal. Nonetheless, the Commission does not believe that this possibility warrants — as a general matter — requiring that all uranium recovery licensees provide for the costs of obtaining new water treatment equipment. Reverse osmosis and brine concentrator units are “fixed” or bolted-down capital equipment that likely would require notable expenditures

⁹⁰ See SRP, Appendix C at C-5.

⁹¹ *Id.*, Appendix C at C-3.

⁹² See Technical Position on Financial Assurances for Reclamation, Decommissioning, and Long-Term Surveillance and Control of Uranium Recovery Facilities (Oct. 1988) at 22.

⁹³ See, e.g., HRI’s Reply to Intervenors at 16; Transcript at 340.

of time and money to decontaminate, making it less likely that creditors would seek to remove them. The same is true for other permanently-in-place equipment installed prior to operations, i.e., well-field pipes and pumps.

If, as the SRP details, restoration will require “additional [water treatment] equipment,” such as additional reverse osmosis or brine concentrator units, beyond that purchased and installed during the operational phase, the financial plan should provide for the cost or rental of these additional needed units.⁹⁴ Similarly, if water treatment equipment is “near the end of its serviceable life,” the surety should be adjusted to account for the equipment’s replacement costs.⁹⁵ There will be a yearly opportunity — the required annual surety updates — to monitor and assess whether water treatment and other permanent equipment — e.g., pipes and wells — necessary for restoration may be in deteriorating condition. Further, HRI’s license requires that a minimum 15% of restoration costs be added to and maintained in the surety to cover contingencies, which would include unforeseen expenses associated with equipment needs.⁹⁶

The Staff evaluates financial plans on a case-by-case basis, and thus can require special measures of particular licensees where warranted, whether at the initial surety stage or later, if changes in operations or other events bearing on decommissioning costs occur. Required annual surety updates provide a flexible and continuous means to allow for NRC-required “[a]djustments to reclamation plans.”⁹⁷

Criterion 9 does not require an initial surety that covers every theoretical possibility. And it does not, as the Intervenors claim, contemplate annual surety adjustments “only when changes in operations occur.”⁹⁸ The plain terms of the regulation itself clearly provide that the updates are intended to cover “any . . . conditions” that may affect the cost estimates. Moreover, there are significant practical considerations in the case of HRI’s license. We could be years away before any operations begin at Section 8, and a number of details of the project — which may bear on labor and equipment needs — will not be known until operations begin. Thus, the annual surety reviews are a practical and *necessary*

⁹⁴ See SRP, Appendix C at C-3.

⁹⁵ *Id.*

⁹⁶ See SUA-1508, LC 9.5. Pursuant to the SRP, HRI’s plan provides for the operating and maintenance expenses associated with the water treatment equipment, including replacement of filters, membrane, and instruments. The plan also provides for the maintenance and potential replacement of submersible pumps and motors, plant and field piping and valves. See RAP at E-2(d). The Intervenors take issue with HRI having based these maintenance estimates on HRI’s own operating experience, but again, we do not read Criterion 9 to bar an applicant outright from drawing upon its own experiences to justify otherwise reasonable assumptions.

⁹⁷ See SRP, Appendix C at C-4.

⁹⁸ Intervenors’ Response to HRI’s and Staff’s Briefs (Labor/Equipment) (July 12, 2004) at 19.

means for assuring an adequate financial surety for Section 8, as well as for every licensed site.⁹⁹

IV. CONCLUSION

For the reasons given in this Order, the Commission *affirms* LBP-03-4's ruling on the pore volumes issue, and *reverses* the rulings on the labor and equipment issues.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of December 2004.

⁹⁹We conclude with an additional observation not raised on review by the Intervenors, but which merits the NRC Staff's future attention. In LBP-04-3, the Presiding Officer rejected the Intervenor argument that HRI's plan failed to provide for contract administration expenses (project management). The Presiding Officer accepted HRI's explanation that the plan already contains an amount covering "contingency/profit." However, HRI's plan apparently conflates the "contingency/profit" category and the project management expenses category. Moreover, contractor profit and the general "contingency" category are typically set forth separately. HRI's combined figure leaves unclear how much has actually been proposed for each of these categories. We therefore expect the NRC Staff, at the next annual surety update for Section 8, to reexamine and clarify the particular amounts estimated to cover contractor profit, project management, and contingencies.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward J. McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Investigation 1-2003-037

RENE CHUN

December 8, 2004

The Commission grants in part and denies in part a motion to quash a subpoena issued by NRC's Office of Investigations to a freelance writer.

COMMISSION PROCEEDINGS GENERALLY

The legal process is not a game. The Commission expects forthright pleadings from those who seek relief from the agency.

COMMISSION SUBPOENA AUTHORITY

The Commission has the authority to issue subpoenas to require any person to appear and testify or appear and produce documents, or both, at any designated place to assist it in exercising any authority provided in this Act, or in the administration or enforcement of this Act, or any regulations or orders issued thereunder. Atomic Energy Act of 1954, as amended, § 161c, 42 U.S.C. § 2201(c).

COMMISSION SUBPOENA AUTHORITY

Reviewing courts have consistently upheld the right of the NRC to issue subpoenas to persons who are not NRC licensees. *See, e.g., United States v. Construction Products Research, Inc.*, 73 F.3d 464, 471 (2d Cir. 1996); *United States v. Comley*, 890 F.2d 539 (1st Cir. 1989); *United States v. Garde*, 673

F. Supp. 604 (D.D.C. 1987), *appeal dismissed as moot*, 848 F.2d 1307 (D.C. Cir. 1988); *United States v. McGovern*, 87 F.R.D. 582, 584, 590 (M.D. Pa. 1980).

COMMISSION INVESTIGATIONS

The U.S. Court of Appeals for the Second Circuit has emphasized that an “NRC investigation is proper if it ‘assist[s] the [NRC] in exercising any authority provided in this chapter, . . . or any regulations or orders issued thereunder.’” *United States v. Construction Products Research, Inc.*, 73 F.3d 464, 471 (2d Cir. 1996), *quoting* 42 U.S.C. § 2201(c) (emphasis in the Court’s opinion).

DEPARTMENT OF JUSTICE GUIDELINES ON SUBPOENAS TO MEMBERS OF THE MEDIA

The Department of Justice Guidelines are not binding on the NRC. However, they may provide some internal guidance to the Department of Justice in deciding whether to seek enforcement of the subpoena in federal court, should that eventually arise.

DEPARTMENT OF JUSTICE GUIDELINES ON SUBPOENAS TO MEMBERS OF THE MEDIA

The Department of Justice Guidelines do not vest any rights in a person challenging the subpoena. By their own terms, the Guidelines “are not intended to create or recognize any legally enforceable right in any person.” 28 C.F.R. § 50.10(n). *See In re Grand Jury Subpoena American Broadcasting Companies, Inc.*, 947 F. Supp. 1314, 1322 (E.D. Ark. 1996).

FIRST AMENDMENT PRIVILEGE FOR JOURNALISTS

Any privilege afforded to journalists under the First Amendment is a “qualified” privilege that can be overcome by a showing of need and unavailability from other sources. *See generally Gonzales v. NBC*, 194 F.3d 29, 32-36 (2d Cir. 1999).

FIRST AMENDMENT PRIVILEGE FOR JOURNALISTS

Doubts have been raised as to whether this privilege actually exists. *See In re Grand Jury Proceedings: Storer Communications v. Giovan*, 810 F.2d 580, 585 (6th Cir. 1987).

FIRST AMENDMENT PRIVILEGE FOR JOURNALISTS

“Where the protection of confidential sources is not involved, the nature of the press interest protected by the privilege is narrower.” *Gonzales v. NBC*, 194 F.3d 29, 35-36 (2d Cir. 1999); *see also McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

FIRST AMENDMENT PRIVILEGE FOR JOURNALISTS

In this case, the information subject to the subpoena is not “confidential.” First, the reporter did not make any specific claim of confidentiality in his motion to quash. Second, this is not a case where the reporter’s source is “confidential”; instead, the article specifically quotes the source by name. Third, the reporter has placed the information in the public domain by publication in the article, so the reporter is not maintaining in confidence the details that he has learned.

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on a motion to quash a subpoena issued by the NRC’s Office of Investigations (“OI”). For the reasons stated below, we grant the motion to quash in part, subject to a condition expressed herein; we deny the motion to quash in part; and we set a new date for compliance with the subpoena.

II. FACTUAL BACKGROUND

On July 8, 2004, OI served a subpoena on Mr. Rene Chun through his attorney. Mr. Chun is a freelance writer who is the author of a magazine article published in 2003. The article discusses several issues relating to security at the Indian Point Nuclear Power Station, and contains several statements attributed to specific individuals, including a former Indian Point employee who had previously worked in the plant’s security department. The NRC Staff has determined that at least one of the statements attributed to the former employee in the article contains “safeguards information” as defined in section 147a of the Atomic Energy Act (AEA) of 1954, as amended, 42 U.S.C. § 2167. *See also* 10 C.F.R. § 73.2. In other words, the article contains at least one statement that gave the public detailed information about security at the Indian Point facility. However, that information should not be assumed to reflect the current security measures at that facility.

The NRC's regulations explicitly provide that only specified persons are authorized to receive safeguards information. 10 C.F.R. § 73.21(c)(1). Disclosure of safeguards information to persons who are not authorized to receive it is a violation of the Commission's regulations. 10 C.F.R. § 73.21(c)(2). In addition, section 223 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2273, provides criminal penalties for a "willful" violation of the disclosure provisions of 10 C.F.R. § 73.21. *See* 10 C.F.R. § 73.81. *See also* AEA § 147b, 42 U.S.C. § 2273. Accordingly, OI initiated an investigation into whether the former employee committed a violation of section 73.21 and, if there was a violation, whether that violation was willful. If the investigation concludes that the former employee did indeed violate the prohibition against the disclosure of safeguards information, the NRC could initiate an enforcement action against the former employee. In addition, if the NRC concludes that a "willful" violation occurred, the NRC could refer that matter to the Department of Justice (DOJ) for possible prosecution.

OI conducted a formal interview of the former employee, who stated that the article misquoted him and that he had not made some of the sensitive statements attributed to him in the article. But when OI informally interviewed Mr. Chun, he advised the OI investigator that (1) the former employee had indeed made the statements attributed to him in the article, and (2) because of similar accusations in the past, Mr. Chun always recorded his interviews and he had recordings to document the statements made in the article. The OI investigator then asked Mr. Chun for access to both the tapes and any notes taken by Mr. Chun of his interviews with the former employee. However, Mr. Chun refused to allow the investigator to have access to those materials and indicated that they were under the control of the magazine. But when OI raised the issue with the magazine, a representative of the magazine advised OI that any request for the materials should be directed to Mr. Chun.

Obviously, there is a factual dispute as to what the former employee actually said to Mr. Chun. Therefore, the Office of Investigations issued a subpoena for Mr. Chun to testify about his conversations with the former employee. In addition, Mr. Chun's tapes and notes of his interview with the former employee would constitute the best evidence of what the former employee actually said. Accordingly, the subpoena required Mr. Chun to provide those materials to OI prior to his interview.

In response, Mr. Chun moved to quash the subpoena, arguing that (1) the subpoena violated the guidelines established by the Department of Justice for issuing a subpoena to a member of the media, and (2) enforcement of the subpoena would violate Mr. Chun's rights as a journalist under the First Amendment to the U.S. Constitution. The motion also questions whether the NRC can issue a subpoena to a party that is not an NRC licensee. However, Mr. Chun's motion did not inform the NRC that he did not actually possess the materials. Subsequently,

Mr. Chun's attorney orally advised the NRC that Mr. Chun had returned the tapes and notes to the magazine pursuant to his employment contract before he had received the subpoena. The magazine has now advised the NRC that it inadvertently discarded the tapes and notes relating to Mr. Chun's interviews.

III. POSSESSION OF THE SUBPOENAED MATERIALS

Mr. Chun now claims, through counsel, that he does not possess the subpoenaed materials, i.e., the tapes and notes of his interviews with the former employee. Therefore, we will quash that portion of the subpoena that requires him to produce those materials if, within 14 days from the date of this Order, Mr. Chun files an affidavit with the Secretary of the Commission (1) stating that he returned the materials to the magazine pursuant to his employment contract prior to the issuance of subpoena (including the date he returned the materials), (2) providing a copy of the employment contract (with personal information such as his salary, etc., redacted), and (3) releasing without reservation any claim of ownership in the materials (based on his creation of them) to the magazine.

We find it unfortunate that Mr. Chun's motion to quash did not inform the Commission that he did not have the tapes and notes. The legal process is not a game. The Commission expects more forthright pleadings from those who seek relief from the agency.

IV. ANALYSIS

Assuming *arguendo* that Mr. Chun does not now possess the tapes and notes relating to his conversations with the former employee, that does not end the matter. The subpoena still calls for Mr. Chun to appear and testify about his conversations with the former employee. Regardless of whether he possesses the tapes and notes, that portion of the subpoena still remains at issue. Accordingly, we now turn to the motion to quash.¹

Before the Commission, Mr. Chun questions whether the NRC can issue a subpoena to a person who is not a licensee. He also claims that (1) OI issued the subpoena in violation of the DOJ's Guidelines, *see* 28 C.F.R. § 50.10, and (2) enforcement of the subpoena would violate Mr. Chun's rights as a journalist

¹ We understand that the arguments raised in the motion to quash apply equally to both Mr. Chun's testimony and to any tapes and notes in which he may have claimed an interest by virtue of having created them in the course of his work. Therefore, this Order will use the term "Mr. Chun's information" to refer to both information that he might provide in a formal interview as well as the tapes and notes of his conversations, if they were still in his possession.

under the First Amendment to the U.S. Constitution. We deal with each claim in turn below.

A. Statutory Authority

Initially, Mr. Chun questions whether the NRC can issue a subpoena to a person who is not an NRC licensee. *See* Motion To Dismiss at 2 n.1. Section 161c of the Atomic Energy Act of 1954, as amended, gives the NRC the authority to

make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this Act, *or in the administration or enforcement of this Act, or any regulations or orders issued thereunder.* For such purposes the Commission is authorized to administer oaths and affirmations, and by subpoena to require *any person* to appear and testify or appear and produce documents, or both, at any designated place.

42 U.S.C. § 2201(c) (emphasis added). Section 11s of the Act, 42 U.S.C. § 2014(s), defines “person” to include “(1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution . . . and (2) any legal successor, representative, agent, or agency of the foregoing.” Thus, it seems clear that the law allows the Commission to subpoena “persons” other than NRC licensees. Mr. Chun is an “individual,” which would place him within the scope of the Commission’s subpoena power.

Moreover, reviewing courts have consistently upheld the right of the NRC to issue subpoenas to persons who are not NRC licensees. *See, e.g., United States v. Construction Products Research, Inc.*, 73 F.3d 464, 471 (2d Cir. 1996); *United States v. Comley*, 890 F.2d 539 (1st Cir. 1989); *United States v. Garde*, 673 F. Supp. 604 (D.D.C. 1987), *appeal dismissed as moot*, 848 F.2d 1307 (D.C. Cir. 1988); *United States v. McGovern*, 87 F.R.D. 582, 584, 590 (M.D. Pa. 1980).

Furthermore, the U.S. Court of Appeals for the Second Circuit has emphasized that an “NRC investigation is proper if it ‘assist[s] the [NRC] in exercising any authority provided in this chapter, . . . or any regulations or orders issued thereunder.’” *Construction Products Research*, 73 F.3d at 471, *quoting* 42 U.S.C. § 2201(c) (emphasis in the Court’s opinion).² *See also United States v. Oncology Services Corp.*, 60 F.3d 1015, 1019 (3d Cir. 1995) (enforcing an NRC subpoena). Finally, as the Second Circuit also noted, “at the subpoena enforcement stage, courts need not determine whether the subpoenaed party is within the agency’s

² Mr. Chun is a resident of New York and any enforcement of the subpoena would take place within the jurisdiction of the U.S. Court of Appeals for the Second Circuit. Thus, we have emphasized Second Circuit cases in this Order.

jurisdiction or is covered by the statute it administers; rather, the coverage determination should wait until an enforcement proceeding is brought against the subpoenaed party.” *Construction Products Research*, 73 F.3d at 470-71, citing *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943).

Here, Mr. Chun has information that would help determine whether the former employee violated the NRC’s regulation prohibiting the disclosure of safeguards information. This regulation was issued under the authority of the Atomic Energy Act. The information sought by the subpoena would assist the NRC in determining whether the former employee violated an NRC regulation issued under the AEA. 42 U.S.C. § 2201(c). See, e.g., *Construction Products Research*, 73 F.3d at 471. Thus, this investigation is proper, and the Commission has the statutory authority to issue the subpoena to Mr. Chun as a part of the investigation.

B. Department of Justice Guidelines

Mr. Chun’s first substantive argument is that the subpoena violates the DOJ guidelines for issuing a subpoena to a member of the media.³ Those guidelines require, *inter alia*, that (1) the agency strike a “proper balance” between the “public’s interest in the free dissemination of ideas and information and the public’s interest in effective law enforcement[.]” 28 C.F.R. § 50.10(a); (2) all reasonable attempts should be made to obtain the information from alternative sources, 28 C.F.R. § 50.10(b); (3) negotiations shall be pursued with the media, 28 C.F.R. § 50.10(c); (4) the information sought should be “essential” to the case, whether it is criminal or civil, 28 C.F.R. § 50.10(f)(1)-(2); and (5) the information “should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information.” 28 C.F.R. § 50.10(f)(4). We believe that the subpoena satisfies these guidelines.

Initially, the DOJ guidelines do not vest any rights in Mr. Chun. By their own terms, the DOJ guidelines “are not intended to create or recognize any legally enforceable right in any person.” 28 C.F.R. § 50.10(n). See *In re Grand Jury Subpoena American Broadcasting Companies, Inc.*, 947 F. Supp. 1314, 1322 (E.D. Ark. 1996) (denying television network’s request to quash grand jury subpoena on the basis that DOJ guidelines were not fulfilled because DOJ “regulations, by their own terms, confer no enforceable rights on the subpoenaed person”) (citations omitted). Thus, even if the subpoena does not satisfy the

³The DOJ Guidelines are not binding on the NRC. However, they may provide some internal guidance to the DOJ in deciding whether to seek enforcement of the subpoena in federal court, should that eventually arise.

guidelines, that fact does not mean that a federal court would not enforce the subpoena.

Moreover, assuming *arguendo* that the guidelines do apply to this situation, it is clear that the subpoena fulfills the guidelines' requirements. First, taking the criteria in reverse order, the subpoena seeks information that is "limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information." 28 C.F.R. § 50.10(f)(4). Thus, this case is not a matter where the NRC seeks the identity of a confidential source or information that is not in the public domain. Instead, the subpoena seeks to verify whether the former employee actually made the statements attributed to him in the article. The NRC needs to verify the accuracy of the attribution of the statements in the article before making a determination of whether there was a violation of the NRC's regulations and, if so, whether that violation was willful.

Second, the information is "essential" to the case. 28 C.F.R. § 50.10(f)(2). If the employee made the statements attributed to him, he may have violated the applicable NRC regulation. Furthermore, the information sought is not "peripheral, nonessential, or speculative." *Id.* Instead, the information sought goes directly to the heart of the matter: did the former employee make the statements attributed to him? Quite simply, the NRC needs Mr. Chun's information to determine the truth of the matter because there is a conflict between Mr. Chun and the former employee over what the former employee told Mr. Chun.⁴ Third, the NRC has negotiated with Mr. Chun (through his counsel) and has concluded that further negotiations would be fruitless. 28 C.F.R. § 50.10(c). Fourth, the NRC is not aware of any alternative source for the information sought here. 28 C.F.R. § 50.10(b).

Finally, we find that this subpoena strikes the "proper balance" between the "public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." 28 C.F.R. § 50.10(a). The NRC does not lightly issue subpoenas to members of the press. Here, the subpoena avoids probing into the general thesis of Mr. Chun's article and instead is narrowly focused on whether a specific individual (not Mr. Chun) made certain specific statements in order to determine whether those statements constitute a violation of NRC regulations and federal law. As such, and in light of the national interest in enforcing laws designed to protect our nation from terrorist attack, we conclude that the subpoena satisfies the DOJ guidelines for subpoenas issued to the media.

⁴ While Mr. Chun is the "target" of the subpoena, he is not the target of the investigation.

C. Mr. Chun's First Amendment Privilege

Mr. Chun also asserts that the subpoena violates his First Amendment rights under the “reporter’s privilege,” which he claims is guaranteed under *Branzburg v. Hayes*, 408 U.S. 665 (1972). Motion To Quash at 6-9. However, the motion to quash concedes that any privilege afforded to Mr. Chun is a “qualified” privilege that can be overcome by a showing of need and unavailability from other sources. Motion To Quash at 7-8.⁵ The Second Circuit has adopted this approach. See generally *Gonzales v. NBC*, 194 F.3d 29, 32-36 (2d Cir. 1999) (citations omitted). But, as the Second Circuit also noted in *Gonzales*, “where the protection of confidential sources is not involved, the nature of the press interest protected by the privilege is narrower.” 194 F.3d at 35-36 (citation omitted). The *Gonzales* Court asserted:

We believe that when protection of confidentiality is not at stake, the privilege should be more easily overcome. Accordingly, we now hold that, while nonconfidential press materials are protected by a qualified privilege, the showing needed to overcome the privilege is less demanding than the showing required where confidential materials are sought. Where a civil litigant seeks nonconfidential materials from a nonparty press entity, the litigant is entitled to the requested discovery notwithstanding a valid assertion of the journalists’ privilege if he can show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources.

194 F.3d at 36 (footnote omitted). See also *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) (“When the information in the reporter’s possession does not come from a confidential source, it is difficult to see what possible bearing the First Amendment could have on the question of compelled disclosure”).

In this case, we have concluded that the information subject to the subpoena is not “confidential.” First, Mr. Chun did not make any specific claim of confidentiality in his motion to quash. Second, this is not a case where the reporter’s source is “confidential”; instead, the article specifically quotes the former employee by name. Third, Mr. Chun has placed this information in the

⁵ Although we need not reach this issue here, new doubts have been raised as to whether this “qualified” privilege actually exists. The majority opinion in *Branzburg* explicitly rejected that claim within the context of a Grand Jury subpoena by a 5-4 vote. See 408 U.S. at 689-91. The conditional or qualified privilege claimed here was adopted by only three members of the Supreme Court in the *Branzburg* dissent. See 408 U.S. at 743. As the U.S. Court of Appeals for the Sixth Circuit points out in *In re Grand Jury Proceedings: Storer Communications v. Giovan*, 810 F.2d 580, 585 (6th Cir. 1987), most courts that have adopted the “qualified” privilege point to Justice Powell’s concurring opinion as the basis for adopting that approach. However, the *Storer Communications* decision raises serious doubts about the correctness of such an analysis, correctly noting that Justice Powell also signed the majority opinion. *Id.*

public domain by publication in the article. So this is not a case in which the reporter is maintaining in confidence the details about plant security that he has learned. Fourth, the NRC is not looking for information about any other people who may have been interviewed by Mr. Chun in preparation for the article; instead, the NRC is looking to confirm that the statements attributed to the former employee in the article are indeed exactly what he told Mr. Chun. Thus, Mr. Chun's information is not "confidential."

Mr. Chun cites *United States v. Burke*, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983), for the proposition that the subpoena should be quashed. But that case is not applicable here. In *Burke*, the Second Circuit affirmed a decision by the trial judge to quash a defendant's subpoena for a reporter's notes and tapes about conversations with a prosecution witness. The Second Circuit held that the information sought was for impeachment purposes only and was merely cumulative, not "highly material and relevant." 700 F.2d at 77-78. Moreover, the Court held that the defendant had failed to demonstrate that the materials were not available from another source. 700 F.2d at 77 n.8. Here, the material sought is both "highly material and relevant" and unavailable from other sources.

The *Gonzales* case, cited above, supports the NRC's position. That case involved a civil rights lawsuit in Louisiana in which persons alleged that a Deputy Sheriff was stopping Hispanic individuals without cause. Shortly thereafter, NBC aired a segment in its "Dateline" television series that involved the same Deputy Sheriff, and that included video of the Deputy stopping the NBC reporter. Both parties issued subpoenas to NBC seeking the unedited tapes (or "outtakes") that were shot by the film crew, and for depositions of the NBC personnel involved. 194 F.3d at 30-31. The District Court ordered NBC to provide the outtakes to the parties and NBC appealed. 194 F.3d at 31-32.

The Second Circuit affirmed, stating:

The outtakes are clearly relevant to a significant issue in the case. The District Court reasonably found they may assist the trier of fact in assessing whether [the Deputy] had probable cause to stop the NBC vehicle and might help determine whether he engaged in a pattern or practice of stopping vehicles without probable cause, as the Plaintiffs allege. We are also persuaded that the outtakes contain information that is not reasonably obtainable from other available sources, because they can provide unimpeachably objective evidence of [the Deputy's] conduct."

194 F.3d at 36 (citation omitted).

Likewise, in this case, Mr. Chun's information about any conversations with the former employee can help the NRC in determining whether the former employee made the statements attributed to him. Thus, the information subject to this subpoena is clearly "of likely relevance to a significant issue in the case," i.e., did the former employee violate the NRC's regulation prohibiting the

unauthorized disclosure of safeguards information when he provided information to Mr. Chun for his article? Moreover, this information is “not reasonably obtainable from other available sources” because there are no other sources for this material or its equivalent. Accordingly, we conclude that, in the circumstances of this case, the NRC Staff has overcome the “qualified privilege” accorded to Mr. Chun. Therefore, we deny the motion to quash insofar as it applies to Mr. Chun’s testimony about any conversations with the former employee.⁶

V. CONCLUSION

Based upon the foregoing analysis, we conclude that OI has proper authority to issue the subpoena to Mr. Chun; that the subpoena meets the Department of Justice Guidelines; and that the NRC’s need for the information and lack of alternative source for the information overcomes Mr. Chun’s qualified privilege as a journalist. Therefore, we deny the motion to quash with regard to Mr. Chun’s testimony about his conversations with the former employee. We enforce the subpoena, as modified, and set a new return date for compliance with the subpoena of January 13, 2005, at 10:00 a.m. local time, at the NRC’s Region I Office, or at any other reasonable time, date, and location mutually agreeable to Mr. Chun and OI.

However, as we noted above, Mr. Chun claims that he returned the tapes and notes of his conversations with the former plant employee to the magazine under his employment contract and before he was issued the subpoena under review in this case. Accordingly, as detailed above, we will grant the motion to quash with regard to that portion of the subpoena that calls for the production of the tapes and notes, subject to the condition specified, i.e., that Mr. Chun files an affidavit within 14 days of the date of this Order (1) stating that he returned the materials to the magazine pursuant to his employment contract prior to the issuance of subpoena (including the date he returned the materials), (2) providing a copy of the employment contract (with personal information such as his salary, etc., redacted), and (3) releasing without reservation any claim of ownership or creative rights in the materials themselves to the magazine.

Should Mr. Chun not file such an affidavit within the prescribed time, the motion to quash is denied in its entirety.

⁶Obviously, if the NRC Staff concludes that the former employee made the statements attributed to him in the article, and then either initiates an enforcement proceeding on its own or refers the matter to the DOJ for possible criminal prosecution, the former employee may very well subpoena Mr. Chun in an effort to vindicate himself. Mr. Chun appears to concede that a reviewing court might very well enforce such a subpoena. Motion To Quash at 9, citing *United States v. Cutler*, 6 F.3d 67 (2d Cir. 1993).

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of December 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 70-3103-ML

LOUISIANA ENERGY SERVICES, L.P.
(National Enrichment Facility)

December 8, 2004

The Commission denies motions for reconsideration of a previously issued Commission decision, remands to the Board requests to admit a late-filed contention, and denies requests by two governmental entities to participate on other parties' admitted contentions. The Commission also affirms a Board decision denying one party's request to serve as a "co-lead" party.

RULES OF PRACTICE: RECONSIDERATION MOTIONS

We do not lightly revisit our own already-issued decisions. We do so only if the party seeking reconsideration brings decisive new information to our attention or demonstrates a fundamental Commission misunderstanding of a key point.

RULES OF PRACTICE: CONTENTIONS

If exigent circumstances warrant an extension of the petition deadline, our rules allow petitioners to file a motion requesting an extension of the filing deadline. What our rules do not allow is using reply briefs to provide, for the first time, the necessary threshold support for contentions; such a practice would effectively bypass and eviscerate our rules governing timely filing, contention amendment, and submission of late-filed contentions.

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.315(c))

The opportunity for state or local governmental entities or affected federally recognized Indian tribes to participate in NRC proceedings is available only to those governmental representatives that have not been admitted as a party under 10 C.F.R. § 2.309.

MEMORANDUM AND ORDER

The Commission today addresses several pending items. These include motions by the New Mexico Environment Department (Environment Department) and the Attorney General of New Mexico (Attorney General) for reconsideration of our decision in CLI-04-25,¹ as well as the Attorney General's motion for leave to file a late-filed contention, and the Environment Department's similar request to submit late contentions. We also respond to issues referred to us by the Atomic Safety and Licensing Board in an order issued on September 14, 2004, specifically the Board's rulings on (1) motions for clarification on participation in this proceeding, filed by the Attorney General and the Environment Department, who seek to participate on contentions admitted by other parties, and (2) the Attorney General's request to act as a "co-lead" party on contention NIRS/PC EC-5/TC-2-AGNM TC-i, a consolidated contention on decommissioning costs on which the Board designated Joint Intervenors Nuclear Information and Resource Service (NIRS) and Public Citizen (PC) the lead party.

As explained further below, the Commission denies the motions for reconsideration of CLI-04-25. We remand to the Board the Attorney General's motion (and the Environment Department's request) to admit a late-filed contention. We deny the Attorney General's and Environment Department's requests to participate in this proceeding on other parties' admitted contentions. Finally, we do not disturb the Board's ruling denying the Attorney General's request to act as a "co-lead" party on the consolidated decommissioning costs contention.

I. MOTIONS FOR RECONSIDERATION OF CLI-04-25

In CLI-04-25, the Commission reviewed contentions that the Licensing Board referred to us. Four were contentions that the Board rejected in LBP-04-14² for failure to meet our contention rule standards. The Environment Department had submitted one of these contentions, and the Attorney General the other

¹ 60 NRC 223 (2004).

² 60 NRC 40 (2004).

three.³ In rejecting these contentions, the Board stressed that the Environment Department and the Attorney General “‘reply’ filings essentially constituted untimely attempts to amend their original petitions” without addressing the late-filing factors set out in 10 C.F.R. § 2.309(c) and (f).⁴ While the Board took into account information from the reply briefs that “‘legitimately amplified’” issues presented in the Environment Department and the Attorney General hearing petitions, it did not consider entirely new support for the contentions offered in the reply briefs.⁵ In CLI-04-25, we affirmed the Board’s ruling on these contentions, agreeing that the reply briefs amounted to an out-of-time attempt to “‘reinvigorate’” and effectively amend what had been inadequately supported contentions in the hearing petitions.⁶

Both the Environment Department and the Attorney General now ask us to reconsider our decision. The Environment Department claims that in requesting more time to file its reply, it acknowledged to the Board that its hearing petition had “‘not fulfill[ed]’” the requirements of the contentions rule, and that therefore it “‘specifically requested additional time to meet those requirements’” with its reply filing.⁷ Because the Board granted its request for an extension of time, the Environment Department states that it “‘could not have anticipated that its additional material [in the reply brief] would not have been considered.’”⁸

The Attorney General states that in her reply brief she responded to the “‘NRC staff’s and Applicant’s concerns about the specificity and bases’” of her contentions.⁹ Because the Applicant and Staff were “‘uncertain what precisely [the Attorney General] was alleging and the basis therefore,’” she says she used the reply brief to “‘explain[] and narrow[] the focus of her contentions and provided citations’” to cases and documents “‘that explained the precise basis for her concerns.’”¹⁰ Both the Attorney General and the Environment Department also suggest that their reply filings provided merely “‘additional bases’” for the contentions.

³The Environment Department’s contention was identified as NMED TC-1/EC/1. The Attorney General’s contentions were identified as AGNM EC-ii, AGNM EC-iii, and AGNM MC-i. “‘TC’” refers to contentions involving primarily technical health and safety issues, “‘EC’” involves primarily environmental claims, and “‘MC’”-designated contentions are a separate miscellaneous category. *See* “‘Initial Prehearing Order’” (Apr. 15, 2004).

⁴LBP-04-15, 60 NRC at 58.

⁵*Id.*

⁶*See* 60 NRC at 224-25.

⁷Environment Department’s Motion for Reconsideration (Sept. 3, 2004) at 5.

⁸*Id.*

⁹Attorney General’s Petition for Reconsideration (Aug. 31, 2004) at 1.

¹⁰*Id.* at 3.

We do not lightly revisit our own already-issued and well-considered decisions.¹¹ We do so only if the party seeking reconsideration brings decisive new information to our attention or demonstrates a fundamental Commission misunderstanding of a key point.¹² Here, the Environment Department and the Attorney General reconsideration petitions do not come close to meeting such standards.¹³ As we explained in CLI-04-25, the four proffered contentions at issue contained conclusory and unsupported allegations and thus no adequate basis. For example, the Environment Department and the Attorney General each submitted a contention regarding the onsite storage of depleted uranium at the LES facility. The Attorney General claimed that such onsite storage “poses a distinct environmental risk to New Mexico.”¹⁴ Similarly, the Environment Department claimed that onsite storage “may pose a threat” to health and property and that LES’s proposed storage plan was insufficiently detailed.¹⁵ Neither petition alleged facts or expert opinion in support of these broad and conclusory allegations. LES’s application outlines potential environmental, health, and safety impacts of storing depleted uranium in uranium byproduct cylinders (UBCs) on an open-air storage pad. But neither the Attorney General nor the Environment Department addressed with any particularity or support how LES’s proposed plan for onsite storage of depleted uranium lacks sufficient information, provides an inaccurate environmental impacts assessment, or otherwise falls short.

“Allowing contentions to be added, amended, or supplemented at any time would defeat the purpose of the specific contention requirements,” as the NRC Staff explains, “by permitting the intervenor to initially file vague, unsupported, and generalized allegations and simply recast, support, or cure them later.”¹⁶ The Commission has made numerous efforts over the years to avoid unnecessary

¹¹ See, e.g., *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-18, 58 NRC 433 (2003), *aff’d*, *Connecticut Coalition Against Millstone*, No. 04-0109 (2d Cir., Oct. 14, 2004) (unpublished).

¹² Under the newly revised hearing procedures in 10 C.F.R. Part 2, a petition for reconsideration may only be granted upon a showing of “compelling circumstances,” such as a clear and material error in a decision which could not have reasonably been anticipated that renders the decision invalid. See 10 C.F.R. § 2.341(d) (referencing the standard found in section 2.323(e)). Petitions for reconsideration of a Commission decision after Commission review — such as the Attorney General and the Environment Department seek — are to be filed under section 2.341(d). Petitions for reconsideration of a *final* Commission (or Licensing Board) decision, on the other hand, are filed under section 2.345. Finally, there is a catch-all provision for motions for reconsideration, found in section 2.323(e), intended for reconsideration of orders in general, e.g., rulings on discovery, motions, etc.

¹³ *Ahmed v. Ashcroft*, 388 F.3d 247 (7th Cir. 2004). A reconsideration motion, to be successful, cannot simply “republish” prior arguments, but must give the Commission a good “reason to change its mind.” *Id.* at 249.

¹⁴ See Supplemental Request of the Attorney General for Hearing (Apr. 23, 2004) at 5-6.

¹⁵ See Environment Department’s Request for Hearing (Mar. 24, 2004) at 2.

¹⁶ NRC Staff Response to Attorney General’s Petition for Reconsideration (Sept. 3, 2004) at 6.

delays and increase the efficiency of NRC adjudication and our contention standards are a cornerstone of that effort. We believe that the 60-day period provided under 10 C.F.R. § 2.309(b)(3) for filing hearing requests, petitions, and contentions is “more than ample time for a potential requestor/intervenor to review the application, prepare a filing on standing, and develop proposed contentions and references to materials in support of the contentions.”¹⁷ Under our contention rule, Intervenor is not being asked to prove their case, or to provide an exhaustive list of possible bases, but simply to provide sufficient alleged factual or legal bases to support the contention, and to do so at the outset. We agree with the Licensing Board that on these four particular contentions, the Attorney General and the Environment Department failed to do so.¹⁸

If exigent circumstances warrant an extension of the petition deadline, our rules allow petitioners to file a motion requesting an extension of the filing deadline.¹⁹ Here, neither the Environment Department nor the Attorney General requested more time in which to prepare their hearing petitions. In addition, our rules allow a late-filed petition and contentions where there is a compelling justification.²⁰ What our rules do not allow is using reply briefs to provide, for the first time, the necessary threshold support for contentions; such a practice would effectively bypass and eviscerate our rules governing timely filing, contention amendment, and submission of late-filed contentions. While our rules provide that designated governmental entities need not provide a showing of standing to intervene, our rules do not, as the Board stated, “give[] them additional latitude to comply with the requirements governing the pleading and amendment of contentions.”²¹

Both the Environment Department and the Attorney General requested and were granted additional time in which to file reply briefs. The Environment Department suggests that because the Board allowed it extra time to file a reply brief, the Board in effect misled the Environment Department into assuming that it could use the reply brief to cure deficiencies in the hearing petition. The Environment Department states that once the Board granted its request for more

¹⁷ Final Rule: “Changes to Adjudicatory Process,” 69 Fed. Reg. 2182, 2199 (Jan. 14, 2004).

¹⁸ In addition to the lack of supporting bases, the Board also found other deficiencies (with which we concur) among the referred contentions. These included impermissible challenges to rulemaking-associated generic determinations (e.g., the “plausible strategy” for disposition of depleted uranium by transfer to DOE if the NRC declares the depleted uranium to be low-level waste), and a failure to establish a genuine dispute with the application. *See generally* LBP-04-14, 60 NRC at 60-66.

¹⁹ *See* Final Rule, 69 Fed. Reg. at 2200.

²⁰ *See* 10 C.F.R. § 2.309(c). The Environment Department and the Attorney General now seek to have contentions admitted under the late contentions rule. We address these requests in the next section of this decision.

²¹ LBP-04-14, 60 NRC at 57.

time to submit a reply, it “then expended substantial resources to retain experts in order to make the proper showing.”²²

The Commission finds this claim unpersuasive. The Environment Department gave the Board “two reasons” for why it needed more time to file a reply. The first reason presented was that the Environment Department intended to coordinate resources with the Attorney General and accordingly “require[d] additional time to begin to coordinate [preparation of pleadings and presentation of evidence] with the Attorney General.”²³ The Environment Department’s second reason was the need to correct deficiencies in the hearing petition. In granting the extension request, the Board explicitly noted the NRC Staff’s concern that the Environment Department appeared to contemplate utilizing the reply brief effectively to amend the hearing petition. The Board stressed that a reply filing “should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC staff answer.”²⁴ The Environment Department should not have assumed that the Board effectively had given it a special opportunity to file its contentions anew by submitting more detailed allegations in a reply brief.

The Attorney General claims that in CLI-04-25 we violated a provision of the Administrative Procedure Act (APA), 5 U.S.C. § 557(c),²⁵ because we affirmed the Board’s rulings on contention admissibility without giving her an opportunity to present her arguments in defense of her contentions. But the Commission’s decision in CLI-04-25 was based on the parties’ presentations already in the record, including all of the Attorney General’s pleadings. And our rules gave the Attorney General the opportunity — which she has invoked — to seek reconsideration of our decision, with a supporting brief. Thus, the Commission is fully aware of the Attorney General’s position. The Commission has considered both her arguments before the Board and those she later submitted directly to us with her reconsideration petition.

II. REQUESTS TO ADMIT LATE-FILED CONTENTIONS

In its motion for reconsideration, the Environment Department alternatively argues that it actually “has met the requirements for late-filed contentions, and

²² Environment Department’s Motion for Reconsideration at 5.

²³ Environment Department’s Motion for Extension of Time To File Reply (Apr. 22, 2004) at 1-2.

²⁴ Memorandum and Order (Granting Extension of Time) (Apr. 27, 2004) at 2.

²⁵ Section 557(c) says that in “on the record” agency adjudications — this case is one (*see* 42 U.S.C. § 2243(b)) — agencies must give parties an opportunity to submit to the decision-maker “proposed findings and conclusions,” or “exceptions” to subordinates’ decisions, and “supporting reasons” for their “exceptions.” It is not self-evident that this language translates to a right to file appellate briefs when (as here) a hearing board refers a prehearing ruling on contention admissibility to the Commission.

should be allowed to intervene on [its] contentions.”²⁶ For the first time in this proceeding, the Environment Department addresses the standards for late-filed contentions under 10 C.F.R. § 2.309(c). The Environment Department claims that there is “good cause” for its “failure to put forth in sufficient detail the bases for its contentions” in its hearing petition, and that once it had “additional time and the aid of outside consultants,” it was able to support the contentions properly.²⁷ Given the fact-specific requirements of our “late-filed contention” rules,²⁸ and the Licensing Board’s closer familiarity with how admission of the Environment Department’s contention might affect the proceeding and parties, the Board in this instance is in a better position than the Commission to evaluate and balance our rules’ multiple “late-filed” factors. Accordingly, the Commission remands to the Board the Environment Department’s request to submit late-filed contentions.²⁹ On remand, the Board should apply the standards set forth in both sections 2.309(c) and (f).

It appears, however, that the Environment Department seeks to apply the late-filing standards to *all* of its rejected contentions, and not merely the one Environment Department contention that the Board earlier referred to us.³⁰ As to the two rejected contentions that the Board did not refer to us, the Environment Department may appeal the rejection of these contentions at the end of the hearing, if the Board does not admit them under the late-filed contention rule.³¹

The Attorney General also seeks to have a contention admitted under the late-filed contention rules. On September 13, 2004, the Attorney General filed a motion with the Commission seeking admission of a newly proposed contention on the waste classification of depleted uranium under Part 61. As we noted above, the Board is best situated to consider and balance the fact-specific requirements under our “late-filed” rules. Therefore, we remand the Attorney General’s request to file a late-filed contention to the Board for its consideration.

²⁶ MNED’s Motion for Reconsideration at 5.

²⁷ *Id.* at 6.

²⁸ 10 C.F.R. § 2.309(c) and (f).

²⁹ Indeed, the Board already has before it a similar recently filed (Oct. 20, 2004) motion by the Environment Department for permission to file late contentions.

³⁰ The Environment Department submitted five contentions, but later withdrew one contention. Of these remaining four contentions, the Board admitted one and found three inadmissible. The Board referred only one of the three rejected contentions — a contention involving onsite storage of depleted uranium — to the Commission.

³¹ See, e.g., *Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466-67 (2004). The same is true for the Attorney General, whose Petition for Reconsideration, in a footnote, apparently attempts to “appeal” portions of a contention rejected by the Licensing Board but not referred to the Commission.

III. ENVIRONMENT DEPARTMENT AND ATTORNEY GENERAL PARTICIPATION ON OTHER PARTIES' CONTENTIONS

In separate pleadings before the Licensing Board, the Environment Department and the Attorney General sought clarification of how they may participate in this proceeding on admitted contentions that they did not file. Specifically, the Environment Department sought to participate as an “interested state” on behalf of the State of New Mexico, pursuant to 10 C.F.R. § 2.315(c). The Environment Department seeks to participate as a party on its sole admitted contention, and as an “interested state” on other parties’ admitted contentions. It stated that it “should be permitted to participate in both capacities in order that it may raise all issues in which it has an interest.”³² “Interested states” may introduce evidence, interrogate witnesses where cross-examination is permitted, advise the Commission without the need to take a position on the subject at issue, file proposed findings where findings are permitted, and petition for review with respect to the admitted contentions.³³

Quoting the language of section 2.315(c), the Licensing Board ruled that the opportunity for state or local governmental entities or affected federally recognized Indian tribes to participate in NRC proceedings is available only to those government representatives “which ha[ve] *not* been admitted as a party under § 2.309.”³⁴ Because the Environment Department is an admitted party to the proceeding, the Board found that the Environment Department cannot participate as an “interested state” on other parties’ admitted contentions. The Board pointed out that the new Part 2 adjudicatory rules explicitly provide the option for petitioners to “adopt” other petitioners’ contentions, “thus providing an avenue of participation for any party in connection with any of the contentions proffered by another participant.”³⁵ In this proceeding, the Board afforded the Environment Department and the Attorney General an early opportunity to adopt any of each others’ or NIRS/PC’s proffered contentions.³⁶ But the Environment Department did not adopt any other proffered contentions. The Attorney General adopted one contention submitted by the Environment Department (although that contention was not admitted).

The Board referred its “interested state” ruling to us. We find that the Board correctly read the plain terms of section 2.315(c) as allowing government entities to claim “interested state” participation only if they are not already admitted

³² Environment Department’s Request for Clarification (Sept. 3, 2004) at 2.

³³ See 10 C.F.R. § 2.315(c).

³⁴ Memorandum and Order (Clarification Requests Ruling and Commission Referral) (Sept. 14, 2004) at 3 (emphasis added).

³⁵ *Id.*

³⁶ See Order (Supplements Regarding Contentions) (May 24, 2004).

parties. We therefore affirm the Board's decision denying the Environment Department's request to participate as an "interested state."

While not citing the "interested state" provision under our rules, the Attorney General also sought guidance from the Board on whether she would be permitted, on behalf of the citizens of the State of New Mexico, to cross-examine witnesses where cross-examination is permitted and to file proposed findings on contentions where findings are permitted. The Attorney General cited NRC cases from the 1970s, which held that an intervenor with an interest in a matter could participate in such fashion on contentions sponsored by other parties, on those matters already placed into controversy.³⁷ The Presiding Officer ruled against the Attorney General's request, but again referred his ruling to the Commission.

We agree with the Presiding Officer's decision that our current rules do not provide an unconstrained right for a party to cross-examine and submit proposed findings on all other parties' contentions, regardless of whether the contentions were ever adopted:

With contention adoption explicitly recognized as the method by which an intervenor can gain a role relative to another petitioner's proffered contentions, to permit any party to the proceeding to take an active role regarding any contention without regard to whether that party made any attempt to adopt that contention would seriously undermine the efficacy of that provision.³⁸

Thus, petitioners seeking intervention as a party under section 2.309 may choose to participate on other petitioners' contentions by *adopting* them.³⁹ Designated governmental representatives who have not been admitted as a party, but who choose to participate in NRC proceedings under 10 C.F.R. § 2.315 as interested states, local governmental bodies, or federally recognized Indian tribes, also may participate on any admitted contentions. The representative shall identify in advance of a hearing those contentions on which he or she wishes to participate.⁴⁰

³⁷ See *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-252, 8 AEC 1175, 1181 *aff'd*, CLI-75-1, 1 NRC 1 (1975). The decisions nonetheless stressed that the cross-examination would be strictly confined to the scope of direct examination and that an intervenor would not have free license to put additional matters into controversy, or to conduct repetitious questioning.

³⁸ Memorandum and Order (Clarification Requests Ruling) at 4.

³⁹ See 10 C.F.R. § 2.309(f)(3).

⁴⁰ See 10 C.F.R. § 2.315(c).

IV. “LEAD” PARTY DESIGNATION FOR CONTENTION ON DECOMMISSIONING COSTS

The final procedural issue the Board referred to us is its ruling on the Attorney General’s request for permission to serve on one consolidated contention in a “co-lead” party status with Intervenor NIRS/PC. The Board admitted one portion of an Attorney General contention on disposal security, which challenged the adequacy of the percentage amount LES has set aside to cover contingencies.⁴¹ The Board, however, consolidated this limited claim with a broader contention on decommissioning costs that Intervenor NIRS/PC had submitted, which, among other claims challenged as insufficient LES’s contingency factor. The Board designated NIRS/PC to be the “lead party” on this consolidated contention. The Board noted that the “lead” party would have the primary responsibility for litigation of the contention, including conducting all discovery, filing motions and testimony, conducting any redirect examination, and preparing proposed findings of fact and conclusions of law.

Subsequently, the Attorney General requested that the Board allow her and NIRS/PC to be “co-lead” parties on this consolidated contention. The Attorney General stressed that her interests in this proceeding are significantly different than those of NIRS/PC. Specifically, she claimed that unlike NIRS/PC, she does not oppose the proposed LES facility, but seeks to assure that the facility is constructed and operated safely. The Attorney General also says that she seeks to assure that state resources will not need to be expended to avoid or mitigate any safety or environmental hazards that may be associated with the disposition of enrichment tails. She and NIRS/PC jointly submitted a status report on how they would share litigation responsibilities. They stated an intent to communicate on the positions to be taken in the litigation, and stated that in the event of differences concerning LES’s contingency factor, each “co-lead” party would present its own evidence or argument through witnesses, discovery responses, briefings, or proposed findings. Both the NRC Staff and LES opposed this request for “co-lead” status, expressing concerns about delay and duplicative evidence.

The Board denied the Attorney General’s request for “co-lead” status. It found unpersuasive her claims “regarding the differing nature of the public and private interests involved relative to the ‘contingency factor’ aspect of the contention . . . that is the sole [Attorney General] feature” of the consolidated contention.⁴² The Board also found that the plan to share responsibilities as “co-lead” parties was vague, and that the intent to proceed separately in the event of differences would undermine the purpose of the “lead party” designation, which aims for a

⁴¹ See LBP-04-14, 60 NRC at 62.

⁴² See Memorandum and Order (Memorializing and Ruling on Matters) (Aug. 16, 2004) at 3.

unified presentation. The Board therefore kept NIRS/PC as the lead party for the contention, directed the Attorney General and NIRS/PC to consult on all material aspects of the litigation, and stated that if they are unable to agree they should promptly bring their differences to the Board for resolution.

The Board referred this ruling to us, expressing some concern over whether it had been appropriate to consolidate a governmental and a private party on a contention, although noting that similar consolidations had occurred in other proceedings. In general, the Commission is very hesitant to disturb procedural case management decisions made by the Board.⁴³ We therefore leave in place the Board's decision to consolidate the two parties' contentions and to designate NIRS/PC as the lead party. The Board has taken care to protect the Attorney General's interests. As the Board has indicated, if the Attorney General strongly disagrees with any aspect of the litigation of this consolidated contention, she may bring her concerns to the Board for resolution.

The Commission stresses that if the Board's "lead party" process itself results in collateral controversies which might delay the proceeding more than simply having the Attorney General make her own separate presentation on the "contingency factor" issue, the Board may revisit its decision to consolidate this contention or to assign a "lead" litigation role for it. These are matters best decided by the Board and we leave them to the Board's judgment.

V. CONCLUSION

For the reasons given in this decision, (1) the Attorney General and the Environment Department petitions for reconsideration of CLI-04-25 are *denied*; (2) the Attorney General and the Environment Department requests to admit late-filed contentions are *remanded* to the Board for its consideration; (3) the Board's decisions denying the Environment Department's and Attorney General's requests to participate on other parties' contentions are *affirmed*; and (4) the Board's decision rejecting a "co-lead" litigation status on the consolidated decommissioning costs contention is *affirmed*.

⁴³ See, e.g., *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-02-13, 55 NRC 269, 273 (2002).

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of December 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

**Docket Nos. 50-336-LR
50-423-LR**

DOMINION NUCLEAR CONNECTICUT, INC.
(Millstone Nuclear Power Station,
Units 2 and 3)

December 8, 2004

The Connecticut Coalition Against Millstone (CCAM) has sought intervenor status and a hearing in which to challenge Dominion Nuclear Connecticut's (Dominion's) pending application to renew its operating licenses for Units 2 and 3 of the Millstone Nuclear Power Station. The Licensing Board issued LBP-04-15, denying CCAM's intervention petition on the ground that each of CCAM's six proffered contentions was inadmissible under 10 C.F.R. § 2.309(f)(1). CCAM sought reconsideration of the Board's order, and requested permission to provide additional support for its contentions. The Board issued LBP-04-22, denying these two requests. On appeal, the Commission affirms the Board's two orders, denies CCAM's appeals, and terminates the proceeding.

RULES OF PRACTICE: ADMISSIBILITY OF CONTENTIONS

REGULATIONS: 10 C.F.R. § 2.309(f)(1)

The Commission will affirm a board's ruling on admissibility of contentions where the appellant fails on appeal to address adequately (if at all) the board's grounds for refusing to admit these contentions, and/or fails to provide specific support for its contentions, and/or presents contentions that fall beyond the scope of the proceeding.

RULES OF PRACTICE: ADMISSIBILITY OF CONTENTIONS

REGULATIONS: 10 C.F.R. § 2.309(f)(1)

Section 2.309(f)(1) of our new Rules of Practice provides that, for a contention to be admissible, it must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case where the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief. In addition, the petitioner must demonstrate that the issue raised in the contention is both within the scope of the proceeding and material to the findings the NRC must make to support the action that is involved in the proceeding. Failure to comply with any of these requirements is grounds for the dismissal of a contention.

RULES OF PRACTICE: AMENDED OR NEW CONTENTIONS

REGULATIONS: 10 C.F.R. § 2.309(f)(2)

This agency does not look with favor on amended or new contentions filed after the initial filing. Section 2.309(f)(2) of our new regulations provides that petitioners may file such late contentions “only upon a showing that — (i) [t]he information upon which the amended or new contention is based was not previously available; (ii) [t]he information upon which the amended or new contention is based is materially different than information previously available; and (iii) [t]he amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.”

RULES OF PRACTICE: RECONSIDERATION OF BOARD ORDERS

REGULATIONS: 10 C.F.R. § 2.323(e)

The NRC sets a high bar for parties seeking reconsideration of board orders. Section 2.323(e) of our regulations provides that “Motions for reconsideration may not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.”

**RULES OF PRACTICE: ADMISSIBILITY OF CONTENTIONS;
APPELLATE REVIEW (ADMISSIBILITY OF CONTENTIONS)**

The Commission affirms Board rulings on admissibility of contentions if the appellant “points to no error of law or abuse of discretion.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000).

SCOPE OF PROCEEDING: LICENSE RENEWAL

**RULES OF PRACTICE: SCOPE OF PROCEEDING
(LICENSE RENEWAL)**

The potential detrimental effects of aging is the issue that essentially defines the scope of license renewal proceedings. Our license renewal inquiry is narrow. It focuses on the potential impacts of an additional 20 years of nuclear power plant operation, not on everyday operational issues. Those issues are effectively addressed and maintained by ongoing agency oversight, review, and enforcement.

SCOPE OF PROCEEDING: LICENSE RENEWAL

**RULES OF PRACTICE: SCOPE OF PROCEEDING
(LICENSE RENEWAL)**

REGULATIONS: 10 C.F.R. § 2.206

A license renewal proceeding is not the proper forum for the NRC to consider operational issues. If an intervenor has information supporting its claim that a licensee’s operation has caused “human suffering on a vast scale,” its remedy would not be a narrowly focused license renewal hearing, but instead a citizen’s petition under 10 C.F.R. § 2.206.

SCOPE OF PROCEEDING: LICENSE RENEWAL

**RULES OF PRACTICE: SCOPE OF PROCEEDING
(LICENSE RENEWAL)**

“Contentions related to terrorism are beyond the scope of [a license renewal] proceeding.” *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358, 363 (2002).

SCOPE OF PROCEEDING: LICENSE RENEWAL

**RULES OF PRACTICE: SCOPE OF PROCEEDING
(LICENSE RENEWAL)**

Security issues at nuclear power reactors, while vital, are simply not among the aging-related questions at stake in a license renewal proceeding.

**NATIONAL POLLUTANT DISCHARGE ELIMINATION
SYSTEM PERMIT**

The NRC does not require a licensee to possess a National Pollutant Discharge Elimination System permit. *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 58, *rev'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974).

**NATIONAL POLLUTANT DISCHARGE ELIMINATION
SYSTEM PERMIT**

SCOPE OF PROCEEDING: LICENSE RENEWAL

**RULES OF PRACTICE: SCOPE OF PROCEEDING
(LICENSE RENEWAL)**

LICENSING BOARD JURISDICTION

A licensee's possession of a National Pollutant Discharge Elimination System permit is outside both the scope of the license renewal proceeding and the jurisdiction of the licensing board.

RULES OF PRACTICE: APPELLATE REVIEW

The Commission does not consider arguments raised for the first time on appeal.

EMERGENCY PLANNING

**RULES OF PRACTICE: SCOPE OF REVIEW (LICENSE
RENEWAL PROCEEDINGS)**

SCOPE OF REVIEW: LICENSE RENEWAL PROCEEDINGS

Emergency planning issues fall outside the scope of license renewal proceedings. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), LBP-04-15, 60 NRC 81, 97 (2004), citing *Florida Power & Light*

Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 9 (2001).

RULES OF PRACTICE: SANCTIONS

REGULATIONS: 10 C.F.R. § 2.314(c)(1)

The Commission expresses its displeasure at the CCAM attorney's consistent disregard for our procedural rules. This is her fifth NRC adjudication since 1999, so she cannot credibly claim ignorance of our practices and procedures. CCAM's attorney has, in this proceeding, repeatedly failed to provide support at the hearing for her client's contentions, as required under 10 C.F.R. § 2.309(f), and has likewise ignored numerous other Commission adjudicatory procedures. She has a similar record in four previous *Millstone* proceedings, where she has repeatedly failed to follow basic NRC adjudicatory procedures.

The Commission informs CCAM's Counsel that any further disregard of our practices and procedures in future adjudications will result in reprimand, censure, or suspension pursuant to 10 C.F.R. § 2.314(c)(1) (providing for sanctions against any "representative of a party who refuses to comply with [the Commission's or the Licensing Board's] directions"). This ruling applies regardless of whether her representation before the NRC is as an attorney at law or otherwise. If such breaches occur during the threshold or hearing stage of an adjudication, we instruct the Board in that proceeding to exercise its authority under 10 C.F.R. § 2.319(g) and impose what it considers appropriate sanctions. We will do the same for any breach during the appellate stage. This warning does not mean that CCAM or its counsel is unwelcome at future NRC proceedings, but only that they must participate according to our rules.

MEMORANDUM AND ORDER

The Connecticut Coalition Against Millstone (CCAM) has sought intervenor status and a hearing in which to challenge Dominion Nuclear Connecticut's (Dominion's) pending application to renew its operating licenses for Units 2 and 3 of the Millstone Nuclear Power Station. On July 28, 2004, the Licensing Board issued LBP-04-15, 60 NRC 81, denying CCAM's intervention petition on the ground that each of CCAM's six proffered contentions was inadmissible under 10 C.F.R. § 2.309(f)(1). CCAM sought reconsideration of the Board's order, and requested permission to provide additional support for its contentions. On September 20th, the Board issued LBP-04-22, 60 NRC 379, denying CCAM's motion for reconsideration and request to provide additional support. CCAM has appealed the Board's July 28th and September 20th orders. For the reasons set

forth below and in the Board's two orders, we affirm those orders, deny CCAM's appeals, and terminate the proceeding.

LEGAL STANDARDS

Section 2.309(f)(1) of our new Rules of Practice provides that, for a contention to be admissible, it must provide (1) a specific statement of the legal or factual issue sought to be raised; (2) a brief explanation of its basis; (3) a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and (4) sufficient information demonstrating that a genuine dispute exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case where the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief.¹ In addition, the petitioner must demonstrate that the issue raised in the contention is both "within the scope of the proceeding" and "material to the findings the NRC must make to support the action that is involved in the proceeding."² Failure to comply with any of these requirements is grounds for the dismissal of a contention.³

This agency does not look with favor on "amended or new contentions filed after the initial filing."⁴ Section 2.309(f)(2) of our new regulations provides that petitioners may file such late contentions

only upon a showing that —

- (i) [t]he information upon which the amended or new contention is based was not previously available;
- (ii) [t]he information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) [t]he amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information."⁵

The NRC likewise sets a high bar for parties seeking reconsideration of Board orders. Section 2.323(e) of our regulations provides that

¹ See 10 C.F.R. § 2.309(f)(1)(i), (ii), (v), and (vi). These requirements are the same as those in our prior contention pleading rule, 10 C.F.R. § 2.714(c).

² See *id.* § 2.309(f)(1)(iii), (iv).

³ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

⁴ 10 C.F.R. § 2.309(f)(2).

⁵ 10 C.F.R. § 2.309(f)(2)(i)-(iii). See also 10 C.F.R. § 2.309(c)(1).

Motions for reconsideration may not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid.

Finally, the Commission affirms Board rulings on admissibility of contentions if the appellant “points to no error of law or abuse of discretion.”⁶

DISCUSSION

I. APPEAL OF LBP-04-15

CCAM asserts in its appeal of LBP-04-15 that the Board should have admitted all six of CCAM’s contentions. We examine each one briefly below and conclude that CCAM has failed on appeal to address adequately (if at all) the Board’s grounds for refusing to admit these contentions. We also concur with the Board’s conclusions that CCAM has repeatedly failed to provide specific support for its contentions and that many of its contentions are beyond the limited scope of this license renewal proceeding. Consequently, we affirm LBP-04-15.

In Contention I, CCAM argued that “[t]he operations of Millstone Units 2 and 3 have caused death, disease, biological and genetic harm and human suffering on a vast scale.”⁷ The Licensing Board rejected this contention for failure to set forth the specific factual or legal basis, as required by 10 C.F.R. § 2.309(f)(1)(v).⁸ The Board further found that CCAM had not shown how its allegations may be related to the potential detrimental effects of aging⁹ — which is, after all, the issue that essentially defines the scope of this (and all other) *license renewal* proceedings.¹⁰ Our license renewal inquiry is narrow. It focuses on “the potential impacts of an additional 20 years of nuclear power plant operation,”¹¹ not on everyday

⁶ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000).

⁷ LBP-04-15, 60 NRC at 90.

⁸ *Id.* at 90-91.

⁹ *Id.* at 92.

¹⁰ See “Notice of Acceptance for Docketing of the Applications and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR-65 and NPF-49,” 69 Fed. Reg. 11,897 (Mar. 12, 2004), defining the scope of the instant proceeding. See generally *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7 (2001); Final Rule: “Nuclear Power Plant License Renewal; Revisions,” 60 Fed. Reg. 22,461 (May 8, 1995).

¹¹ *Turkey Point*, CLI-01-17, 54 NRC at 7.

operational issues. Those issues are “effectively addressed and maintained by ongoing agency oversight, review, and enforcement.”¹²

We have reviewed the record here and conclude that it fully supports the Board’s determinations on Contention I. We therefore reject CCAM’s appeal of the Board’s ruling that Contention I is inadmissible. We also reject this portion of CCAM’s appeal on an additional procedural ground — the appeal does not even challenge the Board’s ruling that Contention I falls outside the scope of this proceeding.¹³ CCAM’s failure to challenge this last ruling is, in and of itself, sufficient justification to reject CCAM’s appeal as to Contention I. This is *not* to say, however, that we take lightly assertions such as those set forth in Contention I. We don’t. We are saying merely that a license renewal proceeding is not the proper forum for the NRC to consider operational issues. If CCAM has information supporting its claim that Millstone’s operation has caused “human suffering on a vast scale,” its remedy would not be a narrowly focused license renewal hearing, but a citizen’s petition under 10 C.F.R. § 2.206.

In Contention II, CCAM argued that Millstone Units 2 and 3 are “terrorist targets of choice.”¹⁴ The Licensing Board concluded that this contention was inadmissible for failure to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(iii) (requiring that a contention be within the scope of the proceeding), and also for failure to provide supporting documentation.¹⁵ We again concur in the Board’s view. We draw particular attention to our ruling just 2 years ago that “contentions related to terrorism are beyond the scope of [a license renewal] proceeding.”¹⁶ On appeal, CCAM cites no authority to the contrary, offering instead only general references to the “911 Commission” Report and unidentified statements in the media.¹⁷ This does not come close to satisfying our requirement to demonstrate clear error or abuse of discretion. As with the health-related concerns expressed in Contention I, we want to emphasize that security issues at nuclear power reactors, while vital, are simply not among the aging-related questions at stake in a license renewal proceeding. The Commission, as we have often reiterated, takes its security responsibilities seriously and has taken numerous regulatory steps to enhance security at nuclear power reactors.¹⁸

In Contention III, CCAM argued that Dominion currently lacks a valid National Pollutant Discharge Elimination System permit. The Board rejected this

¹² *Id.* at 9.

¹³ *See* Notice of Appeal, undated but filed Aug. 9, 2004 (“First Appeal”), at 2-4.

¹⁴ LBP-04-15, 60 NRC at 92.

¹⁵ *Id.*

¹⁶ *Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2)*, CLI-02-26, 56 NRC 358, 363 (2002).

¹⁷ First Appeal at 4-6.

¹⁸ *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 160-62 & nn.4-6 (2d Cir. 2004).

contention as outside both the scope of the license renewal proceeding and the jurisdiction of the Licensing Board.¹⁹ We agree with the Board. On appeal, CCAM does not challenge the correctness of the Board's "scope" ruling.²⁰ This contention has nothing whatever to do with aging-related issues, is beyond the scope of this proceeding, and is therefore inadmissible. Moreover, the NRC simply does not require a licensee to possess this particular permit.²¹ Contention III is therefore also immaterial to this proceeding

In Contention IV, CCAM contended that the operations of Millstone Units 2 and 3 "have caused devastating losses to the indigenous Niantic winter flounder population" and that "continued operations [of the facility] will increase the severity of the environmental damage."²² The Licensing Board declined to admit this contention for three reasons: CCAM's failure to take issue with the environmental provisions of Dominion's license renewal application by pointing out what portion is deficient; CCAM's failure to assert that Dominion failed to comply with the applicable NEPA regulation (10 C.F.R. § 51.53(c)(3)(ii)(B)); and CCAM's failure to provide any expert opinion or reference to substantiate its "general allegation" that Units 1 and 2 "somehow played a material role in the flounder population decline."²³

On appeal, CCAM challenges none of these three rulings, and instead merely makes general arguments about the flounder population's decline and CCAM's willingness to produce supporting documentation at a future hearing in this proceeding.²⁴ CCAM's general arguments do not come to grips with the Board's reasons for rejecting Contention IV and are not nearly enough to revive a contention that lacks support in the law or facts.²⁵ We see no basis to overturn the Board's well-taken rulings.

In Contention V, CCAM asserted that Units 2 and 3 "suffer technical and operational defects which preclude safe operation."²⁶ The Licensing Board, noting that CCAM had failed to cite even a "single specific deficiency" in

¹⁹ LBP-04-15, 60 NRC at 93.

²⁰ See First Appeal at 6-7.

²¹ *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 58, *rev'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974).

²² LBP-04-15, 60 NRC at 94, *citing* CCAM's Petition To Intervene, dated March 22, 2004, at 7, and CCAM's Amended Petition To Intervene, dated June 15, 2004, at 7.

²³ LBP-04-15, 60 NRC at 94, *citing* 10 C.F.R. § 2.309(f)(1)(v), (vi).

²⁴ See First Appeal at 7-8.

²⁵ See generally *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994) ("The appellant bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims").

²⁶ LBP-04-15, 60 NRC at 95.

the application,²⁷ rejected this contention as failing to satisfy the requirements of section 2.309(f)(1)(v) and (vi) to provide specificity and to set forth each deficiency and the reasons supporting petitioner’s conclusion regarding that deficiency.²⁸ On appeal, CCAM again fails to dispute the Board’s rationale²⁹ — a fatal flaw in its appellate challenge to the Board’s rejection of Contention V.

The Board also concluded that even CCAM’s general arguments reflect a failure to read or analyze the license renewal application,³⁰ constitute an improper challenge to Commission regulations,³¹ and exceed the aging-management scope of this license renewal proceeding.³² Based on our own review of the record, we fully concur in the Board’s conclusions. We do not reach CCAM’s belated argument that “the discussion of metal fatigue and its implications for the two reactors is closely mirrored, with no discussion of Unit 2’s history of excessive unplanned shutdowns and, hence, their effect on aging.”³³ This last argument was improperly raised for the first time on appeal. CCAM made no attempt to file this concern as a late-filed contention.³⁴ If CCAM can substantiate its new-arising argument, a petition under 10 C.F.R. § 2.206 would be the appropriate recourse.

Finally, CCAM argued in Contention VI that parts or all of Connecticut and Long Island “cannot be evacuated.”³⁵ The Licensing Board declined to admit the contention because it did not relate to aging and therefore, as with many of CCAM’s other claims, it lay beyond the scope of the license renewal proceeding.³⁶ In support, the Board cited our decision in *Turkey Point*, where we specifically held that emergency planning issues fall outside the scope of license renewal proceedings.³⁷ On appeal, CCAM does not attempt to distinguish *Turkey Point*; indeed, CCAM does not even cite the decision. Rather, CCAM challenges the adequacy of the evacuation plan itself, based on vague references to “[c]urrent circumstances,” “faithfulness to reality” and “common sensed” [*sic*].³⁸ We consider *Turkey Point* dispositive of this issue. The Licensing Board

²⁷ *Id.*

²⁸ *Id.* at 96.

²⁹ See First Appeal at 8-10.

³⁰ LBP-04-15, 60 NRC at 95.

³¹ *Id.* at 96.

³² *Id.*

³³ CCAM’s August 9th Appeal at 11.

³⁴ See *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139-40 (2004); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-04-2, 59 NRC 5, 8 n.18 (2004); *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-00-8, 51 NRC 227, 243 (2000).

³⁵ LBP-04-15, 60 NRC at 96, citing CCAM Petition at 9.

³⁶ 60 NRC at 96-97.

³⁷ 60 NRC at 97, citing *Turkey Point*, CLI-01-17, 54 NRC at 9.

³⁸ First Appeal at 10.

also explained that, in any event, the contention would have been inadmissible due to CCAM's failure to provide specific supporting facts or expert opinion — a conclusion CCAM does not challenge on appeal.³⁹

In sum, we believe that the Board in LBP-04-15 applied the correct standards for evaluating the proposed contentions and reached the correct result in refusing to admit each of them. We further believe that CCAM failed to show on appeal that the Board has either committed errors of law or abused its discretion.

II. APPEAL OF LBP-04-22

In its September 30th Appeal, CCAM first incorporates by reference its entire reconsideration request,⁴⁰ which we reject for the reasons given by the Board in LBP-04-22. CCAM also makes four specific arguments, which we address and reject below. Before examining each assertion, however, we rule generally that CCAM has failed to make the showing, required of all motions for reconsideration filed under 10 C.F.R. § 2.323(e), “of compelling circumstances, such as the existence of a clear and material error . . . , which could not have reasonably been anticipated, that renders the decision invalid.” CCAM likewise failed to address the regulatory criteria for amending already-filed contentions,⁴¹ which is essentially what CCAM seeks to do in its second appeal and motion for reconsideration. Notably, CCAM does not challenge on appeal the Board's ruling that CCAM did not attempt either to address those criteria or to demonstrate the prior unavailability of the material it submitted with its Motion for Reconsideration and Request for Leave To Amend Petition. We turn now to CCAM's four specific arguments.

First, CCAM argues that the Licensing Board “exalted form over substance” in rejecting the information supporting CCAM's petition. In particular, CCAM complains that the Licensing Board rejected “without proper basis” the proffered expert testimony of Dr. Ernest Sternglass and Joseph Mangano, as well as the proffered testimony of Cynthia Besade.⁴² These three affidavits accompanied CCAM's August 9th Request for Reconsideration and Motion To Amend Petition. The Licensing Board denied CCAM's motion to amend, citing the relevant

³⁹ 60 NRC at 97, *citing* 10 C.F.R. § 2.309(f)(1)(vi).

⁴⁰ CCAM's Appeal, dated Sept 30, 2004 (“Second Appeal”), at 1. The Commission does not favor incorporating pleadings by reference. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989). CCAM had been advised of this in the instant and prior proceedings. *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), 2004 WL 1505510, at *1 (NRC June 8, 2004); *id.* 2003 WL 194528, at *1 (NRC Jan. 16, 2003).

⁴¹ 10 C.F.R. § 2.309(f)(2).

⁴² Second Appeal at 1-2.

standards for amending contentions.⁴³ Specifically, the Board noted that CCAM did not attempt to demonstrate that the new information was “not previously available,” “materially different from information previously available,” or that, as a result of earlier unavailability, CCAM’s request to amend was timely submitted.⁴⁴

CCAM never explains on appeal *why* it believes these Licensing Board determinations were erroneous. We do not believe that the Board erred. The Board applied the proper regulatory criteria and reached what we consider the correct result. We also agree with the Licensing Board statement in LBP-04-22 that CCAM’s filings in this proceeding “failed to demonstrate even a modicum of the necessary discipline and preparedness” required by the contention admissibility rules.⁴⁵

Next, CCAM claims that the Board improperly accepted the truth and accuracy of Dominion’s positions regarding environmental and marine effects and validity of necessary permits. CCAM claims to have offered proof to the contrary.⁴⁶ CCAM is presumably referring here to the Board’s rulings on Contentions III and IV — relating to pollution discharge permits and to the local flounder population — and appears to believe that the Board rejected these two contentions on their merits. We disagree. The Licensing Board’s rejection of Contentions III and IV had nothing to do with their merits but rested instead on the conclusions that they fell outside the scope of a license renewal proceeding and lacked sufficient documentary, expert or factual backing to meet our threshold requirements for admitting contentions for hearing.⁴⁷ The Board made these holdings without any reference to the material supporting the license renewal application, but rather on the basis that the proposed contentions were deficient on their face.

CCAM next raises what appears to be a brand new contention — namely, that it “established” that Units 2 and 3 cannot be shut down safely “because [their] shutdowns release unsafe levels of radioisotopes into the environment.”⁴⁸ CCAM did not, however, attempt to satisfy the requirements for submitting late-filed contentions. Even if, as the NRC Staff suggests,⁴⁹ CCAM intended this argument to support the admissibility of Contention I (regarding Millstone’s general health effects), CCAM still failed to address the Licensing Board’s reasons for declining

⁴³ See LBP-04-22, 60 NRC at 383.

⁴⁴ *Id.* at 383-84.

⁴⁵ *Id.* at 384.

⁴⁶ Second Appeal at 2.

⁴⁷ 10 C.F.R. § 2.309(f).

⁴⁸ Second Appeal at 2-3.

⁴⁹ NRC Staff’s Brief in Opposition to Appeal by Connecticut Coalition Against Millstone of LBP-04-15 and LBP-04-22, dated Oct. 18, 2004, at 7.

to admit that contention or for denying CCAM's motion to amend its petition. This failure is fatal to CCAM's argument on appeal.⁵⁰

Finally, CCAM asserts, presumably regarding Contention V (regarding past operational difficulties at Millstone), that the record in this proceeding demonstrates "that the licensee did not establish that it had evaluated the Millstone Unit 2 operational history of unplanned shutdowns as a discrete element in its application and therefore its analysis of metal fatigue and related issues is incomplete."⁵¹ As noted by the Licensing Board, however, the license renewal application incorporated historical data regarding emergency shutdowns (and other transient events) when developing the fatigue analysis of the components required to be examined in the aging analysis, and CCAM never challenged this analysis.⁵² CCAM has offered no basis on appeal for us to conclude that the Licensing Board was incorrect, either in this assessment or in its determination that CCAM Contention V was inadmissible for its failure, among other things, to challenge the application. (The language quoted at the beginning of this paragraph constitutes the entirety of CCAM's argument.)

III. CCAM'S LEGAL REPRESENTATION

Finally, we join the Licensing Board in expressing displeasure at the CCAM attorney's consistent disregard for our procedural rules.⁵³ As we noted just

⁵⁰ See *Advanced Medical Systems*, CLI-94-6, 39 NRC at 297, quoted *supra* note 25.

⁵¹ Second Appeal at 3.

⁵² LBP-04-15, 60 NRC at 95.

⁵³ The Board's two orders are riddled with expressions of frustration at CCAM counsel's repeated failures to comply with this agency's procedural rules. In the interest of brevity, however, we cite only the following handful as examples:

"This is only one of several examples in which CCAM has . . . provided little or no sources or specificity so as to warrant admission of a contention. Such lack of care is unjustifiable, notwithstanding counsel representing CCAM on a pro bono basis." LBP-04-15, 60 NRC at 91.

The Board referred to counsel's "poorly articulated and misapprehended reference" to a regulatory provision. *Id.* at 92.

The Board referred to counsel's "failure to read or perform any meaningful analysis of the applications." *Id.* at 95.

"CCAM has given no reason whatsoever . . . why — despite having numerous opportunities to do so — it chose not to provide this information until now." LBP-04-22, 60 NRC at 382.

"CCAM has failed to demonstrate even a modicum of the necessary discipline and preparedness." *Id.* at 384.

The Board referred to "the careless disregard of relevant standards and procedures by CCAM counsel, and the disorganized manner in which the CCAM information has been presented." *Id.*

last year when criticizing CCAM's same counsel for similar dereliction, she is "no stranger[] to the NRC adjudicatory process." This is her fifth NRC adjudication since 1999,⁵⁴ so she cannot credibly claim ignorance of our practices and procedures. As the Board's two orders in this proceeding and our own order today make clear, CCAM's attorney has repeatedly failed to provide support at the hearing for her client's contentions, as required under section 2.309(f) of our rules of practice and procedure.⁵⁵ Further, the record in this proceeding indicates that CCAM's attorney has likewise ignored numerous other Commission adjudicatory procedures. Nor has her disregard for our procedures been limited to this proceeding. She has a similar record in four previous *Millstone* proceedings, where she has repeatedly failed to follow basic NRC adjudicatory procedures.⁵⁶

CCAM's Counsel is informed that any further disregard of our practices and procedures in future adjudications will result in reprimand, censure, or suspension pursuant to 10 C.F.R. § 2.314(c)(1) (providing for sanctions against any "representative of a party who refuses to comply with [the Commission's or the Licensing Board's] directions").⁵⁷ This ruling applies regardless of whether her representation before the NRC is as an attorney at law or otherwise. If such breaches occur during the threshold or hearing stage of an adjudication, we instruct the Board in that proceeding to exercise its authority under 10 C.F.R. § 2.319(g) and impose what it considers appropriate sanctions. We will do the same for any breach during the appellate stage. This warning does not mean that CCAM or its counsel is unwelcome at future NRC proceedings, but only that they must participate according to our rules.

⁵⁴ In addition to the instant proceeding, CCAM's attorney has participated in the following license amendment proceedings: Docket No. 50-336-OLA-2; Docket No. 50-423-LA-3; Docket Nos. 50-336-LA & 50-423-LA; and Docket Nos. 50-245-LT, 50-336-LT, & 50-423-LT.

⁵⁵ 10 C.F.R. § 2.309(f).

⁵⁶ See, e.g., *Connecticut Coalition Against Millstone v. NRC*, 2004 WL 2309754, at *1-*2 (2d Cir. Oct. 14, 2004); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207 (2003), *reconsidered*, CLI-03-18, 58 NRC 433 (2003), *aff'd* LBP-03-12, 58 NRC 75, 93-94 (2003), *petition for review denied sub nom. Connecticut Coalition Against Millstone v. NRC, supra*; *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349 (2001), *reconsidered*, CLI-02-1, 55 NRC 1 (2002), *aff'd* LBP-01-10, 53 NRC 273 (2001); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-00-18, 52 NRC 129 (2000).

⁵⁷ Federal courts have imposed sanctions on parties who repeatedly disregard court orders or procedural rules. See, e.g., *Velazquez-Rivera v. Sea-Land Service, Inc.*, 920 F.2d 1072, 1076-77 (1st Cir. 1990); *Yusov v. Yusuf*, 892 F.2d 784, 787 (9th Cir. 1989).

CONCLUSION

For the reasons set forth above, we affirm LBP-04-15 and LBP-04-22 in all respects, deny CCAM's two appeals, and terminate this proceeding.
IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of December 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

**Docket Nos. 50-413-OLA
50-414-OLA**

**DUKE ENERGY CORPORATION
(Catawba Nuclear Station, Units 1
and 2)**

December 8, 2004

In this license amendment proceeding to authorize the use of four lead test assemblies of mixed oxide fuel at one of Duke Energy Corporation's Catawba nuclear reactors, the Commission denies the Intervenor's motion for reconsideration of CLI-04-29.

RULES OF PRACTICE: RECONSIDERATION PETITIONS

The Commission will sometimes entertain a reconsideration motion in order to clarify the meaning or intent of language in one of its decisions. *See Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 390-91 (1995).

**COMMISSION: ADJUDICATORY RESPONSIBILITIES;
RESOLUTION OF PRELIMINARY ISSUES**

SECURITY INFORMATION: NEED TO KNOW

Pursuant to 10 C.F.R. § 2.905(d), the Board "may certify to the Commission for its consideration and determination any questions relating to access to Restricted Data or National Security Information" arising in an adjudicatory context. To

resolve such questions, the Commission sometimes must consider matters that arguably touch on the merits. An actual merits decision comes only after an adequate record is developed.

MEMORANDUM AND ORDER

This proceeding arises from Duke Energy Corporation's application for a license amendment to authorize the use of four lead test assemblies of mixed oxide (MOX) fuel in one of its Catawba nuclear reactors. In CLI-04-29, we recently clarified the "need-to-know" standard for discovery and reversed a Licensing Board decision allowing the Blue Ridge Environmental Defense League (BREDL) to obtain two classified documents during prehearing discovery.¹ BREDL has moved for reconsideration of CLI-04-29. We deny the motion.

I. BACKGROUND

We will not repeat the procedural and factual background of this case, which we provided in CLI-04-29.² BREDL has requested that the Commission reconsider CLI-04-29, and Duke opposes BREDL's motion.³ The NRC Staff has not taken a position on BREDL's motion.

According to BREDL, our decision "unlawfully reaches the merits of the case before an evidentiary hearing has been conducted"⁴ and thus prejudices BREDL's right to a full and fair hearing. BREDL says the Commission has refused it access to documents "based on a set of factual determinations that go straight to the merits of this case."⁵

¹ See CLI-04-29, 60 NRC 417 (2004), *reversing* LBP-04-21, 60 NRC 357 (2004).

² See CLI-04-29, 60 NRC at 419-20.

³ Duke also requests that we offer guidance now on: (1) the "attractiveness" of MOX fuel to an assault by terrorists or thieves and (2) the applicable "design basis threat." See "Duke Energy Corporation's Response to Motion for Reconsideration of CLI-04-29" at 14-16 (Oct. 28, 2004). Neither BREDL nor the NRC Staff sought leave to respond to Duke's request. On December 6, 2004, Duke repeated its request in a letter from Attorney David A. Repka to Annette L. Vietti-Cook, Secretary of the Commission. With the case in its current posture — on the eve of a Licensing Board hearing on BREDL's remaining security contention — we think it best to await the Board's development of a full record, and its final decision, before considering the "attractiveness" or "design basis threat" issues. The Catawba MOX license amendment is *sui generis*. Issues surrounding it are not easily reduced to generic guidance.

⁴ "Blue Ridge Environmental Defense League's Motion for Reconsideration of CLI-04-29" at 1 (Oct. 18, 2004) ("Motion").

⁵ Motion at 5.

As examples, BREDL cites Commission statements (1) that plutonium in the form of MOX fuel assemblies is difficult for a terrorist to acquire and transport; and (2) that because of the composition of the MOX fuel, its form, and its low plutonium concentration, the MOX fuel is “not nearly as attractive to potential adversaries” as the material at the two existing Category I facilities.⁶ BREDL asserts that the following passage in the Commission decision “even contains the ultimate legal conclusion that stems from the Commission’s factual determinations regarding the attractiveness of MOX fuel to thieves”:⁷

[I]t is clear to the Commission that while Catawba would technically be a Category I facility, there is no rational reason for Catawba to have a significantly different level of security than is already existing at the reactor site. Therefore, dissemination to the intervenor of Category I security guidance that applies to the BWXT and NFS facilities would be unnecessary and inappropriate.⁸

BREDL says that these conclusions amount to merits determinations on issues its security contention raises. In a related vein, BREDL also disputes the Commission’s ruling that the requested guidance documents are not relevant because they apply to large fuel cycle facilities, which are different from the Catawba nuclear power plant.

II. DISCUSSION

The Commission will sometimes entertain a reconsideration motion in order to clarify the meaning or intent of language in one of its decisions.⁹ Here, while we see no basis for revisiting our need-to-know determination, we believe it useful to offer a few observations on BREDL’s claim that, by means of certain statements in CLI-04-29, we have prejudged the security issues before the Board. We have carefully reexamined CLI-04-29, and find no support for the prejudgment claim.

⁶ Category I facilities are licensed to possess formula quantities of strategic special nuclear material. The existing Category I facilities, Nuclear Fuel Services (NFS) and BWX Technologies (BWXT), are fuel cycle facilities. Catawba will be a Category I facility only from the time it accepts delivery of the four MOX lead test assemblies from the U.S. Department of Energy until they are inserted into the reactor core. *See* CLI-04-29, 60 NRC at 421 n.15.

⁷ Motion at 5.

⁸ *Id.*, *citing* CLI-04-29, 60 NRC at 424-25. BREDL’s motion notes that it omitted a footnote in the quoted passage. That footnote, appearing in CLI-04-29 after the word “site,” is: “We leave it to the Board to determine whether the specific measures Duke has proposed are adequate to protect the public health and safety.” CLI-04-29, 60 NRC at 424 n.34.

⁹ *See Curators of the University of Missouri (TRUMP-S Project)*, CLI-95-8, 41 NRC 386, 390-91 (1995).

The ultimate security question in this adjudication as framed by the Board is whether the regulatory exemptions Duke has requested should be granted. The Board reworded and admitted one of BREDL's security contentions:

Duke has failed to show, under 10 C.F.R. §§ 11.9 and 73.5, that the requested exemptions from 10 C.F.R. § 73.46, subsections (c)(1), (h)(3) and (b)(3)-(12), and (d)(9) are authorized by law, will not constitute an undue risk to the common defense and security, and otherwise would be consistent with law and in the public interest.¹⁰

In essence, Duke maintains that its proposed arrangements are sufficient, while BREDL contends that the arrangements are inadequate and Duke won't be able to defend the MOX material if the requested exemptions are granted.

The Commission has indeed said, both in CLI-04-29 and previously,¹¹ that MOX-related security needs at Catawba are different from security needs at other Category I facilities. But this is not the same as saying that nothing needs to be done at Catawba compared with other commercial reactors — the inference BREDL has apparently drawn from the statements it now contests. The Commission and all of the parties, including Duke, recognize that when the unirradiated MOX fuel assemblies are onsite, Catawba must implement security measures that are qualitatively better or greater than those required for a commercial nuclear reactor employing standard uranium fuel assemblies.¹² It is the nature of the MOX-related extra measures that is at issue in this adjudication. We have expressly left it to the *Board* to determine whether the specific security measures Duke has proposed in its application are adequate.¹³

Moreover, we made the security-related comments that BREDL dislikes in the course of deciding a need-to-know dispute that was before us. Pursuant to 10 C.F.R. § 2.905(d), the Board, as it did here, “may certify to the Commission for its consideration and determination any questions relating to access to Restricted

¹⁰ LBP-04-10, 59 NRC 296, 352 (2004).

¹¹ See notes 16-19, *infra*, and accompanying text.

¹² The unpublished portion of Duke's license amendment application (to which BREDL's attorney and expert witness are privy) details the measures Duke intends to add to enhance security during the critical time period when the unirradiated MOX fuel assemblies are present at Catawba. The application also details the measures Duke believes are unnecessary, compared to other facilities that possess strategic quantities of special nuclear material, and requests exemptions from these requirements. “In doing so, Duke recognizes that it does need to do something more, compared to measures taken for standard uranium fuel assemblies, to handle the fresh MOX assemblies.” See CLI-04-19, 60 NRC 5, 8 (2004). (The unpublished portions of the application have been withheld from the public domain because they contain safeguards information.)

¹³ See CLI-04-29, 60 NRC at 424 n.34, and note 8, *supra*.

Data or National Security Information” arising in an adjudicatory context.¹⁴ To resolve such questions, we sometimes must consider matters that arguably touch on the merits.¹⁵ An actual merits decision comes only after an adequate record is developed.

Our need-to-know decision in CLI-04-29 depended on whether the guidance documents in question had any applicability in the present circumstances. In an earlier decision in this case, we had already stated that the security needs at Catawba are “visibly different” from NFS and BWXT.¹⁶ Similarly, addressing the need to prevent unnecessary disclosure of classified security information, we said in CLI-04-29:

Catawba simply does not share the underlying conditions, or potential hazards, precipitating the classified security guidance we issued in 2000 that was intended to deal with the general type of Category I facilities then in existence. That guidance does not extend to Catawba. Catawba is not a large-scale fuel facility; rather, it is a commercial nuclear reactor that will, for a short time, possess more plutonium than other commercial reactor sites. As we stated earlier in this case, “[a]t stake here is the appropriate increment — the appropriate heightening of security measures — necessitated by the proposed presence of MOX fuel assemblies at the Catawba reactor site.” Guidance applicable to an entirely different type of facility is not useful in evaluating the Catawba MOX security proposal.¹⁷

There is no real dispute over certain facts regarding use of the MOX material at Catawba: (1) that the plutonium concentration in MOX is low compared to other sources of formula quantities of strategic special material; (2) that plutonium oxide particles in MOX are dispersed in a ceramic matrix of depleted uranium oxide with a plutonium concentration of less than 6 weight percent; (3) that the plutonium oxide will be housed in fuel assemblies that are over 12 feet long and weigh approximately 1500 pounds; and (4) that a large quantity of MOX fuel and an elaborate extraction process would be required to yield enough material for use

¹⁴ 10 C.F.R. § 2.905(d). The Commission’s new adjudicatory rules do not apply to this case, which began before their promulgation. *See* Final Rule: “Changes to Adjudicatory Process,” 69 Fed. Reg. 2182 (Jan. 14, 2004).

¹⁵ *Cf. Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4 (1980) (reconsideration of order ruling on intervenor’s motion for emergency action); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1 (1986) (ruling on stay request).

¹⁶ *See* CLI-04-19, 60 NRC at 11.

¹⁷ CLI-04-29, 60 NRC at 425 (citations omitted).

in an improvised nuclear device or weapon.¹⁸ BREDL sought no reconsideration of the Commission's earlier statement (in CLI-04-19), based largely on these facts, that the security needs at Catawba are "visibly different" from those at the Category I fuel cycle facilities.¹⁹ Such Commission statements merely point out the obvious. They do not resolve the ultimate question here — the adequacy of Catawba's MOX-related security arrangements. The Commission would, of course, review a Board decision on the merits with an open mind.

In summary, the Commission statements BREDL now challenges were intended to help explain why BREDL had no need-to-know with respect to the dispute before us. They were based on information available at that stage of the proceeding and on the Commission's knowledge about the history and purpose of the documents BREDL requested. Significantly, all parties to this proceeding agree that Duke must enhance security measures at Catawba to accommodate unirradiated MOX fuel. We have expressly left it to the Board to determine the ultimate issue in this case — whether the specific incremental measures Duke has proposed are adequate. We are confident that the Board is able to determine the issues fairly on the basis of the full record the parties will develop and unencumbered by any perception of Commission prejudice.

III. CONCLUSION

For the foregoing reasons, we *deny* BREDL's motion for reconsideration of CLI-04-29.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 8th day of December 2004.

¹⁸ We recited these very facts in an earlier decision in this case. See CLI-04-19, 60 NRC at 11-12. CLI-04-19 ruled inadmissible a BREDL security contention that called on Duke to meet the same enhanced security standards that the NRC imposed on other Category I facilities in the wake of the 9/11 terrorist attacks.

¹⁹ More than 3 months elapsed between this statement and BREDL's request for reconsideration of similar statements in CLI-04-29.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 30-07710-CO
(Confirmatory Order
Modifying License)

STATE OF ALASKA DEPARTMENT OF
TRANSPORTATION AND PUBLIC
FACILITIES

December 14, 2004

The Commission denies Robert Farmer's motion for reconsideration of CLI-04-26, 60 NRC 399 (2004), which reversed the Licensing Board's decision to grant Farmer's intervention petition.

RULES OF PRACTICE: RECONSIDERATION PETITIONS

"A petition for reconsideration must demonstrate a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid." 10 C.F.R. § 2.345(b). See *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 & nn. 11-12 (2004).

RULES OF PRACTICE: RECONSIDERATION

APPELLATE REVIEW: ADVISORY OPINIONS

The Commission's alleged factual error, even if it were true, is not a ground for reconsideration, where the alleged error was not "material" to the Commission's decision. The disputed section of CLI-04-26 was merely advisory, not necessary

to the result, and could have been deleted without impairing the analytical foundations of the holding. *See Sarnoff v. American Home Products Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986); *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 2), ALAB-137, 6 AEC 491, 504 (1973).

RULES OF PRACTICE: RECONSIDERATION

A misunderstanding, if any, that amounts to *dicta* is inconsequential.

ENFORCEMENT ACTIONS: SCOPE OF PUBLIC PARTICIPATION

RULES OF PRACTICE: INTERVENTION

A hearing petitioner may not seek enhanced enforcement actions by raising factual or remedial questions. Under established case law, the NRC may exclude claims for more extensive enforcement relief.

MEMORANDUM AND ORDER

This proceeding arises from Robert Farmer's challenge to a confirmatory order modifying the materials license of the State of Alaska Department of Transportation and Public Facilities (ADOT). The confirmatory order implemented an agreement between ADOT and the NRC Staff settling an enforcement action. In CLI-04-26, we reversed a Licensing Board decision granting Farmer's intervention petition and admitting one of his contentions.¹ Farmer has moved for reconsideration of CLI-04-26. ADOT and the NRC Staff oppose Farmer's motion. We deny the motion.

"A petition for reconsideration must demonstrate a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid."² Farmer has not demonstrated such an error. His two chief arguments for reconsideration are: (1) that the Commission "misstated the facts" when it said that the NRC Staff understood ADOT's conduct to be "deliberate";³ and (2) that in finding no injury "traceable" to the confirmatory order the Commission disregarded

¹ See CLI-04-26, 60 NRC 399 (2004).

² 10 C.F.R. § 2.345(b). *See Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 & nn. 11-12 (2004).

³ See Motion for Reconsideration (Oct. 18, 2004) at 3-7.

Farmer’s claims of ongoing ‘‘egregious harassment’’ that, he says, ‘‘likely would be redressed’’ by a Board decision rescinding the order.⁴

The first argument, even if it were true, is not a ground for reconsideration because the Commission’s alleged factual error was not ‘‘material’’ to the Commission’s decision. The case actually turned on settled principles of standing deriving from a 1983 court decision, *Bellotti v. NRC*.⁵ The section of CLI-04-26 regarding the role of factual disputes in *Bellotti* cases was merely advisory, not necessary to the result, and could have been deleted without impairing the analytical foundations of the holding.⁶

Our precise holding in CLI-04-26 was:

[W]e address the question whether petitioners may obtain licensing board hearings to challenge NRC Staff enforcement orders as too weak or otherwise insufficient. The answer, under a longstanding Commission policy upheld in *Bellotti v. NRC*, is no. The only issue in an NRC enforcement proceeding is whether the order should be sustained. Boards are not to consider whether such orders need strengthening.⁷

We reasoned that Farmer lacked standing under *Bellotti* because the confirmatory order required ADOT to take various whistleblower protection measures, and thus did not ‘‘adversely affect[]’’ Farmer because it actually ‘‘improve[d] the safety situation.’’⁸ We characterized our standing determination as ‘‘dispositive of this case.’’⁹

We offered our perspective on fact issues in confirmatory order cases only because a majority of the Board in LBP-04-16 had discussed at length possible discrepancies in the factual basis for the confirmatory order.¹⁰ We held that in such cases ‘‘a challenge to the facts themselves by a nonlicensee is not cognizable.’’¹¹ We added that, contrary to the Board’s view, we saw no ‘‘genuine dispute’’ on the question whether ADOT acted against Farmer ‘‘deliberately.’’¹² We pointed to the notice of violation’s use of the term ‘‘retaliatory’’ — which, we said, meant

⁴ See *id.* at 8-9.

⁵ 725 F.2d 1380 (D.C. Cir. 1983), *aff’g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982). See CLI-04-26, 60 NRC at 404-08.

⁶ See *Sarnoff v. American Home Products Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986); *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 2), ALAB-137, 6 AEC 491, 504 (1973).

⁷ CLI-04-26, 60 NRC at 404.

⁸ *Id.* at 406.

⁹ *Id.* at 408.

¹⁰ See LBP-04-16, 60 NRC 99, 107-08, 114-16, 118 (2004). *Cf. Patel v. Sun Co.*, 141 F.3d 447, 462 (3d Cir. 1998) (language in decision responding to criticism from dissent about issues not directly before the court is *dictum*).

¹¹ CLI-04-26, 60 NRC at 408.

¹² *Id.* at 410.

that the NRC Staff, like Farmer, “by definition” must have considered ADOT’s actions “deliberate.”¹³

Farmer, however, calls our attention to an NRC Staff letter indicating that the Staff in actuality “did *not* develop evidence that managers acted deliberately with respect to NRC’s requirements.”¹⁴ While this discrepancy suggests that we may have oversimplified the “deliberate” issue,¹⁵ our misunderstanding, if any, is inconsequential because it amounts to *dicta*.¹⁶ It does not undercut our core ruling in this case, namely, that under *Bellotti*, Farmer lacks standing to obtain a hearing to challenge an NRC enforcement order out of a desire for more aggressive relief.

We also reject Farmer’s second argument — that the Commission disregarded Farmer’s injury. Harm to Farmer resulted from retaliatory conduct by ADOT; thus, his injury does not derive from the confirmatory order and does not give him standing to challenge it. The Commission fully considered Farmer’s alleged injury before concluding that there was no cause and effect relationship between any injuries Farmer personally suffered and a confirmatory order that “directly addresses ADOT’s wrongful behavior by mandating a program designed to alter the Safety Conscious Work Environment favorably and prevent similar injuries in the future.”¹⁷ The confirmatory order plainly enhances public safety and increases protection of the licensee’s employees.

Throughout his petition for an NRC hearing Farmer based his standing argument on the concept that if the confirmatory order were rescinded, the Staff would necessarily impose stricter enforcement actions on ADOT. Similarly, Farmer’s motion for reconsideration maintains that “appropriate” and “better” mitigative and protective action ultimately will emerge if the Board rescinds the confirmatory order.¹⁸ At bottom, Farmer’s reconsideration petition simply reargues his position

¹³ *Id.*

¹⁴ Motion for Reconsideration at 5, *quoting* Letter from Frank J. Congel, Director, NRC Office of Enforcement, to Billie P. Garde, Counsel for Petitioners, at 1 (Apr. 5, 2004) (emphasis supplied).

¹⁵ The NRC Staff has requested clarification of our rather loose use of the term “deliberate” in CLI-04-26. *See* “NRC Staff Response to Robert F. Farmer’s Motion for Reconsideration” at 4-5 n.20 (Oct. 28, 2004). As we said in CLI-04-26, an action described as “retaliatory” is by definition “deliberately” taken against the object of the action. Our discussion in CLI-04-26 addressed deliberateness in this sense to show that the NRC Staff was aware of the underlying factual allegations and their seriousness. *See* CLI-04-26, 60 NRC at 409-10. By contrast, violations of NRC whistleblower regulations are, in NRC parlance, “deliberate” when the retaliator *knows* that the conduct is contrary to an NRC regulatory requirement. Farmer apparently disputes the NRC Staff letter stating that ADOT’s actions were not “deliberate” in this second sense. But, as we stated in CLI-04-26, “allowing a petitioner to attack a confirmatory order in the guise of a factual dispute would effectively permit an end run around *Bellotti*.” *Id.* at 408.

¹⁶ We introduced our brief factual discussion with the statement, “while we need not decide this issue” CLI-04-26, 60 NRC at 409.

¹⁷ CLI-04-26, 60 NRC at 407.

¹⁸ *See* Motion for Reconsideration at 7.

that the confirmatory order is not strict enough and did not take account of the ADOT's allegedly deliberate disregard of regulatory requirements. But *Bellotti*, a longstanding precedent, prescribes a contrary rule — a hearing petitioner like Farmer may not seek enhanced enforcement actions by raising factual or remedial questions. Under *Bellotti* the NRC may exclude claims for more extensive enforcement relief.

For the foregoing reasons, we deny Farmer's motion for reconsideration of LBP-04-26.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of December 2004.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of

Docket No. 40-8968-ML

HYDRO RESOURCES, INC.
(P.O. Box 15910, Rio Rancho,
NM 87174)

December 14, 2004

The Commission denies petitions for review of a Presiding Officer decision that denied Intervenor motions for supplementation of a final environmental impact statement.

NEPA: FEIS SUPPLEMENTATION

A supplemental environmental impact statement is not necessary every time new information comes to light after the EIS is finalized. The new information must present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.

MEMORANDUM AND ORDER

I. INTRODUCTION

Before the Commission are petitions for review of LBP-04-23,¹ a Presiding Officer decision denying Intervenor Eastern Navajo Diné Against Uranium Min-

¹ 60 NRC 441 (2004).

ing (ENDAUM) and the Southwest Research and Information Center's (SRIC) motions to supplement the final environmental impact statement (FEIS) for the Crownpoint Uranium Project (CUP). For the reasons given below, we deny the petitions for review of LBP-04-23.

II. BACKGROUND

The Intervenor's motions sought to have the NRC Staff supplement the FEIS analysis of environmental impacts to Church Rock Sections 8 and 17, two of the four sites encompassed by the *in situ* leach uranium mining license challenged in this proceeding. The motions stem from a proposed 1000-unit housing development named the Springstead Estates Project (SEP), which would be built southwest of the proposed mining operations in Church Rock Sections 8 and 17, approximately 2 miles from the southern boundary of Section 17. The Intervenor's motions alleged potential hydrogeological, radiological, traffic, and environmental justice impacts from operations in Sections 8 and 17 stemming from the proposed housing development's proximity to the Crownpoint Uranium Project.²

In LBP-04-23, the Presiding Officer found that the Intervenor had failed to present significant new information warranting supplementation of the FEIS. The Presiding Officer, assisted by two judges with technical expertise, reviewed the Intervenor's motion and attached affidavits from experts, and the NRC Staff and Hydro Resources, Inc. (HRI) responses. In a highly fact-based technical decision, the Presiding Officer found no evidence that the proposed housing development

²There were two motions to supplement the FEIS, one regarding the potential impacts of mining in Church Rock Section 8, and the other regarding Church Rock Section 17. The Presiding Officer instructed the Intervenor to file a separate motion on Section 8 before the Commission, stating that it no longer had jurisdiction over Section 8-related issues because the hearing on environmental impacts from mining activities in Section 8 had concluded (the hearing on impacts related to Section 17 has yet to be held). Therefore, the Intervenor filed a motion on Section 8 before the Commission and a similar motion on Section 17 before the Presiding Officer. Given that the motions contained virtually identical arguments, the Commission referred the motion on Section 8 to the Presiding Officer.

Before the Commission, the Petitioners have filed separate petitions for review, one for interlocutory review of LBP-04-23 as it pertains to Section 17, and one for review of LBP-04-23 as a partial initial decision on Section 8-related environmental impacts. Commission review of interlocutory matters is governed by 10 C.F.R. § 2.786(g). *See, e.g., Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320 (1998). Review standards for full or partial initial decisions are under 10 C.F.R. § 2.786(b)(4). The Intervenor argues that the Commission should take review of LBP-04-23 as to both Sections 8 and 17, and that it would cause confusion and delay to take review of LBP-04-23 as it relates to Section 8 but not take review of the Presiding Officer's decision as it pertains to Section 17. They point out that both the FEIS and the Presiding Officer in LBP-04-23 considered the impacts of both sites as one unit. We agree with the Presiding Officer that there is no reason warranting FEIS supplementation as to either site, and therefore deny both petitions.

might cause effects that are significantly different from those already studied in the FEIS. The Intervenor seeks review of the Presiding Officer's decision.

III. ANALYSIS

As the Commission outlined previously in this proceeding, “[a] Supplemental Environmental Impact Statement is not necessary ‘every time new information comes to light after the EIS is finalized.’”³ “The new information must present ‘a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.’”⁴ In LBP-04-23, the Presiding Officer found that the Intervenor had not shown how the proposed housing development might result in a “seriously different picture of the environmental impact” of the Crownpoint project.⁵

The Intervenor's petitions for review do not identify any clearly erroneous factual or legal conclusion in the Presiding Officer's decision, or provide any other reason warranting review.⁶ Moreover, where in consultation with technical experts a Presiding Officer reaches highly fact-specific findings following a review of technical information, the Commission will ordinarily defer to these findings, absent an indication of a “clearly erroneous” finding.⁷

In their petitions for review, the Intervenor first claim that the Presiding Officer improperly shifted to them the “burden of proof” for determining whether the FEIS should be supplemented. Specifically, they claim that the Presiding Officer should not have directed them, in the first instance, to submit motions with expert affidavits outlining their arguments for why supplementation was required. In the Intervenor's view, once they informed the NRC Staff of the proposed housing development, it was the Staff's burden, as an initial matter, to conduct a detailed technical analysis, with expert opinions or affidavits, showing no need to supplement the FEIS.

The Intervenor, however, confuse the burden of coming forward with initial information on why FEIS supplementation is warranted with the “burden of proof” on the factual evidence presented. We find no error in the Presiding Officer having directed the Intervenor to provide a basis for their motion to

³ CLI-99-22, 50 NRC 3, 14 (1999) (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989)).

⁴ *Id.* (quoting *Sierra Club v. Froehlke*, 816 F.2d 205, 210 (5th Cir. 1987)); see also *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 52 (2001).

⁵ LBP-04-23, 60 NRC at 448.

⁶ See 10 C.F.R. § 2.786(b)(4) and (g).

⁷ See, e.g., *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant; Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 189 (2004).

supplement the FEIS. If the NRC Staff were obligated to conduct a detailed technical analysis of every potential novel circumstance after an FEIS has been issued, simply on the basis of generalized or unsupported assertions of significant environmental impact, the Staff's environmental review could prove limitless.⁸ The Presiding Officer merely directed the Intervenors, as the parties requesting a hearing, to set forth how the proposed housing development represents a significant "new set of circumstances" compared to the environmental impacts already studied in the FEIS.⁹ It was not unreasonable to ask the Intervenors to come forward with support for their supplementation request, a burden akin under our practice to a petitioner's initial obligation to come forward with sufficient basis for a contention.¹⁰

Thus, the Presiding Officer did not shift the "burden of proof" on the evidence presented to the Intervenors. It merely outlined the Intervenors' initial burden of coming forward with specific arguments on the need for FEIS supplementation, to which the Staff and Applicant could then respond. Later, based on its review of the technical written presentations ultimately provided by the Intervenors, the Applicant, and the NRC Staff, the Presiding Officer found that the Intervenors had not shown any significantly new potential impact from the proposed development.

The Intervenors also claim that the NRC Staff failed to take a hard look at "environmental justice" issues because of the "increased density and proximity of the low-income Native American population" that the proposed housing development may bring to the area.¹¹ The Presiding Officer found this argument unpersuasive. Significantly, he found that the Intervenors presented "no evidence" that the proposed development presented any "additional environmental justice concerns not already addressed by the FEIS in its current form."¹² The Presiding Officer emphasized that the "FEIS addresses in substantial detail the minority and low-income population located in the same area as the Church Rock sites," and "evaluates the impact of the HRI operations within an 80-kilometer radius of the site — an area predominantly inhabited by Native Americans."¹³ Indeed, earlier in this proceeding the Commission itself summarized at length the

⁸ The Staff already had examined the Environmental Assessment for the proposed housing development, and reviewed FEIS evaluations and the adjudicatory record, but had determined that the FEIS was not deficient. *See* Joint Status Report (Mar. 26, 2004).

⁹ *See* Transcript, Telephone Conference (4/14/2004) at 61.

¹⁰ *See* 10 C.F.R. § 2.714 (former rules); *cf.* 10 C.F.R. 2.309 (current rules, but not applicable to this case). *See generally* *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248-49 (1996).

¹¹ Intervenors' Petition for Review of LBP-04-23 With Respect to Section 8 ("Intervenors Petition/Section 8") (Nov. 11, 2004) at 9; *see also* Intervenors' Petition for Review of LBP-04-23 With Respect to Section 17 ("Intervenors' Petition/Section 17") (Nov. 11, 2004) at 9.

¹² LBP-04-23, 60 NRC at 460 (emphasis added).

¹³ *Id.*

extensive FEIS analysis and discussion of the “special areas of concern involving the Native American population.”¹⁴ We also noted the FEIS’s acknowledgment that the population surrounding the proposed sites is “almost entirely Navajo,” and that hundreds of residents live within 3 miles of Church Rock.¹⁵ The Intervenor do not suggest how the additional population from the proposed housing development would make any material difference to the extensive discussion and analysis already provided in the FEIS. Moreover, in LBP-04-23 the Presiding Officer simply found no persuasive evidence that the proposed housing development would significantly bear on the Crownpoint mining project or significantly alter any of its potential impacts as already described in the FEIS.

As their final argument, the Intervenor claim that the Presiding Officer’s decision is “contrary to NEPA’s public participation goal.”¹⁶ They state that “by deciding that the FEIS should not be supplemented, the Licensing Board [*sic*] also foreclosed the possibility of input” from various entities, such as the Navajo Housing Authority or the Federal Housing and Urban Development Department. These entities could have “comment[ed] on the [housing] project” and “potentially clarif[ied] issues” about the project had the Staff circulated FEIS supplementation documents publicly, the Intervenor argue.¹⁷ But the Staff need not prepare a supplement to an FEIS *unless* it has first determined, pursuant to 10 C.F.R. § 51.92, that a supplement is warranted. Here the Staff found that the proposed housing development would not significantly alter the environmental analysis and conclusions of the FEIS and therefore that supplementation would be unnecessary.

The Commission denies the petitions for review.

IT IS SO ORDERED.

For the Commission

ANNETTE L. VIETTI-COOK
Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of December 2004.

¹⁴ CLI-01-4, 53 NRC 31, 65 (2001); *see also id.* at 64-71.

¹⁵ *Id.* at 65, 70.

¹⁶ Intervenor’s Petition/Section 8 at 10; Intervenor’s Petition/Section 17 at 10.

¹⁷ Intervenor’s Petition/Section 8 at 11; Intervenor’s Petition/Section 17 at 10-11.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ann Marshall Young, Chair
Alex S. Karlin
Dr. Peter S. Lam

In the Matter of

Docket No. 30-35059-CivP
(ASLBP No. 04-834-01-CivP)

US INSPECTION SERVICES (USIS)
(Dayton, Ohio)

December 6, 2004

ORDER
(Terminating Proceeding)

Licensee US Inspection Service's November 16, 2004, withdrawal of its request for hearing, through its authorized representative¹ and as confirmed in a telephone conference held December 2, 2004, is hereby APPROVED. Based upon this withdrawal, this proceeding is TERMINATED.

¹Corporate Safety Manager Jon E. Silks, who filed both the request for hearing and withdrawal, was formally authorized to act for USIS by its President, James Bailey, by letter faxed to the Board Chair December 1, 2004.

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Alex S. Karlin
ADMINISTRATIVE JUDGE

Dr. Peter S. Lam
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 6, 2004²

² Copies of this document were sent this date by Internet e-mail to the representatives of all parties.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alan S. Rosenthal, Presiding Officer in MLA-6 and
Licensing Board Chairman in MLA-9

Dr. Anthony J. Baratta, Special Assistant in MLA-6 and
Licensing Board Member in MLA-9

Dr. Richard F. Cole, Licensing Board Member in MLA-9

In the Matter of

**Docket Nos. 40-8027-MLA-6
40-8027-MLA-9
(ASLBP Nos. 03-812-03-MLA,
04-824-06-MLA)**

**SEQUOYAH FUELS CORPORATION
(Gore, Oklahoma Site)**

December 14, 2004

**MEMORANDUM AND ORDER
(Dismissing Proceedings Based Upon Settlement Agreement)**

In hand, in different procedural stages, are two license amendment applications related to the Licensee Sequoyah Fuels Corporation's Gore, Oklahoma site. Between 1970 and 1993, the Licensee had operated under the aegis of its source materials license (SUB-1010) a facility on that site that produced uranium hexafluoride from yellowcake (a uranium oxide) and converted depleted uranium hexafluoride to uranium tetrafluoride.

The first of the two license amendment applications in question (identified as MLA-6 for adjudicatory purposes) was addressed to the Licensee's plan for reclamation of the Gore site. In accordance with the notice of opportunity to seek a hearing published in the *Federal Register*, timely hearing requests with regard

to that plan were submitted in 2003 by the State of Oklahoma and the Cherokee Nation. Under the Commission's Rules of Practice then in effect, the hearing requests were assigned to a presiding officer and special assistant for adjudication. In LBP-03-29, 58 NRC 442 (2003), they were granted.

Filed in early 2004, the second application (MLA-9) related to a proposed raffinate sludge dewatering project, which seemingly had in mind the disposition of the sludge in a different manner than that contemplated in the reclamation plan that was the subject of MLA-6. Oklahoma submitted a timely hearing request with regard to that proposal following the publication of the relevant *Federal Register* notice. Under the new Rules of Practice that became effective in February 2004, that request was assigned to a three-member licensing board instead of a single presiding officer.

In normal circumstances, after the grant of the two hearing requests in MLA-6, the next step (upon the furnishing of the mandated hearing file by the NRC Staff) would have been the preparation and submission of written presentations by Oklahoma and the Cherokee Nation, followed by responsive presentations on the part of the Licensee and Staff. And, in MLA-9, once the responses to the Oklahoma hearing request were in hand, the Licensing Board would have immediately undertaken to determine whether the request met the requirements of the then applicable Rules of Practice. The Presiding Officer and Licensing Board were informed, however, that serious negotiations were underway that might lead to a settlement of not only these two proceedings but, as well, others involving the reclamation of the Gore site, including one pending in a federal court of appeals. Given the obvious desirability of such an outcome, the Presiding Officer in MLA-6 granted a series of extensions of the time within which to file the opening written presentations on the reclamation plan. And in MLA-9, the Licensing Board withheld action on the Oklahoma hearing request pertaining to the raffinate sludge dewatering project.

The protracted settlement negotiations have turned out to be successful. Now before the Presiding Officer in MLA-6 and the Licensing Board in MLA-9 is the December 6, 2004 joint motion of Oklahoma and the Cherokee Nation requesting termination of both proceedings. Attached to the motion was a copy of the settlement agreement reached by the parties, the text of which is also set forth in an Appendix to this Order.

The motion recites that a material provision of the settlement agreement that helped facilitate resolution of the outstanding issues was section III.B.1. In accordance with that provision, Oklahoma and the Cherokee Nation request that the order terminating MLA-6 include the following (as editorially revised by the Presiding Officer):

Pursuant to the Settlement Agreement resolving the hearing request in MLA-6, it is acknowledged that, in the event either (1) Sequoyah Fuels Corporation

makes additional changes to the Reclamation Plan filed with the NRC for its Gore, Oklahoma facility, or (2) new information becomes available that indicates deficiencies in the Reclamation Plan unknown to the State of Oklahoma or the Cherokee Nation on November 30, 2004, the occurrence of such changes or the discovery of such new information shall constitute good cause within the meaning of 10 C.F.R. § 2.309(c)(1)(i) for the failure of either the State of Oklahoma or the Cherokee Nation to file a hearing request on time.

In a separate December 8, 2004 filing, the Licensee explicitly endorses the request that this provision be included in the order terminating MLA-6. And both it and the movants stress that the provision does no more than to reflect the agreement of all parties to the settlement that, in the stated circumstances, good cause would exist for a late filing. As the movants acknowledge (at 2), “the requirements of 10 C.F.R. § 2.309 would still apply and the balancing of the factors set forth therein remain applicable in deciding whether a hearing request should be granted or denied.” In the course of its endorsement of the provision, the Licensee observes (at 2) that it is “acceptable because it is consistent with, and in essence restates, the Commission’s existing standards. See 10 C.F.R. § 2.309(c)(1)(i); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-13, 53 NRC 319, 324-26 (2001).” The Licensee goes on to note (*ibid.*) that “the proposed statement would not prejudice any questions that might arise in a future hearing request about such issues as whether certain knowledge should be imputed to a party or whether the new information provides an adequate basis for requesting a hearing.”

In light of these considerations, the Presiding Officer in MLA-6 sees no good reason not to include in this Order the adoption of the above-stated provision and *it is accordingly made a part of the Order insofar as the Order directs the dismissal of that proceeding*. The short of the matter is that the provision was apparently central to the reaching of a highly desirable settlement of several proceedings relating to the reclamation of the Gore site and does no apparent violence to any provision of the Rules of Practice.

Insofar as the balance of the settlement agreement is concerned, neither the Presiding Officer in MLA-6 nor the Licensing Board in MLA-9 has paused to consider whether approval of the agreement as a whole is required as a condition precedent to the grant of the dismissal motion. Be that as it may, both have undertaken to examine the agreement and perceive no basis for objection to any of its provisions, finding them to be consistent with the public interest. See 10 C.F.R. § 2.1241 (pre-February 2004 provision applicable to MLA-6), *id.* § 2.338(i) (post-February 2004 provision applicable to MLA-9).

The joint motion of the State of Oklahoma and the Cherokee Nation to dismiss MLA-6 and MLA-9 is *granted*, the dismissal in MLA-6 incorporating the provision set forth at pages 666-67 of this Order.

It is so ORDERED.

BY THE PRESIDING OFFICER IN MLA-6
AND LICENSING BOARD IN MLA-9¹

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 14, 2004

¹Copies of this Memorandum and Order were sent by electronic mail transmission to counsel for the parties to the proceedings.

APPENDIX

SETTLEMENT AGREEMENT

I. Recitals:

- A. This Settlement Agreement concerns legal challenges by the State of Oklahoma (State) and Cherokee Nation (CN) to the decommissioning and reclamation plans of the Sequoyah Fuels Corporation (SFC) facility in Gore, Oklahoma that are currently under review by the U.S. Nuclear Regulatory Commission. The parties to this Settlement Agreement are the State, CN and SFC.
- B. SFC is licensed by the NRC to possess and use, for limited purposes, source and 11e.(2) byproduct material at its Gore facility. SFC has requested NRC approval of various license amendments to authorize activities associated with the decommissioning/reclamation of the facility. SFC also has agreed with the U.S. Environmental Protection Agency (EPA) to an order under section 3008(h) of the Resource Conservation and Recovery Act (RCRA).
- C. State and CN filed separate hearing requests concerning several of SFC's license amendment applications. State and CN are agreeing to terminate several ongoing legal proceedings specifically described below that challenge SFC's compliance with the Atomic Energy Act in return for certain commitments by SFC that are detailed in this Settlement Agreement.
 1. After State and CN both requested a hearing on SFC's application for an amendment authorizing possession of 11e.(2) byproduct material, CN and SFC entered into a settlement and CN withdrew its hearing request. The NRC subsequently ruled that certain SFC waste could be reclassified as 11e.(2) byproduct material and denied State's hearing request on the remaining issues. State has appealed these rulings to the U.S. Court of Appeals.
 2. Both State and CN were granted a hearing and admitted as parties in the proceeding considering SFC's proposed Reclamation Plan (RP). The hearing is pending before an NRC Presiding Officer.
 3. NRC also denied hearing requests of State and CN respecting SFC's proposed Groundwater Monitoring Plan (GWMP) and Groundwater Corrective Action Plan (GWCAP). After this denial, State and CN urged the NRC to consider their objections

to those plans as a request for a Director's Decision pursuant to 10 CFR § 2.206 and NRC agreed to do so. This request is pending before the NRC Director of Nuclear Material Safety and Safeguards.

4. State's request for a hearing on SFC's proposal for dewatering raffinate sludge is pending before an NRC Atomic Safety and Licensing Board.

II. Effective Date:

The effective date of this Settlement Agreement shall be the last date by which it has been executed by an authorized representative of each of the parties.

III. Agreement to Terminate the Ongoing Legal Proceedings:

- A. **Court of Appeals:** The parties agree to take all actions necessary to terminate State's appeals to the U.S. Court of Appeals in Case Nos. 04-9503 and 04-9523:
 1. Within one week following the effective date of this Settlement Agreement, State will withdraw its appeals in the above referenced cases and request dismissal of both cases.
 2. If any responsive pleadings are required, SFC will submit responses that support dismissal of both cases.
- B. **Hearing on the RP:** The parties agree to take all actions necessary to terminate the NRC hearing on the RP (i.e., the proceeding NRC has numbered as MLA-6).
 1. Within one week following the effective date of this Settlement Agreement, State and CN will take all actions necessary to withdraw their respective hearing requests and request termination of MLA-6. State and CN shall retain their respective rights to request further NRC hearings to the extent that SFC makes additional changes to the RP or to the extent that new information becomes available which indicates deficiencies of the RP previously unknown to State and CN on the effective date of this Settlement Agreement, subject only to the consultation requirements in section IV.B of this Agreement. SFC authorizes State and CN to state in such request to terminate MLA-6 that SFC joins in requesting that the NRC order for such termination include a provision stating that the occurrence of new infor-

mation, such as additional RP changes or previously unknown deficiencies, would constitute good cause within the meaning of 10 CFR § 2.309(c)(1)(i) for the failure of either State or CN to file a hearing request on time. Furthermore, if State and/or CN file such a hearing request promptly after the new information becomes available and the conclusion of consultations regarding the subject of such hearing request in accordance with section IV.B, below, SFC will not object to the hearing request(s) on the grounds that State and/or CN failed to demonstrate good cause for such hearing request being untimely. In addition, SFC authorizes State and/or CN to state in such hearing request that SFC has agreed that new information, including RP changes and information revealing previously unknown RP deficiencies, would constitute good cause for a hearing request to be untimely.

2. If any pleading is required in response to the hearing termination request, SFC will submit a response that supports termination, and the inclusion of such a provision in the termination order.

C. **Hearing on Dewatering Plan:** State and SFC agree to take all actions necessary to terminate the NRC's consideration of State's request for hearing on SFC's raffinate dewatering project (i.e., the proceeding NRC has numbered as MLA-9).

1. Within one week following the effective date of this Settlement Agreement, State will take all actions necessary to withdraw its hearing request and request termination of MLA-9.
2. If any responsive pleading is required, SFC will submit a response that supports termination.

D. **2.206 Petition:** The parties agree to seek termination of NRC's ongoing consideration of State and CN concerns under 10 CFR § 2.206.

1. State and CN agree that promptly after the groundwater plans are revised in accordance with this Agreement, they will advise the NRC in writing that their respective concerns regarding the current version of the groundwater plans have been resolved, and that they desire to withdraw their respective requests for a Director's Decision under 10 CFR § 2.206.

IV. Consultation to Avoid Future Litigation

- A. **Copies of Documents:** SFC agrees to continue to provide State and CN with copies of the documents it submits to the NRC or EPA concerning decommissioning/reclamation of the SFC facility, including proposed license amendments and any other applications, no later than the time the documents are submitted to the NRC or EPA, and will use its best efforts to provide a draft of the proposed amendments 30 days in advance of submittal to the NRC.
- B. **Consultation:** State and CN agree that they will notify SFC of any concerns regarding the SFC site and negotiate in good faith with SFC to resolve their concerns. State and CN further agree that they will make mutual agreement on such concerns their first priority, and will not file any future hearing requests or litigation until such good faith negotiations have been unsuccessful in resolving their concerns.

V. Resolution of Concerns Regarding the Pending Applications

A. Disposal of Certain Materials.

- 1. **Raffinate Sludge, North Ditch Sediments, Emergency Basin Sediments, and Sanitary Lagoon Sediments.**
 - a. The Parties agree:
 - (i) SFC will revise the RP to state that the raffinate sludge, north ditch sediment, emergency basin sediment, and sanitary lagoon sediment (collectively “Material”) located at the SFC site will be disposed of at an appropriate offsite location.
 - (ii) SFC agrees to spend up to \$3.5 million for offsite disposal of the Material.
 - (iii) The parties acknowledge that offsite disposal of the Material is of utmost importance to State and CN and will be given high priority by SFC but they also acknowledge that complete offsite disposal of the Material may subsequently prove not to be economically possible due to circumstances outside the control of SFC.
 - (iv) Within two months after the NRC completes its Technical Evaluation Report for the RP, SFC will prepare and provide to State, CN and NRC, an updated assess-

ment of the available offsite disposal locations, SFC's financial resources, and the estimated costs of such offsite disposal, decommissioning and reclamation, including a timely schedule for shipment for offsite disposal of Material to commence within three (3) months after both distribution of the updated assessment discussed above, and achievement of Material densities of 55 percent solids by weight. The three month period after achievement of a Material density of 55 percent is to be calculated separately for each shipping batch (i.e., truck load).

- (v) In the event the aforementioned updated assessment confirms that complete offsite disposal of the Material cannot be economically achieved through no fault of SFC, the parties will attempt to reach consensus on other disposal options or modifications to the RP necessary to achieve complete offsite disposal of the Material, subject to NRC approval, if required.
 - (vi) The parties agree that if, after good faith negotiations, they are unable to reach a consensus, and State and/or CN request a hearing on a SFC application for NRC approval of an alternative disposal option, the parties to that new proceeding will make a prompt request for alternative dispute resolution in accordance with 10 CFR § 2.338(b). Furthermore, if such a hearing request is deemed to be untimely but is filed promptly after the conclusion of such negotiations, SFC will not object to the hearing request(s) on the grounds that it failed to demonstrate good cause for being untimely and authorizes State and/or CN to so state in the request for such hearing.
2. **DUF4 Slag:** SFC agrees not to dispose of the drummed DUF4 slag, which is currently stored at SFC's facility, on SFC's site.
 3. **Potentially Hazardous Wastes:** SFC agrees to comply with the provisions of NRC's policy regarding disposal of non-11e.(2) byproduct material in a uranium mill tailings impoundment, the current version of which has been published as Attachment 1 to NRC's Regulatory Issue Summary number RIS 2000-023.

- a. SFC agrees to take representative samples of the Calcium Fluoride Sludge and conduct a Toxicity Characteristic Leachate Procedure Test (TCLP) and total metals analyses on the samples. State will review the results of these samples to determine whether it agrees that the Calcium Fluoride Sludge is not “hazardous waste” as defined in the Resource Conservation and Recovery Act (42 U.S.C. § 6901 et seq.) (“RCRA hazardous waste”).
 - b. If State agrees that the Calcium Fluoride Sludge is not RCRA hazardous waste, it will provide a statement to SFC that will help satisfy the requirements in NRC’s letter to SFC dated April 5, 2004, in which the NRC advised that SFC will need to provide the NRC with a statement from the State to the effect that no State permit is required for disposal of SFC’s non-11e.(2) byproduct material in the onsite disposal cell.
 - c. SFC agrees that it will not place in the onsite disposal cell any non-11e.(2) byproduct material that is RCRA hazardous waste without the approval of the government regulator with jurisdiction to approve such disposal.
 - d. In accordance with an Administrative Order on Consent dated August 3, 1993 (AOC), SFC has submitted a Draft Corrective Measures Study (DCMS) to the EPA and EPA has the DCMS under review. After the NRC determined that some wastes at the SFC site meet the definition of 11e.(2) byproduct material, SFC suggested that EPA consider closing the AOC so that all of the corrective actions at the SFC site would be regulated by a single regulator, the NRC. SFC agrees that if EPA does close the AOC, SFC will submit a revision to the RP or take other appropriate procedural steps in consultation with the NRC Staff, to assure that the matters now being considered in the EPA review of the DCMS are placed before the NRC for its consideration.
4. **PCB-Contaminated Soil:** SFC agrees to excavate the PCB-contaminated soil and dispose of this material at an approved offsite disposal location in accordance with the applicable requirements in 40 CFR Part 761, and to provide a copy of any required reports to State and CN at the time of submission to EPA.

5. **Asbestos:** SFC plans to remove friable asbestos from the SFC buildings prior to their demolition, in accordance with the RP.
 - a. Asbestos removal will be accomplished by a contractor that is licensed to conduct such activities in Oklahoma and in accordance with Oklahoma law.
 - b. The asbestos will be removed from the SFC buildings and packaged in accordance with the applicable requirements in 40 CFR Parts 61.145 and 61.150. Documentation of the amount of asbestos removed and packaged will be maintained by SFC and made available to the State for inspection upon request.
 - c. State agrees that:
 - (i) The onsite disposal cell described in the RP and as modified by this Settlement Agreement is acceptable to the State for purposes of disposing of asbestos currently present at the SFC site, as long as the packaging required in paragraph (5)(b) above is intact when onsite disposal occurs.
 - (ii) No additional approval or authorization will be required from the State for SFC's disposal of the asbestos in the onsite disposal cell.
 6. **Offsite Waste:** SFC agrees not to accept, store or dispose of radioactive or other wastes at SFC that are not currently at the SFC site, except for samples of SFC wastes originally generated from the site and being returned after analysis or testing.
- B. **Reclamation Plan Changes:** SFC agrees to make the following changes to the design of its disposal cell and to amend the RP to incorporate these modifications. SFC further agrees that it will provide the Oklahoma Department of Environmental Quality (DEQ) and CN with a reasonable opportunity to comment on the proposed amendment before SFC submits it to the NRC:
1. **Base Liner:** The thickness of the disposal cell clay base liner will be increased to 3 feet and the synthetic base liner will be 60 millimeters in thickness.
 2. **Cap:** The disposal cell cover will be ten feet in thickness and will be composed of 8 feet of soil and 2 feet of compacted clay which will be placed above the emplaced waste materials.

If the synthetic liner is retained in the cap design, such clay layer will be directly below the synthetic liner. If SFC proposes to eliminate the synthetic liner, it will first consult with State and CN in accordance [with] IV, above. If, after consultation, the parties do not agree and SFC requests NRC approval of a cap without a synthetic liner, this change would constitute new information, as that term is discussed in III.B.1, above.

3. **Technical Specifications:** The proposed Cell Construction Technical Specifications will be revised to be consistent with the draft revised Technical Specifications SFC provided to State and CN on October 22, 2004, with the addition of provisions to the effect that the permeability of the clay layers in the cell liner and cap must be 1×10^{-7} or less, contaminated water will not be used for reclamation activities and trees will be eliminated from the vegetative mix on the cover consistent with V.B.4, below.
4. **Trees:** Trees will be eliminated from the planned vegetative mix on the cover, and SFC will prevent the growth of trees on the cover as long as it retains its NRC license.
5. **Separation From Groundwater:** SFC will maintain at least a five foot separation between the waste in the cell, including leachate, and the highest measured groundwater level at any point under the cell as established by the water level measurements SFC has taken since 1990.
6. **Sumps:** The design of the leachate collection sumps will be revised to provide for welding the synthetic liner to the leachate collection pipe, double-wall pipe, and with a liner-to-pipe joint design that is designed to withstand anticipated differential settlement.
7. **Leak Detection:** The disposal cell described in the RP is underlain by a leak detection system under the synthetic cell base liner. SFC will not make changes to this design unless the NRC finds that an alternative design provides a satisfactory level of protection for public health, safety, and the environment which is equivalent to, or more stringent than, the level which would be achieved by compliance with Appendix A to 10 CFR Part 40. SFC agrees that if it does propose a change to this design, such proposal would constitute new information, as that term is discussed in III.B.1, above.

8. **Point of Compliance Wells:** Two proposed disposal cell point of compliance wells will be added, one of which will be placed near the Phase II cell section leachate collection sumps on the southwest corner of the cell and the other will be placed midway along the south side of the cell. SFC will sample all point of compliance wells quarterly.
9. **Action Plan:** The sampling and analysis plan for the cell point of compliance monitoring wells (described in RP § 6.4) will be revised to provide that if SFC detects statistically significant indications of cell leakage, it will take the following actions:
 - a. SFC will verify the indications by such actions as re-sampling, review of calculations and re-analysis.
 - b. If the indications are verified, SFC will increase the sampling frequency to monthly, and analyze the sample results to confirm or refute the existence of cell leakage.
 - c. If leakage is confirmed, SFC will initiate an investigation to determine the cause of the leakage and prepare a corrective action plan.
 - d. SFC agrees that, if leakage is confirmed, it will inform DEQ and CN promptly (at essentially the same time as it informs the NRC) and provide them with a reasonable opportunity to comment on a proposed corrective action plan before SFC submits the plan to the NRC.

C. Additional Actions Related to the Reclamation:

1. **TerreSIM Model:** SFC agrees to re-run the TerreSIM model after final agreement has been reached with the NRC on the cell cover design, and to provide a copy of the results to DEQ and CN. SFC will ensure that the leachate collection system is adequately designed to handle any infiltration that is indicated by the model.
2. **Borrow Areas:** SFC agrees to provide DEQ and CN with a copy of any future studies of alternative borrow areas.
3. **Treatment of Calcium Fluoride Sludge and Soil:** SFC agrees to provide State and CN with an analysis of need to treat or stabilize Calcium Fluoride Sludge and contaminated soils at the site within 60 days after the effective date of this Settlement Agreement. If such analysis indicates that treatment

or stabilization is necessary, SFC agrees to amend the RP to provide for such actions.

4. **Radon Model:** SFC further agrees that it will rerun the RADON model based on the final cell design proposed to NRC to determine whether the design will meet the NRC radon emission standard. SFC will provide the results of these analyses to DEQ upon completion.
 5. **Settlement Analysis:** SFC will conduct an analysis of differential settlement for the final design to ensure that settlement will not undermine the integrity of the cell and the leachate collection system. SFC will provide the results of this review to DEQ upon completion.
 6. **Fill Excavation:** SFC will excavate fill materials at the SFC site in areas where groundwater is contaminated and in areas where the level of soil contamination exceeds the cleanup level approved in the RP.
 7. **Drainage 005:** SFC will install rock armor in the 005 Drainage adequate to assure that erosion will not undermine the cell.
 8. **Well Plugging:** SFC agrees that it will plug all wells that it closes at the SFC site in accordance with Oklahoma law.
 9. **Impoundment Closure:** State agrees to provide SFC with a letter stating that the impoundment closure plans that SFC provided to DEQ are acceptable and satisfy the impoundment closure provision of SFC's OPDES Permit, as to the impoundments identified in the closure plans.
- D. **GWCAP:** SFC agrees that the objective of the GWCAP is to meet the groundwater standards in 10 CFR Part 40, Appendix A, Criteria 5 and 13, or, for constituents that do not have limits specified in Appendix A, the Maximum Contaminant Level (MCL) established in accordance with the Safe Drinking Water Act. Based on groundwater monitoring conducted to date, the constituents of concern and the applicable limits have been established as:
- Arsenic: 0.05 mg/l
 - Fluoride: 4.0 mg/l
 - Nitrate: 10 mg/l
 - Uranium: 30 µg/l

1. **Vicinity of Fluoride Holding Basin #2:** SFC will excavate an exploratory trench to the top of bedrock in the area north and west of Fluoride Holding Basin #2 to investigate the flow of groundwater contamination within 2 months after the effective date of this Settlement Agreement.
 - a. Based on the results of this investigation, SFC will develop a corrective action plan for submission to NRC as a revision to the GWCAP.
 - b. SFC will provide DEQ and CN with a copy of its report of the results of the investigation, and with a reasonable opportunity to comment on the proposed corrective action plan before it is submitted to the NRC.
2. **Consultation:** SFC will consult with DEQ and CN during the course of implementation of the GWCAP, as follows:
 - a. SFC will continue to collect groundwater data in accordance with the GWMP and will utilize the data to assess the effectiveness of the GWCAP in achieving its objective, which is to reduce the concentrations of constituents of concern that have been found in the groundwater to within the relevant concentration limits.
 - b. SFC will conduct statistical analyses for trends in the monitoring data. SFC will monitor all new wells quarterly for the first year after completion to analyze trends and then annually thereafter.
 - c. Based on its assessment, and other changes in groundwater and contaminant flows, particularly the changes that are likely to result from implementation of the GWCAP and the RP, SFC will consider whether changes should be made to the GWCAP.
 - d. If the data from the site monitoring wells and other sources indicates that the concentration limits described above will not be met in a reasonable time despite reasonable changes to the GWCAP or that migration will result in impairment of surface waters, SFC will either undertake further corrective action or propose Alternate Concentration Limits in accordance with the NRC standards for establishing such limits in 10 CFR Part 40, Appendix A, criteria 5B(5)(c) and 5B(6).

- e. To implement SFC's commitment to consult with DEQ and CN regarding such decisions, SFC will provide DEQ and CN with copies of its reports to NRC of monitoring results and with a reasonable opportunity to comment on proposed changes to the GWCAP before SFC submits the changes to the NRC.
- E. **GWMP:** SFC will monitor Groundwater in accordance with the GWMP. SFC agrees to make the following changes to the GWMP:
- 1. **Action Plan:** SFC will include a plan for responding to significant changes in groundwater quality:
 - a. If it identifies statistically significant adverse changes in groundwater concentrations, other than changes that are clearly intended as a result of actions reflected in the RP or GWCAP, and verifies the existence of these changes, SFC will increase the sampling frequency to monthly, notify the NRC within 60 days, and provide the NRC with an assessment of alternative actions.
 - b. SFC will provide DEQ and CN with a copy of any such notice to NRC, and a reasonable opportunity to comment on the associated assessment of corrective action alternatives.
 - 2. **Seep Samples:** SFC will analyze future seep samples for all of the constituents it detected in the samples it collected in July 2004 that exceed background or the MCL. (Background will be used if there is no MCL or if higher than MCL).
 - a. SFC agrees to provide DEQ and CN with the results of the sampling and analysis of the seep samples it collected in July 2004, including analyses for all of the constituents listed in Table 4 of the GWMP.
 - b. Based on the results and in consultation with DEQ and CN, SFC will determine whether to amend its procedure for sampling the seeps to provide for analyses for constituents found to exceed the MCL, except for constituents which exceed the MCL at background levels, in which case the constituents will be added if the detected levels exceed background.
 - c. SFC will include the results of future seep sampling events in SFC's Annual Groundwater Monitoring Reports.

- F. **Risk Assessment:** SFC agrees to complete a risk assessment, provide the results to State and CN, and consult with State and CN regarding any comments or concerns they may have.
- G. **OPDES Permit:** In response to SFC's application for renewal of its OPDES Permit, DEQ provided SFC with draft Renewed OPDES Permit No. OK0000191, Facility ID I-68000010, on September 15, 2004. SFC provided DEQ with comments on the draft Renewed Permit by letter dated October 25, 2004, including a comment indicating that the receiving stream segment designation in the draft Renewed Permit is incorrect. By letter dated November 18, 2004 DEQ indicated that, except for Radium-226, which will remain the same as in the draft OPDES permit dated September 15, 2004, the draft OPDES permit will contain effluent limitations for radionuclides as set forth by the U.S. Nuclear Regulatory Commission in 10 CFR Part 20, Appendix B. The only such radionuclides will be Uranium-natural and Thorium-230. SFC represents that Uranium-natural, Thorium-230 and Radium-226 are the only radionuclides known to be found at the SFC facility above natural background levels. However, if during the normal decommissioning of the SFC facility, SFC discovers additional radionuclides SFC will report the discovery to DEQ and any effluent limits for those radionuclides will also be as set forth in 10 CFR Part 20, Appendix B. Correction of the receiving stream designation as a "high quality waters" will not result in more stringent limits for any constituents than those contained in the draft Renewed Permit sent to SFC on September 15, 2004. SFC agrees to continue the permitting process and obtain a Renewed Permit, but SFC specifically reserves the right to argue in any forum that the State's regulation of radioactive materials at the SFC site is preempted by the Atomic Energy Act (AEA). SFC further agrees that it will not challenge the State's authority to issue or enforce the provisions concerning nonradioactive materials in the Renewed Permit or any future OPDES permit on the grounds that the State's regulation is preempted by the AEA due to NRC's determination that SFC possesses 11e.(2) byproduct material unless the future permit contains provisions that are more stringent than were in the draft Renewed Permit discussed above, such that (1) SFC cannot comply with such provisions and also complete decommissioning in accordance with the RP and NRC requirements or (2) the cost of compliance would have a substantial adverse impact on SFC's ability to complete decommissioning. SFC agrees, however, that it will not take any action for the purpose of making itself unable to comply with any OPDES Permit provision. In

the event that SFC does challenge such provisions of a future permit on preemption grounds associated with 11e.(2) byproduct material such challenge will be limited to those provisions which are more stringent than the draft Renewed Permit.

VI. General

- A. **Reservation of Rights:** This Settlement Agreement resolves all pending legal challenges to the versions of the RP, GWCAP, GWMP, and the raffinate sludge dewatering plan pending before the NRC as of the effective date of this Settlement Agreement, and the appeals of State pending before the U.S. Court of Appeals as of such date. The parties specifically reserve the right to take appropriate action regarding such Plans, as discussed below, in response to changes to such Plans or the discovery of new information that was not reasonably available to them on the effective date of this Settlement Agreement. In particular:
1. If consultations with SFC in accordance with IV, above, do not result in agreement, State and/or CN may submit a hearing request to the NRC concerning the matter of concern. If such a request is filed, SFC agrees not to argue that the State and/or CN lacked good cause for the request being “untimely” if:
 - a. The information on which the contentions of State/CN are based was not previously available, such as modifications of the RP other than those described in V.B and V.C, above; and
 - b. The request was filed promptly after the information became available to State and CN, and completion of such consultations.
 2. This Settlement Agreement relates solely to the legal proceedings described in Section I of this Agreement, and is intended to resolve all concerns of State and CN existing as of the effective date of this Settlement Agreement pertaining to the Plans described in Section I. The State and CN expressly retain all other rights and remedies that may be available to them under tribal, state and federal law concerning any matter other than such plans. Nothing in this Settlement Agreement shall relieve SFC of the responsibility to comply with applicable state and federal laws, rules and regulations. Furthermore, nothing herein shall prohibit or impede the State or CN from pursuing relief in

any appropriate forum if such Plan(s) fail to achieve the intended purposes of such Plan(s).

- B. SFC is entering into this Settlement Agreement in an effort to end litigation and restore a cooperative and constructive relationship among the parties, without admitting that any of the changes to the RP, GWMP, GWCAP, or any other action or limitation provided in this Settlement Agreement is necessary to meet any applicable NRC or other legal requirement.
- C. SFC agrees that it will request NRC approval for the actions specified in the terms of this Settlement Agreement and not to request NRC approval for actions inconsistent with the terms of this Settlement Agreement unless NRC indicates that it will not approve SFC's Plans without such changes. SFC agrees that any changes to the RP, GWCAP, GWMP or Sludge Dewatering Plan required by NRC that are inconsistent with the terms of this Settlement Agreement will be new information that would constitute good cause within the meaning of 10 CFR § 2.309(c)(1)(i) for the failure of either State or CN to file a hearing request on time. Furthermore, if State and/or CN file such a hearing request promptly after the new information becomes available and the conclusion of consultations regarding the subject of such hearing request in accordance with section IV.B, above, SFC will not object to the hearing request(s) on the grounds that State and/or CN failed to demonstrate good cause for such hearing request being untimely. In addition, SFC authorizes State and/or CN to state in such hearing request that SFC has agreed that new information, including Plan changes that are inconsistent with this Settlement Agreement, would constitute good cause for a hearing request to be untimely.
- D. This Settlement Agreement constitutes the entire agreement among the parties respecting the SFC plans and applications currently pending before the NRC, provided, however, that the separate letter agreement between SFC and CN dated April 9, 2003 shall not be affected and shall remain in effect. Any other offers or proposals that may have been made as part of the settlement negotiations are either reflected in this Settlement Agreement or have been withdrawn. Each party shall bear its own costs and attorney fees incurred in connection with the aforementioned administrative or court proceedings.
- E. In the event any party is prevented from fulfilling its obligations under any provision of this Settlement Agreement, that party shall inform the other parties of the cause of its inability to fulfill the obligation, and shall enter into good faith negotiations regarding alternative actions to

achieve the objectives of the obligation. This Settlement Agreement shall not be changed or superseded, except by mutual agreement in writing signed by the duly authorized representatives [of] each party.

- F. All parties agree to exercise due diligence in the performance of their various responsibilities under this Settlement Agreement and to cooperate with each other in carrying out its intent. This Settlement Agreement applies to the parties hereto, including their respective successors and assigns.
- G. The Parties agree that this Settlement Agreement may be enforced as a contractual obligation the terms of which shall be construed according to the laws of the state of Oklahoma.
- H. The Parties represent that they have carefully read this Settlement Agreement and understand its terms and conditions without reservation, and that it has been entered into knowingly and voluntarily. Moreover, this Settlement Agreement has been negotiated and prepared at the mutual request, direction and instruction of the parties, at arms length, with the advice and participation of counsel for each party. The provisions of this Settlement Agreement are to be interpreted without regard to the identity of the party that drafted them.
- I. Notices: Any notice to a party required pursuant to this Settlement Agreement shall be provided in writing to the designated representative of the party as follows:

for SFC: John H. Ellis
President, Sequoyah Fuels Corp.
P.O. Box 610
Gore, OK 74435

for State: James V. Barwick, Esq.
Assistant Attorney General
Environmental Protection Unit
4545 North Lincoln Boulevard, Suite 260
Oklahoma City, Oklahoma 73105-3498

and

Saba Tahmassebi, Engineer Manager
Land Protection Division
Oklahoma Department of Environmental Quality
P.O. Box 1677
Oklahoma City, Oklahoma 73101-1677

for CN: Julian Fite, General Counsel
Cherokee Nation
P.O. Box 948
Tahlequah, OK 74465

VII. Acceptance

By signing below, the designated representative of the respective party represents, warrants and agrees that he or she is authorized to execute this Settlement Agreement on behalf of the designated party and thereby to bind that party to comply with the provisions this Settlement Agreement. This Settlement Agreement may be executed by the parties in one or more counterparts and a copy with all original executed signature pages affixed thereto shall constitute an original Settlement Agreement, so that each party will receive an executed original Settlement Agreement, but all of which shall constitute one and the same Settlement Agreement.

For the State of Oklahoma

[Original Signed by] 11/30/04
James V. Barwick Date
Assistant Attorney General

For the Cherokee Nation

[Original Signed by] 11/30/04
Julian Fite Date
General Counsel

For Sequoyah Fuels Corporation

[Original Signed by] 11/24/04
John H. Ellis Date
President

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Anthony J. Baratta
Lester S. Rubenstein

In the Matter of

Docket No. 50-271-OLA
(ASLBP No. 04-832-02-OLA)

**ENTERGY NUCLEAR VERMONT
YANKEE, L.L.C., AND ENTERGY
NUCLEAR OPERATIONS, INC.**
**(Vermont Yankee Nuclear Power
Station)**

December 16, 2004

In this proceeding concerning an amendment authorizing a power increase to the operating license of the Vermont Yankee Nuclear Power Station, the Board concludes that, pursuant to 10 C.F.R. § 2.310, the informal hearing procedures of 10 C.F.R. Part 2, Subpart L are the most appropriate for the four admitted contentions and that the opportunity for cross-examination under Subpart L is equivalent to the opportunity for cross-examination under section 556(b) of the Administrative Procedure Act and thus is consistent with a State's "reasonable opportunity . . . to interrogate witnesses" under 42 U.S.C. § 2021(l).

RULES OF PRACTICE: SELECTION OF HEARING PROCEDURES

Under 10 C.F.R. § 2.310(d) there are only two criteria that entitle a petitioner to a Subpart G process. The first criterion combines two elements, requiring that a contention necessitate resolution of "a dispute of material fact concerning the occurrence of a past activity" *and* that "the credibility of an eyewitness may

reasonably be expected to be an issue” in resolving that dispute. The second criterion entitling a petitioner to a Subpart G proceeding involves “issues of motive or intent of the party or eyewitness material to the resolution of the contested matter.”

RULES OF PRACTICE: SELECTION OF HEARING PROCEDURES

The complexity of an issue does not automatically trigger a Subpart G hearing under 10 C.F.R. § 2.310(d).

RULES OF PRACTICE: SELECTION OF HEARING PROCEDURES

A petitioner is not entitled to a Subpart G hearing under 10 C.F.R. § 2.310(d) based on the fact that there is a high degree of public interest in the proceeding, that it is controversial, or that discovery and cross-examination are allegedly required to assure public confidence in the proceeding and its decisions.

RULES OF PRACTICE: SELECTION OF HEARING PROCEDURES

The Board will not grant a Subpart G proceeding based on the fact that such a proceeding may be more efficient than a Subpart L proceeding because “efficiency” is not a criterion under 10 C.F.R. § 2.310(d).

**RULES OF PRACTICE: SELECTION OF HEARING PROCEDURES;
MANDATORY DISCLOSURES**

Petitioners will not be granted a Subpart G proceeding based on an assertion that the licensee will not comply with its duty to disclose documents under 10 C.F.R. § 2.336(a) because the Board will not presume that a party will not comply with its duty to disclose. If there is an unexcused failure to make full disclosure, the Board will not hesitate to impose sanctions, including the use of depositions and interrogatories, against the offending party.

RULES OF PRACTICE: SELECTION OF HEARING PROCEDURES

Alleging generalized aspersions on the tactics or motives of the parties, their employees, members, lawyers, or *pro se* representatives will not satisfy the “credibility” or “motive” elements of either criterion of 10 C.F.R. § 2.310(d), so as to trigger a Subpart G proceeding.

RULES OF PRACTICE: SELECTION OF HEARING PROCEDURES

The fact that a witness may be a paid employee or dedicated member of a party, does not, *per se*, create a presumption that his or her credibility or motives are in such doubt that a Subpart G proceeding is required pursuant to 10 C.F.R. § 2.310(d).

RULES OF PRACTICE: SELECTION OF HEARING PROCEDURES

For purposes of demonstrating a Subpart G proceeding is mandated under 10 C.F.R. § 2.310(d), a party may challenge the credibility of potential eyewitnesses based on historical information in a similar or related proceeding, so long as it is probative of whether a witness's credibility "reasonably may be expected to be at issue" in the current proceeding.

RULES OF PRACTICE: SELECTION OF HEARING PROCEDURES

Inasmuch as the initial selection of hearing procedures is done before the identity of opposing party witnesses is known, the selection is not immutable and may be changed if, upon subsequent motion, it is shown that the criteria of 10 C.F.R. § 2.310(d) are met.

RULES OF PRACTICE: SELECTION OF HEARING PROCEDURES

Section 2.310(a), which states that the presiding officer "may" use Subpart L procedures, clearly does not mandate the use of Subpart L procedures for a contention that does not meet the criteria of 10 C.F.R. § 2.310(d). In such a circumstance, the Board, in its sound discretion, must determine the type of hearing procedures most appropriate for the specific contentions before it.

**STATUTORY CONSTRUCTION OR INTERPRETATIONS:
GENERAL RULES**

It is a fundamental rule of regulatory construction that "may," when contrasted with "must" or "will," is permissive. *See Crockett Telephone Co. v. FCC*, 963 F.2d 1564, 1570 (D.C. Cir. 1992) (use of words "may" and "shall" in same provision shows them to have their usual, different meanings); *International Union, UAW v. Dole*, 919 F.2d 753, 756 (D.C. Cir. 1990) ("the usual presumption that 'may' confers discretion, while 'shall' imposes an obligation to act").

**STATUTORY CONSTRUCTION OR INTERPRETATIONS:
GENERAL RULES**

When “the meaning of the regulation is clear and obvious, the regulatory language is conclusive” and a Board is “not free to go outside the express terms of an unambiguous regulation to extrinsic aids such as regulatory history.” *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-95-17, 42 NRC 137, 145 (1995).

RULES OF PRACTICE: SELECTION OF HEARING PROCEDURES

In exercising its discretion under 10 C.F.R. § 2.310(a) to order a Subpart G proceeding, the Board may consider a number of factors, including whether the technical issues are extraordinarily complex, the experience of the parties and their counsel in NRC licensing proceedings, and the necessity for discovery, which is not available under Subpart L.

RULES OF PRACTICE: SELECTION OF HEARING PROCEDURES

Having requested a hearing and submitted two admissible contentions, the State is a party to this proceeding and cannot participate as an interested State.

RULES OF PRACTICE: CROSS-EXAMINATION

Based on the Commission’s authoritative representation to the U.S. Court of Appeals for the First Circuit that the opportunity for cross-examination under Subpart L is equivalent to the opportunity for cross-examination under section 556(b) of the APA, which entitles a party to cross-examination whenever it is “required for a full and true disclosure of the facts,” and based on the First Circuit’s decision in reliance thereon, *CAN v. United States*, No. 04-1145, 2004 WL 2827697, at *8-9 (1st Cir. Dec. 10, 2004), the Board holds that the opportunity for cross-examination under 10 C.F.R. § 2.1204(b)(3) is consistent with the State’s “reasonable opportunity . . . to interrogate witnesses” under 42 U.S.C. § 2021(l).

RULES OF PRACTICE: CROSS-EXAMINATION

Cross-examination by a party is available under 10 C.F.R. § 2.1204(b)(3) whenever the Board determines that it is necessary for the development of adequate record for a sound decision or is required for a full and true disclosure of the facts. Any failure of a Board to allow cross-examination with fidelity to this principle may subject the Part 2 regulations to judicial challenge.

RULES OF PRACTICE: CROSS-EXAMINATION

Cross-examination under 10 C.F.R. § 2.1204(b)(3) is not restricted to those situations described in 10 C.F.R. § 2.310(d), e.g., issues concerning a past activity where the credibility of an eyewitness may reasonably be expected to be at issue. Where needed for a full and true disclosure of the facts, cross-examination under Subpart L can encompass any issue that is relevant to the findings of fact that a Board or presiding officer must make in order to render a decision. This includes, for example, the cross-examination of experts and their opinions, where it is needed to establish an adequate record to resolve a conflict in expert opinions and/or to determine whether a party is able to carry its burden of proof because decisions often hinge upon evaluation of competing expert opinions, technical and scientific facts, which become central elements of the findings of fact.

MEMORANDUM AND ORDER (Selection of Hearing Procedures and Ruling on State Statutory Claim)

On November 22, 2004, this Board granted the requests for hearing of two petitioners, the Department of Public Service of the State of Vermont (State) and the New England Coalition (NEC), challenging certain aspects of the application of Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (collectively, Entergy), for an amendment to the operating license for the Vermont Yankee Nuclear Power Station in Windham County, Vermont. LBP-04-28, 60 NRC 548, 550-51 (2004). Entergy is applying for an increase in Vermont Yankee's maximum power level from 1593 megawatts thermal (MWt) to 1912 MWt and to modify associated technical specifications of the license. The Board found the State and NEC had each raised two contentions admissible under 10 C.F.R. § 2.309(f). Today's ruling addresses the appropriate procedures to use in conducting the hearing on these contentions.

Two issues, each of first impression, are raised. The first involves interpreting a new NRC regulation, 10 C.F.R. § 2.310, "Selection of hearing procedures," and applying it to the four admitted contentions.¹ The second issue involves the nature and extent of the State's right to present evidence and interrogate witnesses pursuant to section 274(l) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2021(l).

For the reasons set forth below, with regard to the first issue we conclude, pursuant to 10 C.F.R. § 2.310, that the informal hearing procedures of 10 C.F.R.

¹ NRC Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004).

Part 2, Subpart L “Informal Hearing Procedures for NRC Adjudications” are the most appropriate for the four contentions. With regard to the second issue, we hold, based on the finding in *Citizens Awareness Network, Inc. v. United States*, No. 04-1145, 2004 WL 2827697, at *8-9 (1st Cir. Dec. 10, 2004) [hereinafter *CAN v. United States*], that the opportunity for cross-examination under Subpart L is equivalent to the opportunity for cross-examination under the Administrative Procedure Act and that the opportunity for cross-examination under 10 C.F.R. § 2.1204(b)(3) is consistent with the State’s “reasonable opportunity . . . to interrogate witnesses” under 42 U.S.C. § 2021(I).

I. BACKGROUND

In September 2003, Entergy submitted an extended power uprate (EPU) application to the Commission to amend Facility Operating License No. DPR-28, for operation of the Vermont Yankee Nuclear Power Station.² On July 1, 2004, the Commission issued a notice of consideration of issuance of the proposed amendment and opportunity for a hearing. 69 Fed. Reg. 39,976 (July 1, 2004).

The State and NEC each filed a timely petition to intervene, asking to be admitted as a party to any proceeding conducted on the application.³ The State submitted five contentions challenging certain aspects of Entergy’s application. NEC proposed seven contentions.

Following the designation of this Board, 69 Fed. Reg. 56,797 (Sept. 22, 2004), both Entergy⁴ and the NRC Staff⁵ submitted answers to the Petitioners’ hearing requests. Each Petitioner filed replies to the Entergy and Staff Answers.⁶

²Letter from Jay K. Thayer, Site Vice President, to U.S. Nuclear Regulatory Commission, Document Control Desk, “Vermont Yankee Nuclear Power Station License No. DPR-28 (Docket No. 50-271) Technical Specification Proposed Change No. 263 Extended Power Uprate” (Sept. 10, 2003), ADAMS Accession No. ML032580089 [hereinafter Application]. Subsequently, Entergy supplemented and amended its application several times.

³[State] Notice of Intention To Participate and Petition To Intervene (Aug. 30, 2004) [hereinafter State Petition]; [NEC]’s Request for Hearing, Demonstration of Standing, Discussion of Scope of Proceeding and Contentions (Aug. 30, 2004) [hereinafter NEC Petition].

⁴Entergy’s Answer to [State] Notice of Intention To Participate and Petition To Intervene (Sept. 29, 2004) [hereinafter Entergy Answer to State]; Entergy’s Answer to the [NEC]’s Request for Hearing (Sept. 29, 2004) [hereinafter Entergy Answer to NEC].

⁵NRC Staff Answer to [State] Notice of Intention To Participate and Petition To Intervene (Sept. 29, 2004) [hereinafter Staff Answer to State]; NRC Staff Answer to Request for Hearing of [NEC] (Sept. 29, 2004) [hereinafter Staff Answer to NEC].

⁶[State] Reply to Answers of Applicant and NRC Staff to Notice of Intention To Participate and Petition To Intervene (Oct. 7, 2004) [hereinafter State Reply]; [NEC]’s Reply to Applicant and NRC Staff Answers to New England Coalition’s Request for Hearing, Demonstration of Standing, Discussion of Scope of Proceeding and Contentions (Oct. 11, 2004) [hereinafter NEC Reply].

In addition to discussing issues relating to standing and the admissibility of contentions, the pleadings addressed the proper interpretation and application of 10 C.F.R. § 2.310 and the State's rights under 42 U.S.C. § 2021(*l*). On October 21 and 22, 2004, the Board heard oral argument on these issues in Brattleboro, Vermont. Tr. at 61-558.

On November 22, 2004, the Board granted the Petitioners' hearing requests and admitted four of the proposed contentions. We now must determine the procedures that will govern our adjudicatory hearing on each contention. The State and NEC, respectively, assert that each of their contentions should be adjudicated under Subpart G. State Petition at 5; NEC Petition at 9. Entergy and the Staff argue that none of the contentions meet the criteria for Subpart G and thus they should be adjudicated under Subpart L. Entergy Answer to State at 39; Entergy Answer to NEC at 48; Staff Answer to State at 27; Staff Answer to NEC at 24.

II. REGULATORY ANALYSIS OF APPROPRIATE HEARING PROCEDURE UNDER 10 C.F.R. PART 2

A. Three-Step Analysis

Our regulatory analysis of the appropriate hearing procedures for the four admitted contentions involves three steps. First, we grapple with the basic interpretation of 10 C.F.R. § 2.310 and several generic issues concerning how to construe this new regulation. The second step is to apply 10 C.F.R. § 2.310(d) to each of the contentions and decide whether it mandates the use of Subpart G procedures. If Subpart G procedures are not required, then a third step is necessary where we decide which Subpart — L or G — to use for each contention.

B. Basic Analysis and Interpretation of 10 C.F.R. § 2.310

1. Overview

On January 14, 2004, the NRC substantially amended 10 C.F.R. Part 2, its rules of practice on adjudicatory hearings, "to make the NRC's hearing process more effective and efficient." 69 Fed. Reg. 2182 (Jan. 14, 2004) (Adjudicatory Process Final Rule). In the final rule the Commission continued its efforts "to move away from the trial-type, adversarial format to resolve technical disputes" believing that "in most instances, the use of the full panoply of formal, trial-like adjudicatory procedures . . . is not essential to the development of an adequate hearing record." *Id.* Thus, the Adjudicatory Process Final Rule encourages, and in some situations requires, the use of the "informal" procedures specified in 10 C.F.R. Part 2, Subpart L, rather than the formal procedures of Subpart G,

in proceedings involving the grant, renewal, or amendment of licenses. *See* 10 C.F.R. § 2.310. Under Subpart L, (a) discovery is prohibited except for certain mandatory disclosures, (b) the parties file all direct and rebuttal testimony in written form, (c) the Board conducts oral hearings during which it interrogates the witnesses, and (d) cross-examination by the parties is permitted, on motion, if the Board deems it necessary for the development of an adequate record. The formal adjudicatory procedures of Subpart G differ, in relevant part, by allowing the parties to propound interrogatories, to take depositions, and to cross-examine witnesses without leave of the Board.

The issue in this case is whether, under the Adjudicatory Process Final Rule, any of the four admitted contentions must or should be heard under Subpart G procedures. Since this case involves a ‘licensee-initiated amendment’ to a license for a nuclear power reactor, the determination of the appropriate hearing procedures hinges on the interpretation and application of 10 C.F.R. § 2.310(a) and (d), which read, in pertinent part:

§ 2.310 Selection of hearing procedures.

Upon a determination that a request for hearing/petition to intervene should be granted and a hearing held, the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to rule on the request/petition will determine and identify the specific hearing procedures to be used for the proceeding as follows —

(a) Except as determined through the application of paragraphs (b) through (h) of this section, proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits subject to part[] . . . 50 . . . of this chapter may be conducted under the procedures of subpart L of this part.

* * * *

(d) In proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits for nuclear power reactors, where the presiding officer by order finds that resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter, the hearing for resolution of that contention or contested matter will be conducted under subpart G of this part.

A petitioner requesting a Subpart G hearing pursuant to section 2.310(d) ‘‘must demonstrate, by reference to the contention and the bases provided and the specific procedures in subpart G of this part, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures.’’ 10 C.F.R. § 2.309(g).

2. *Regulatory Criteria*

At the most fundamental level, the parties dispute the proper interpretation of 10 C.F.R. § 2.310(d). The State asserts that the regulation requires that a contention be heard under Subpart G procedures in three different circumstances. The Staff and Entergy argue that the regulation mandates Subpart G only in two situations. The key regulatory phrase mandates Subpart G procedures where the presiding officer finds that:

resolution of the contention or contested matter necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or issues of motive or intent of the party or eyewitness material to the resolution of the contested matter . . .

10 C.F.R. § 2.310(d).

The State points to the comma between the words “activity” and “where” and argues that a Subpart G hearing must be provided if a contention involves either: (1) “issues of material fact relating to the occurrence of a past activity”; or (2) a situation “where the credibility of an eyewitness may reasonably be expected to be an issue”; or (3) “issues of motive or intent of the party or eyewitness may reasonably be expected to be at issue.” State Petition at 44. The State asserts that 10 C.F.R. § 2.309(g) supports this interpretation because it only requires a petitioner to demonstrate that resolution of the contention necessitates the “resolution of material issues of fact.”

Entergy and the Staff argue that the first two elements of 10 C.F.R. § 2.310(d) must be read in conjunction. In support, they cite the Statement of Considerations, where the Commission stated: “The first criterion contains two elements: The first is that there is a dispute of material fact concerning the occurrence of . . . a past activity. . . . The second element is that the credibility of the eyewitness may reasonably be expected to be an issue.” 69 Fed. Reg. at 2222. The Commission goes on to describe the third phrase in the regulation (motive or intent) as the “second alternative criterion.” *Id.*

We conclude that 10 C.F.R. § 2.310(d) provides only two criteria entitling a petitioner to a Subpart G process and that the first criterion combines two elements, requiring that a contention necessitate resolution of “a dispute of material fact concerning the occurrence of a past activity” *and* that “the credibility of an eyewitness may reasonably be expected to be an issue” in resolving that dispute. This conclusion is based primarily on the parallel structure of the regulation, which specifies that Subpart G procedures will be used where resolution of the contention “necessitates resolution of *issues* of material fact relating to the occurrence of a past activity, where the credibility of an eyewitness may reasonably be expected to be at issue, and/or *issues* of motive or intent of the party or eyewitness material to the resolution of the contested matter.” 10 C.F.R. § 2.310(d) (emphasis added).

In addition, if the two elements of the first criterion were read as independent criteria, the scope of the section 2.310(d) could be so broadly expanded as to subsume most of the general rule. Recognizing that the regulation is not without ambiguity, any doubt about the validity of our interpretation is resolved by the Commission's contemporaneous interpretation in the Statement of Considerations quoted in the preceding paragraph. *See* 69 Fed. Reg. at 2222.⁷

3. *Other Generic Issues*

The Petitioners raise several other generic arguments as to why they should be entitled to a Subpart G hearing with full discovery and cross-examination. First, the Petitioners declare that the complexity of the issues requires that a Subpart G process be used.⁸ Second, NEC argues that it is entitled to a full and fair public hearing under section 189a of the AEA. NEC Petition at 6. Next, Petitioners assert that there is a high degree of public interest in this proceeding and that it is controversial and therefore that discovery and cross-examination are essential to assure that there will be public confidence in the Board's decision.⁹ In this regard, NEC argues that in determining whether to use Subpart G or L procedures, the Board should look at "what will best accommodate the needs of ordinary citizens who are participants in this proceeding and who face extremely limited resources." Tr. at 511. Further, the State argues that granting it the right to discovery and cross-examination will expedite, not delay, the process. State Petition at 46. According to the State, the process established for oral examination of witnesses under Subpart L, whereby a party submits proposed questions to the Board and the Board conducts the questioning, is "extraordinarily convoluted" and less effective because "there is no way . . . to then tell the Board what the follow-up question should be" until the initial answer is heard. Tr. at 497. Next, the State and NEC argue that the Applicant may not rigorously obey the mandate of section 2.336(a) to disclose all documents that are relevant to the contentions and therefore that discovery is needed to "equalize" the situation and ensure a full and true disclosure of the facts. Tr. at 515; State Reply at 49. Finally, the State

⁷ Contrary to the State's assertion, 10 C.F.R. § 2.309(g) simply specifies how to submit a request for a particular hearing procedure, but it does not expand or modify the criteria that must be met under 10 C.F.R. § 2.310(d).

⁸ *See* State Petition at 43 ("issues involved are extremely complex"); State Petition at 46 ("complexity of issues"); State Reply at 51 ("numerous complex, substantive issues"); NEC Petition at 9 ("too serious and complex"); NEC Reply at 15 ("highly technical").

⁹ The State argues that it has a "keen and continuing interest" in this matter, illustrated by its many years of involvement with the Vermont Yankee facility, State Petition at 42-43, that public confidence requires a Subpart G hearing, State Petition at 43. NEC argues that the matter is "highly controversial," NEC Reply at 15, that "public interest is extremely high," and that the "public will benefit" by using a higher level of due process. NEC Reply at 16.

asserts that the position of the Staff — that a Subpart G process should only be granted under the first criterion of 10 C.F.R. § 2.310(d) if credibility is an issue — is “inconsistent with the official position taken by the NRC” in its brief in *CAN v. United States*¹⁰ where the NRC represented that “factual disputes, regardless of whether the credibility of eyewitnesses [is] at issue, may form the basis for a right to cross-examine witnesses.” State Reply at 44.¹¹

Most of the Petitioners’ generic arguments in favor of a mandatory Subpart G hearing were considered and rejected by the Commission in the comments and debate leading to the promulgation of the Adjudicatory Process Final Rule. The remaining arguments are essentially attacks on the Commission regulations and are not appropriate in this adjudicatory proceeding. *See* 10 C.F.R. § 2.335(a).

Viewed in this light, we turn to each of the generic arguments. With regard to complexity, plainly there is no regulatory language in 10 C.F.R. § 2.310(d) that supports the argument that the complexity of the issues dictates that a contention be heard under Subpart G. Although the NRC’s proposed rule on adjudicatory proceedings included complexity as one of the criteria that would require a Subpart G proceeding, 66 Fed. Reg. 19,610, 19,637 (Apr. 16, 2001), the Commission deleted this factor from the final rule, stating:

[C]omplexity and number of issues in nuclear power plant licensing proceedings may not, *per se*, lead ineluctably to the conclusion that cross-examination is necessary to ensure a fair and adequate hearing on the contested matters. Rather, it is the nature of the disputed matters themselves that most directly and significantly bears on whether the techniques of formal hearings such as cross-examination are appropriate.

69 Fed. Reg. at 2196. The complexity of an issue thus does not automatically trigger a Subpart G hearing under 10 C.F.R. § 2.310(d).¹²

Next, we address the argument that section 189a of the AEA, 42 U.S.C. § 2239(a), entitles Petitioners to conduct discovery and cross-examination in this proceeding. Indeed, NRC and its predecessor, the Atomic Energy Commission, originally concluded that on-the-record hearings, with discovery and cross-examination, were required under section 189a. 69 Fed. Reg. at 2183. NRC now rejects this interpretation and discussed the evolution of its thinking and

¹⁰ Brief for Federal Respondents, *CAN v. United States*, No. 04-1145 (1st Cir. 2004) (filed July 14, 2004), State Reply, Exh. 37 [hereinafter Federal Brief in *CAN v. United States*].

¹¹ The State also argues that “deficiencies in the record and uncertainties over critical issues ultimately disadvantages the party with the burden of proof [which in this case] is the Applicant.” State Petition at 46. Since the disadvantaged party, the Applicant, is not complaining and instead opposes the State’s argument, we will not consider this issue further.

¹² As explained *infra*, Part III.B, complexity may be a factor in determining whether cross-examination is needed to ensure the development of an adequate record under 10 C.F.R. § 2.1204(b)(3).

reversal of its position at substantial length in the Statement of Consideration to the Adjudicatory Process Final Rule. 69 Fed. Reg. at 2182-85, 2191-92, 2195-96. In *CAN v. United States*, No. 04-1145, 2004 WL 2827697, at *6 (1st Cir. Dec. 10, 2004), the First Circuit declined to resolve this issue: “Because the new rules adopted by the Commission meet the requirements of the APA, it does not matter what type of hearing the NRC is required to conduct in reactor licensing cases.” On this basis, and pursuant to 10 C.F.R. § 2.335(a), we need not rule on this issue.

We next turn to the argument that there is a high degree of public interest in this proceeding, that it is controversial, and therefore that discovery and cross-examination are required to assure public confidence in the proceeding and its decisions. The short answer is that there is nothing in the plain language of 10 C.F.R. § 2.310(d) to support that position.¹³ The Commission heard and rejected these arguments when it promulgated the Adjudicatory Process Final Rule. 69 Fed. Reg. at 2192. These policy choices, embodied in the final regulation, are not subject to attack in an adjudicatory proceeding. 10 C.F.R. § 2.335(a).

Further, we believe that at least some elements of the Subpart L procedures, *may* serve to assist, not hinder, petitioners. The three administrative judges on each Board, usually including two scientific experts in fields relevant to the proceeding, bring substantial experience and expertise to each contested matter. Given that the Board has the primary responsibility to examine witnesses in Subpart L proceedings, its three judges must be active inquisitors of the factual, technical, and scientific evidence relevant to resolving contested issues. 69 Fed. Reg. at 2188. This active and inquisitorial role of the Boards in Subpart L proceedings may serve to reduce the burdens that ordinary citizens with limited resources might otherwise face in a full adversarial Subpart G proceeding and help to “level the playing field” in a way that may enhance public confidence in the proceeding.

Turning next to the assertion that Subpart L proceedings will be “extraordinarily convoluted” and that Subpart G proceedings will be faster and more efficient, we reject this as speculative. The Commission has stated that using an expert Board as the primary interrogator of witnesses, and reducing the amount of cross-examination and discovery by the parties, will “avoid needless delay and unproductive litigation.” 69 Fed. Reg. at 2188. Convoluted or not, this Board will do its best to manage and administer the hearing procedures (be they Subpart G, L, or whatever) in an fair and efficient manner. Only time will tell whether the new Subpart L procedures expedite proceedings. In any event, we reject the Petitioners’ “efficiency” argument simply because it is not a criterion under 10 C.F.R. § 2.310(d).

¹³ This proposed criterion is administratively impractical, as all petitioners would likely assert that their nuclear power plant licensing proceeding is of high public interest, and this Board is neither suited nor inclined to attempt to assess the quantum of public interest.

Petitioners' next argument — that Entergy may not fully comply with its duty to disclose documents under 10 C.F.R. § 2.336(a) and therefore the Petitioners should be granted a Subpart G process where they can take depositions and ask interrogatories, to “equalize” the field — is rejected. First, we will not presume that a party will not comply with its duty to disclose “all documents . . . relevant to the contentions.” 10 C.F.R. § 2.336(a)(2)(i).¹⁴ Second, if there is an unexcused failure to make a full disclosure, the Board will not hesitate to impose sanctions, including the use of depositions and interrogatories, against the offending party. 10 C.F.R. § 2.336(e).¹⁵

Addressing the Petitioners' final generic argument, we see no inconsistency between the Staff's position here and the Commission's statements to the Court of Appeals in *CAN v. United States*. Here, the Staff argues that the contentions do not meet the criteria of 10 C.F.R. § 2.310(d) for a Subpart G formal adjudicatory hearing. In *CAN v. United States*, the Commission represented to the Court that

[T]he new Subpart L permits such cross-examination as is “necessary to ensure development of an adequate record for decision.” 10 C.F.R. 2.1204(b). This is equivalent to the APA's provision for such cross-examination “as may be required for a full and true disclosure of the facts.” 5 U.S.C. § 556(d).¹⁶

We see no inconsistency between saying that factual disputes alone are insufficient to trigger Subpart G procedures under 10 C.F.R. § 2.310(d), and saying that factual disputes, even where eyewitness credibility is not an issue, may justify cross-examination under 10 C.F.R. § 2.1204(b)(3).

C. Application of 10 C.F.R. § 2.310(d) to Admitted Contentions

Based on the foregoing interpretation of 10 C.F.R. § 2.310(d), we must now examine each contention to determine if the Petitioner has demonstrated that it meets the first criterion of 10 C.F.R. § 2.310(d), i.e., “necessitates resolution of issues of material fact relating to the occurrence of a past activity, where the

¹⁴ Similar obligations are imposed on the Staff. *See* 10 C.F.R. §§ 2.1203 and 2.336(b).

¹⁵ The First Circuit recently concluded that there is no explicit right to discovery under the APA, 5 U.S.C. § 556, that the new mandatory disclosure rules in Subpart L provide meaningful access to information, and thus that the Subpart L rules do not conflict with the APA. *CAN v. United States*, 2004 WL 2827697, at *7-8.

¹⁶ Federal Brief in *CAN v. United States* at 18-19, State Reply, Exh. 37.

credibility of an eyewitness may reasonably be expected to be an issue.”¹⁷ If so, the contention must be heard under Subpart G.

1. State Contention 1

Entergy has claimed credit for containment overpressure in demonstrating the adequacy of ECCS pumps for plant events including a loss of coolant accident in violation of draft General Design Criteria 44 and 52 and therefore Entergy has failed to demonstrate that the proposed uprate will provide adequate protection for public health and safety as required by 10 C.F.R. § 50.57(a)(3).

This contention focuses on relatively technical issues such as whether Entergy has demonstrated that, in the event of a loss of coolant accident (LOCA), the emergency core cooling system (ECCS) pumps will function adequately if containment overpressure is factored into the equation, and whether this part of the application satisfies Draft GDC 44 and 52 and 10 C.F.R. § 50.57(a)(3). The State argues that resolution of this issue will require resolution of material factual disagreements relating to past activities such as “does defense in depth . . . prohibit allowing failure of one physical barrier, in this case the reactor containment, to result in the failure of the ECCS pump function which in term [*sic*] will fail a second barrier, the fuel cladding” State Petition at 44.¹⁸ The State then asserts that the “Answer filed by Applicant uses tactics designed to conceal, not reveal facts,” State Reply at 48; that “Applicant misrepresented the facts by asserting that Mr. Sherman’s opinion was without support when the Applicant knew there was evidence to support that opinion,” State Reply at 49; and that the Applicant’s “less revealing tactic,” State Reply at 49, and “half truths,” Tr. at 505, make cross-examination essential. State Reply at 49. The State gives the following example:

[I]f a witness testifies that it is conservative to use the assumptions for calculating NPSH following a LOCA which appear in Regulatory Guide 1.82, Rev. 3, even though the underlying experimental bases for those assumptions have been unable,

¹⁷Except for the generic issues associated with interpreting 10 C.F.R. § 2.310(d) discussed above, the Petitioners focus on credibility issues and offer no serious argument that their contentions meet the second criterion of the regulation — “issues of motive or intent of the party or eyewitness material to the resolution of the contested matter.” The State expressly acknowledges that motive is not an issue here. Tr. at 507.

¹⁸State arguments about material fact disagreements relating to past activities concerning the adequacy of the ACRS review of Reg. Guide 1.82 and the adequacy of evidence concerning the necessity of containment overpressure credit and the impracticability of other options, State Reply at 44-45, are disregarded here, as these bases for Contention 1 were rejected in our November 22, 2004 ruling. *See* LBP-04-28, 60 NRC at 558-59, 561.

in many instances . . . to bound or otherwise quantify the uncertainties, only carefully crafted cross-examination will be able to test the bases and reasoning of the witness against the specific experimental studies to understand whether the witness's reasoning and basis stand up.

State Reply at 50; *see* Tr. at 508.

The Board concludes that the State has failed to demonstrate that resolution of State Contention 1 meets the requirements of 10 C.F.R. § 2.310(d). Based on the State's arguments, it appears that State Contention 1 will present disputes such as the proper assumptions to be used in calculating NPSH, the validity of these assumptions, and the nature, extent and certainty with which technical and safety conclusions can be drawn from these assumptions and calculations. The parties will likely submit the written testimony of witnesses relating to the assumptions they used and the calculations they performed. But even if such witnesses are deemed "eyewitnesses" to their own calculations, and even if such calculations are deemed "past activities," we see no demonstration that the truthfulness or credibility of any of these eyewitnesses "may reasonably be expected to be at issue." Likewise, expert witnesses may testify as to the validity of the various technical assumptions and calculations, but they are not eyewitnesses. Although we "reasonably may expect" battles over the opinions of the opposing experts and disputes about their professional qualifications, unless they are also testifying as fact eyewitnesses with first-hand knowledge of a material and disputed past activity, Subpart G procedures are not dictated under 10 C.F.R. § 2.310(d). 69 Fed. Reg. at 2222. To hold otherwise would allow the exception to swallow the rule.

We also conclude that generalized aspersions on the tactics or motives of the parties, their employees, members, lawyers, or *pro se* representatives do not satisfy the "credibility" or "motive" elements of either criterion of 10 C.F.R. § 2.310(d). Certainly we expect and require truthfulness from all parties in all aspects of our proceedings. However, the fact that a party's initial pleading at the contention admissibility stage emphasizes those facts supporting its position and minimizes the relevance of opposing facts, does not shock us, nor does it require a Subpart G hearing under either criterion of 10 C.F.R. § 2.310(d). Similarly, the fact that each party is naturally motivated to prevail in its legal position and that lawyers are ethically bound to zealously represent their respective clients, does not trigger Subpart G procedures. And the fact that a witness may be a paid employee or dedicated member of a party, does not, *per se*, create any presumption that his or her credibility or motives are in such doubt that a Subpart G proceeding is required pursuant to 10 C.F.R. § 2.310(d).

2. *State Contention 2*

Because of the current level of uncertainty of the calculation which the Applicant uses to demonstrate the adequacy of ECCS pumps, the Applicant has not demonstrated that the use of containment overpressure to provide the necessary net positive suction head for ECCS pumps will provide adequate protection for the public health and safety as required by 10 C.F.R. § 50.57(a)(3).

In addition to the generic arguments discussed above, the State asserts that this issue raises a number of material fact disagreements related to past activities. These include (a) how did Entergy calculate post-accident conditions and were these calculations appropriate, (b) did the testing on ECCS pumps relating to the impact of a potential LOCA leave large areas of uncertainty, and (c) is the level of uncertainty sufficiently high to make reliance on probabilistic risk assessment unacceptable. State Petition at 44-45. The State's example quoted in the preceding section, dealing with alleged uncertainties and challenges to the conservatisms in the NPSH calculations, covers State Contention 2 as well as State Contention 1.

For the reasons set forth with regard to State Contention 1, we conclude that the State has failed to demonstrate that resolution of State Contention 2 meets the criteria of 10 C.F.R. § 2.310(d). The credibility of eyewitnesses does not appear to be an issue with regard to the State's alleged uncertainties and challenged conservatisms in Entergy's calculations. If these are the issues in dispute, there is no reason to think that Subpart G procedures are required.

3. *NEC Contention 3*

The license amendment should not be approved unless Large Transient Testing is a condition of the Extended Power Uprate.

Without focusing on any of its specific contentions or the regulatory language of 10 C.F.R. § 2.310(d), NEC alleges that there are issues of credibility concerning Entergy that warrant granting NEC the right to cross-examine witnesses and obtain discovery. NEC points to a "series of incidents in which [Entergy's] potential witnesses in this proceeding were shown to be of questionable veracity under oath." NEC Reply at 16. NEC quotes a June 13, 2003 Vermont Public Services Board order regarding the production of documents by Entergy to the effect that it was "disingenuous in its reading of the rule" and engaged in "selective quotation suggest[ing] a willingness to be less than forthright with this Board." NEC Petition at 8. NEC also alleges that on October 7, 2003, the Vermont Public Services Board stated that Entergy has a "corrosive and bullying attitude that threatens an otherwise fair and open process" and ordered Entergy to reimburse NEC \$51,000 in costs incurred in discovery. NEC Petition at 8. NEC further alleges that on September 18, 2000, the NRC Office of Investigations issued

a notice of violation (NOV) to Entergy's predecessor at Vermont Yankee and that the notice makes clear that the offending "VY manager was untruthful with investigators." *Id.* Yet when asked to name an individual eyewitness in this proceeding whose credibility reasonably may be an issue, NEC named only Jay Thayer, the Entergy official who signed its license amendment application. Tr. at 514. NEC did not provide us with an example of a past activity where the credibility of Mr. Thayer's eyewitness testimony reasonably may be expected to be an issue in this proceeding.

Entergy responds to NEC's allegations by arguing that "[a]lleged discovery misconduct in another proceeding before another agency [i.e., the Vermont Public Services Board] has absolutely nothing to do with the 'credibility of an eyewitness' . . . and has no bearing in determining the appropriate hearing procedures in the NRC proceeding." Entergy Answer to NEC at 49 n.55. Entergy cites *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 366 (2001), as support for the proposition that issues relating to the credibility of a witness "cannot be historical" but must instead be "something that he may be accused of doing here and now that affects his credibility as a witness here." Tr. at 528. It also declares that the 2000 NRC NOV was issued to the "*previous* VY licensee" and is irrelevant to the current proceeding. Entergy Answer to NEC at 49-50. Entergy asserts that allegations as to the overall credibility of a party are not sufficient to require holding formal hearings. *Id.* at 50.

This situation demonstrates the difficulty the petitioner faces under the new rules in demonstrating, in its initial request for hearing, that a specific contention raises reasonable concerns about the credibility of an eyewitness to a material past activity. *See* 10 C.F.R. §§ 2.309(g) and 2.310(d). At this stage, the Petitioners do not even know the identity of the witnesses that Entergy may call.

Under these circumstances, we reject the notion that the demonstration of questions about an eyewitness's credibility "cannot be historical." At this early juncture in the proceeding, historical information is one of the few bases upon which a petitioner can argue, and this Board assess, the credibility of a potential eyewitness. Certainly, allegations of a witness's prior untruthfulness or dissembling that are reasonably related to issues in contention may suffice. This is true regardless of whether the allegations arise in a similar or related prior proceeding, so long as it is probative of whether a witnesses' credibility "reasonably may be expected to be at issue" in the current proceeding. 10 C.F.R. § 2.310(d).

Here, NEC has made some relatively specific allegations about the behavior of unnamed Entergy managers and about the activities of the predecessor licensee of Vermont Yankee. As to Entergy's predecessor, unless the allegations concern an individual who continues to work for Entergy and is identified as an eyewitness here, we cannot conclude that 10 C.F.R. § 2.310(d) has been satisfied. The

prior licensee and Entergy are different corporate entities and the credibility of employees of the former will not be assumed to be the same as the credibility of different individuals employed by the latter. As to NEC's allegations of problems that have occurred after Entergy became the licensee, NEC has made no showing that the unnamed individuals in question will likely be eyewitnesses in this proceeding, or how the alleged prior credibility problems relate to this case. Likewise, NEC has made no showing that we have any reason to suspect that Mr. Jay Thayer, the one current Entergy employee named by NEC, may not be credible or truthful.

Accordingly, at this early point, NEC having failed to demonstrate that the credibility of an eyewitness reasonably may be expected to be an issue in litigating NEC Contention 3, we have no basis for concluding that a Subpart G hearing is mandated under 10 C.F.R. § 2.310(d).

4. *NEC Contention 4*

The license amendment should not be approved because Entergy cannot assure seismic and structural integrity of the cooling towers under uprate conditions, in particular the Alternate Cooling System cell. At present the minimum appropriate structural analyses have apparently not been done.

As outlined above, NEC's arguments relating to the credibility of Entergy and its employees and witnesses are not tied to any specific contention and it raises nothing new or particular on this issue with regard to NEC Contention 4. Accordingly, for the reasons set forth above, we rule that NEC has not shown, at this time, that under 10 C.F.R. § 2.310(d) NEC Contention 4 must be heard under Subpart G.

5. *Conclusion*

Based on the foregoing analysis, the Board concludes that, at this point, the Petitioners have not demonstrated that any of the admitted contentions meet the criteria of 10 C.F.R. § 2.310(d), so as to mandate the use of Subpart G procedures. If, however, at some later stage in this proceeding (e.g., when the identity of witnesses is known) a party submits a motion pursuant to 10 C.F.R. § 2.310(d), arguing that the credibility of an eyewitness as to a material past activity reasonably may be expected to be in issue, we may revisit the matter at that time.¹⁹

¹⁹This is consistent with the Commission's statement that "a requestor/petitioner who fails to address the hearing procedure issue would not later be heard to complain in any appeal of the hearing
(Continued)

D. Determination of Appropriate Hearing Procedure

Having concluded that the Petitioners have not demonstrated that any of the four admitted contentions must be heard under Subpart G pursuant to 10 C.F.R. § 2.310(d), the Board must now determine which set of procedures to use. Entergy and the Staff assert that, in this circumstance, Subpart L procedures are mandatory. Entergy argues “the revised rules . . . are specifically intended to eliminate the use of such formal procedures except in exceptional cases and instead [requires the Board to] conduct licensing hearings under the informal procedures of Subpart L.” Entergy Answer to State at 39. The Staff also contends that “a proceeding involving a license amendment must ordinarily follow procedures for an informal hearing set forth in 10 C.F.R. Part 2, Subpart L.” Staff Answer to State at 27. Indeed, this position finds support in the Statement of Considerations to the Adjudicatory Process Final Rule, stating that “Section 2.310(a) . . . applies the hearing procedures of the new Subpart L to all other proceedings not specifically named” and “Subpart L procedures would be used in nuclear power plant licensing proceedings for the resolution of contentions which do not meet the criteria set forth in section 2.310(d) for use of Subpart G hearing procedures.” 69 Fed. Reg. at 2205-06.

We disagree with the position of Entergy and the Staff.

The plain language of 10 C.F.R. § 2.310(a), which uses the term “may,” clearly does not dictate the use of Subpart L if a petitioner fails to demonstrate that Subpart G procedures are mandatory. Section 2.310(a) states: “Except as determined through the application of paragraphs (b) through (h) of this section, proceedings . . . *may* be conducted under the procedures of subpart L of this part.” 10 C.F.R. § 2.310(a) (emphasis added). The term “may” is discretionary. This result is consistent with the thrust of the new regulations, which vest substantial responsibility and discretion in the boards, which are closest and most knowledgeable about the proceeding and its efficient management. *Cf.* 69 Fed. Reg. at 2196 (“While the Commission acknowledges that this approach places greater emphasis and responsibility on the presiding officer to oversee the development of a full and complete record, the Commission concludes this approach will result in the fair but expeditious development of an adequate record for a final decision.”).

procedure selection ruling.” 69 Fed. Reg. at 2221. Certainly a petitioner who knows the identity of an opposing party’s eyewitnesses and has information raising questions about their credibility must present such arguments when it submits its initial request for hearing, or be barred. If, however, the petitioner shows that the identity of the eyewitnesses of opposing parties, or information regarding their lack of credibility on issues material to this proceeding, was not previously available and submits a motion in a timely fashion, it may be considered. This approach is somewhat analogous to 10 C.F.R. § 2.309(f)(2)(i) and (iii).

The structure of 10 C.F.R. § 2.310 also supports the conclusion that Subpart L procedures are not automatic if a contention does not meet the criteria of the exceptions in each of the subsections (b) through (g). Each of these subsections use the mandatory language of “must,” “will,” or “shall,” in specifying the procedures that apply, whereas 10 C.F.R. § 2.310(a) uses permissive language of “may” in referring to Subpart L. It is a fundamental rule of regulatory construction that “may,” when contrasted with “must” or “will,” is permissive. *See Crockett Telephone Co. v. FCC*, 963 F.2d 1564, 1570 (D.C. Cir. 1992) (use of words “may” and “shall” in same provision shows them to have their usual, different meanings); *International Union, UAW v. Dole*, 919 F.2d 753, 756 (D.C. Cir. 1990) (“the usual presumption that ‘may’ confers discretion, while ‘shall’ imposes an obligation to act”).²⁰

Because the plain language of the 10 C.F.R. § 2.310(a) is unambiguous, the Board need not examine the regulatory history. When “the meaning of the regulation is clear and obvious, the regulatory language is conclusive” and a Board is “not free to go outside the express terms of an unambiguous regulation to extrinsic aids such as regulatory history.” *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-95-17, 42 NRC 137, 145 (1995).²¹ Nonetheless, even the regulatory history of section 2.310, supports our interpretation. For example, the Commission noted that “[u]nless otherwise provided in § 2.310, proceedings . . . must *ordinarily* use Subpart L procedures.” 69 Fed. Reg. at 2222 (emphasis added). The use of the word “ordinarily” confirms that Subpart L procedures are not mandatory.

Accordingly, we hold that Subpart L procedures are not mandatory for a contention that does not meet the criteria of 10 C.F.R. § 2.310(d). In such a circumstance, the Board, in its sound discretion, must determine the type of hearing procedures most appropriate for the specific contentions before it.

In applying our discretion to the four contentions admitted here, we heed the Commission’s statement that unless otherwise provided in 10 C.F.R. § 2.310, Subpart L proceedings should “ordinarily” be used. 69 Fed. Reg. at 2222. Against this, we weigh some of the generic factors argued by the Petitioners. Certainly the admitted contentions raise some complex technical issues. But many

²⁰ *See also Haig v. Agee*, 453 U.S. 280, 294 n.26 (1981) (holding that the language “may” is discretionary); *Southern Railway Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 455 (1979) (stating that “the Commission may . . . order a hearing” can only be construed as discretionary).

²¹ *See also Chevron U.S.A. Inc., v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress”); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988) (“Although administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation’s language, its interpretation may not conflict with the plain meaning of the wording used in that regulation”).

nuclear reactor licensing proceedings do the same, and the issues here do not appear extraordinarily technical or beyond the grasp of this Board, duly assisted by questions suggested to us by the parties, and possibly by cross-examination by the parties if needed for a fair decision and an adequate record. Further, we note the long and active involvement of the State of Vermont in NRC licensing proceedings relating to Vermont Yankee. This, plus the fact that counsel for the State and Entergy each have at least 30 years of experience in practicing before the NRC, indicate that a Subpart G proceeding, if granted, would be as efficient and productive as possible and entail no unnecessary delay. The necessity for discovery, which is not available under Subpart L, might also be a factor. But, at this point, we see no particular reason why the additional discovery mechanisms of Subpart G are necessary for the full and fair disclosure of the facts. Finally, as this is the first case to arise under the new 10 C.F.R. § 2.310, we are loathe to conclude that the new Subpart L procedures, so preferred by the Commission, should not be applied here.

Weighing these factors and the information submitted to date, we conclude that the procedures of Subpart L are appropriate for the four admitted contentions.

III. STATUTORY ANALYSIS OF STATE'S RIGHT TO INTERROGATE WITNESSES UNDER 42 U.S.C. § 2021(l)

We now turn to the argument that section 274(l) of the AEA, 42 U.S.C. § 2021(l) gives the State the right to cross-examination of witnesses in a Subpart L proceeding, regardless of 10 C.F.R. § 2.310.²² The statute states, in pertinent part, “the Commission shall . . . afford reasonable opportunity for the State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application.” 42 U.S.C. § 2021(l).

A. Effect of State Contentions on Its 42 U.S.C. § 2021(l) Claim

As a preliminary matter, Entergy and the Staff argue that by filing proposed contentions the State has elected to participate as a party rather than as an “interested State” and thus is somehow barred from asserting its claim under 42 U.S.C. § 2021(l). Entergy Answer to State at 3-4; Staff Answer to State at 2-3. They assert that the State cannot participate as both a party

²²Entergy’s license amendment application for a 20% increase in maximum power clearly falls within the scope of 42 U.S.C. § 2021(l) as an “application for Commission license authorizing an activity as to which the Commission’s authority is continued pursuant to [42 U.S.C. § 2021(e)].”

and an interested State. Tr. at 117, 120, 129-32. They point to 10 C.F.R. § 2.315(c), which reads, in pertinent part, “The presiding officer will afford an interested State . . . *which has not been admitted as a party under § 2.309*, a reasonable opportunity to participate in a hearing” (emphasis added), as dictating that a State that has been admitted as a party loses the rights given to an interested State.²³ In support of this proposition they cite *Louisiana Energy Services, L.P.* (National Enrichment Facility), Licensing Board Memorandum and Order (Clarification Requests Ruling and Commission Referral), (Sept. 14, 2004) (unpublished), which states “on its face, this [italicized] language precludes participation under section 2.315(c) by an interested governmental entity that has been admitted as a section 2.309 party to a proceeding.” *Id.* at 3.²⁴

While we disagree with the Licensing Board’s logic,²⁵ the issue is moot because subsequent to the briefing in this proceeding the Commission resolved this matter by affirming *Louisiana Energy Services*. The Commission ruled that the “plain terms of section 2.315(c) [allow] government entities to claim ‘interested state’ participation only if they are not already admitted parties.” *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 626-27 (2004). Accordingly, we hold that the State of Vermont, having requested a hearing and submitted two admissible contentions, is a party to this proceeding and cannot participate as an interested State.²⁶

This case presents a different issue — whether 42 U.S.C. § 2021(*l*) gives the State the right to discovery and cross-examination of witnesses, i.e., a right to a Subpart G proceeding, regardless of the Board’s 10 C.F.R. § 2.310 decision. Neither the Commission nor the Board addressed the impact of section 2021(*l*) in *Louisiana Energy Services* because the issue never arose. And nothing in the statute makes the State’s right to a “reasonable opportunity . . . to interrogate witnesses” dependent on its status under 10 C.F.R. § 2.315(c) as an interested

²³ The phrase “which has not been admitted as a party under § 2.309” was not in the current rule’s predecessor, *see* 10 C.F.R. § 2.715(c) (2004), or in the proposed version of the current rule. *See* 66 Fed. Reg. 19,610, 19,639 (Apr. 16, 2001).

²⁴ The Board referred its ruling in *Louisiana Energy Services* to the Commission.

²⁵ The statement that a State that has *not* been admitted as a party *may* participate as an interested State, does not mandate the converse — that a State that *has* been admitted as a party *may not*. Imposing such a Hobson’s choice on the State runs counter to the basic purpose of the regulation, which is to give the State additional rights.

²⁶ The State raises the novel argument that it need not decide whether to participate as an interested State or a party “until the Board has ruled as to whether there’s going to be a hearing and has decided what the contentions are.” Tr. at 104. They cite no regulatory support for this proposition, and we reject it. However, the Adjudicatory Process Final Rule provides the option for Petitioners, such as the State, to “adopt” other Petitioners’ contentions, thus providing the State with an avenue of participation in them. 10 C.F.R. § 2.309(f)(3).

State or a party.²⁷ Thus, *Louisiana Energy Services* provides no answer to the State's arguments under 42 U.S.C. § 2021(l).

B. Consistency of 10 C.F.R. § 2.1204(b) and 42 U.S.C. § 2021(l)

Accordingly, we consider the merits of whether 42 U.S.C. § 2021(l) entitles the State to a Subpart G hearing with cross-examination.²⁸ The State argues that the statute guarantees it such rights. State Petition at 3; State Reply at 3-4.

Entergy and the Staff respond that the Adjudicatory Process Final Rule represents, *inter alia*, the Commission's reasonable interpretation of 42 U.S.C. § 2021(l), and that 10 C.F.R. § 2.1204(b)(3) affords the State a "reasonable opportunity" to interrogate witnesses and thus satisfies the statute. Tr. at 522-23 (Entergy); Tr. at 132, 540-43 (Staff).

The statutory language is our lodestar. It states that "the Commission . . . shall afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission." 42 U.S.C. § 2021(l). For reasons set forth below, we conclude this language is consistent with the new Adjudicatory Process Final Rule.

First, we note that the Commission never discussed the issue of the State's rights under 42 U.S.C. 2021(l) in the Statements of Considerations (totaling 70+ pages) to the proposed or final revisions to 10 C.F.R. Part 2. *See* 66 Fed. Reg. 19,610-71 and 69 Fed. Reg. 2182-2282.

At first blush, 10 C.F.R. § 2.1204(b)(3) appears to be at odds with the State's "reasonable opportunity" to interrogate witnesses under 42 U.S.C. § 2021(l). Under Subpart L, the presiding officer "shall allow cross-examination by the parties *only if* the presiding officer determines that cross-examination by the parties is *necessary to ensure the development of an adequate record for decision*." 10 C.F.R. § 2.1204(b)(3) (emphasis added). Certainly, the rationale of Subpart L proceedings is to assign primary responsibility to the Board, not the parties, for the interrogation of witnesses and development of an adequate record. As the Commission explained:

In such cases, questioning of witnesses by the presiding officer, after consideration of questions for witnesses propounded by the parties, has the potential to be the better approach for assuring the expeditious, controlled and deliberate development

²⁷ Questions as to whether 10 C.F.R. § 2.315(c), particularly its new phrase, "where cross-examination by the parties is permitted," fully implements the State's rights under 42 U.S.C. § 2021(l) are moot under *Louisiana Energy Services*.

²⁸ The State's argument that it is entitled to discovery under 42 U.S.C. § 2021(l) is rejected because the statute does not explicitly mention discovery, nor is it necessarily implicit in the other granted rights. *See CAN v. United States*, 2004 WL 2827697, at *7-8.

of an adequate record for decision. The presiding officer is ultimately responsible for the preparation of an initial decision on the contention/contested matter; it would follow that the presiding officer is best able to assess the record information as the hearing progresses, and determine where the record requires further clarification or explanation in order to provide a basis for the presiding officer's (future) decision.

69 Fed. Reg. at 2196.

But the Commission goes on to say that, cross-examination by the parties is indeed available under 10 C.F.R. § 2.1204(b)(3):

If there are circumstances in any proceeding where the presiding officer believes that cross-examination by the parties is needed to develop an adequate record, the presiding officer may authorize cross-examination by the parties.

69 Fed. Reg. at 2196.²⁹

The recent decision in *CAN v. United States*, No. 04-1145, 2004 WL 2827697 (1st Cir. Dec. 10, 2004), supports the view that a reasonable opportunity for cross-examination, in appropriate circumstances, must be afforded to any party under 10 C.F.R. § 2.1204(b)(3). In that case, the Commission represented to the court that the availability of cross-examination under 10 C.F.R. § 2.1204(b)(3) “is equivalent to the APA’s provision for such cross examination ‘as may be required for a full and true disclosure of the facts,’ for on-the-record adjudicatory hearings under 5 U.S.C. § 556(d).” Federal Brief in *CAN v. United States* at 19, State Reply, Exh. 37 (emphasis added).³⁰ The Commission went on to state that “Subpart L, though using somewhat different language, provides as much access to cross-examination as the APA.” *Id.* at 46.

On this basis, the First Circuit held that the Subpart L regulations did not violate a petitioner’s right to cross-examine witnesses under the APA and were valid:

The Commission represents that, despite the difference in language, it interprets the standard for allowing cross-examination under the new rules to be equivalent

²⁹The Statement of Considerations includes suggestions that the parties will need to conduct cross-examination in Subpart L proceedings “only in rare circumstances.” 69 Fed. Reg. at 2196. While we acknowledge that the Boards must take the laboring oar on any examination of the witnesses, we are not so confident that Subpart L effectively banishes cross-examination by the parties. Certainly, this was not the position of the Commission in *CAN v. United States*. Setting predictions aside, *CAN v. United States* teaches that each Board must exercise its discretion and answer the question: is the requested cross-examination needed for a full and true disclosure of the facts and to ensure the development of an adequate record for a sound decision? This will be a case-by-case determination.

³⁰See also the Statement of Considerations to the Adjudicatory Process Final Rule where the Commission stated that the opportunity for cross-examination under Subpart L is “consistent with” the availability of cross-examination under 5 U.S.C. § 556(d). 69 Fed. Reg. at 2188.

to the APA standard. . . . Given the Commission’s stated interpretation, the new rules on cross-examination cannot be termed inconsistent with the dictates of the APA. [Accordingly] we find that the new rules meet the APA requirements for on-the-record adjudications [and] we hold that their promulgation does not exceed the Commission’s authority.

CAN v. United States, 2004 WL 2827697, at *8.

With regard to the discretion of the presiding officer/Board to determine whether cross-examination is needed, the court stated:

[W]e cannot say that it is arbitrary and capricious for the Commission to leave the determination of whether cross-examination will further the truth-seeking process in a particular proceeding to the discretion of the individual hearing officer.

We do, however, *add a caveat*. *The APA does require that cross-examination be available when “required for a full and true disclosure of the facts.”* [5 U.S.C. § 556(d)]. If the new procedures are to comply in practice with the APA, cross-examination must be allowed in appropriate instances. *Should the agency’s administration of the new rules contradict its present representations or otherwise flout this principle, nothing in this opinion will inoculate the rules against further challenges.*

Id. at *11-12 (emphasis added).

Our task is slightly different than the issue that confronted the court in *CAN v. United States*, because here the State raises a different statutory issue — whether the opportunity for cross-examination under Subpart L is consistent with 42 U.S.C. § 2021(l). Nevertheless, we hold, based on the finding in *CAN v. United States* that the opportunity for cross-examination under Subpart L is equivalent to the opportunity for cross-examination under the APA, that the opportunity for cross-examination under 10 C.F.R. § 2.1204(b)(3) is likewise consistent with the State’s “reasonable opportunity . . . to interrogate witnesses” under 42 U.S.C. § 2021(l). We do so in firm recognition of the First Circuit’s caveat that “the APA [requires] that cross-examination be available when ‘required for a full and true disclosure of the facts’” and that the continuing validity of the Subpart L regulation depends on us administering this regulation with fidelity to this requirement. *Id.* at *12.

Applying *CAN v. United States*, to this case, it is clear that cross-examination under 10 C.F.R. § 2.1204(b)(3) is not restricted to those situations described in 10 C.F.R. § 2.310(d), e.g., issues concerning a past activity where the credibility of an eyewitness may reasonably be expected to be at issue.³¹ Where needed for

³¹The purposes of 10 C.F.R. §§ 2.310(d) and 2.1204(b)(3) are entirely different. The former helps determine which type of proceeding should be used. The latter assumes that Subpart L rules apply and allows the presiding officer to authorize cross-examination where needed.

a full and true disclosure of the facts, cross-examination under Subpart L can encompass any issue that is relevant to the findings of fact that a Board or presiding officer must make in order to render a decision. This includes, for example, the cross-examination of experts and their opinions, where it is needed to establish an adequate record to resolve a conflict in expert opinions and/or to determine whether a party is able to carry its burden of proof because our decisions often hinge upon our evaluation of competing expert opinions, technical and scientific facts,³² which become central elements of our findings of fact. Although the Board includes technical experts, we are not experts in all disciplines nor as well versed in the nuances of some issues as some of the litigants. Therefore, supplemental cross-examination by the parties is clearly allowed under 10 C.F.R. § 2.1204(b)(3) and 5 U.S.C. § 556(d) when it is required for a full and fair disclosure and adequate record of competing technical and scientific evidence and testimony. It is on this basis that we conclude that using Subpart L rules for this proceeding is consistent with State's statutory right under 42 U.S.C. § 2021(l).

IV. RELIEF

For the foregoing reasons, the Board denies the requests of the Petitioners, the Department of Public Services of the State of Vermont and the New England Coalition, that their admitted contentions be heard pursuant to the procedures of 10 C.F.R. Part 2, Subpart G. The Board rules that the procedures of Subpart L shall be used for these contentions. The State shall participate in the hearing as a party, with the rights and responsibilities of a party. Within 15 days of the issuance of this Order, the Staff shall notify the Board whether they desire to participate in this proceeding as a party. The parties shall make their initial disclosures pursuant to 10 C.F.R. § 2.336(a) and the Staff shall file the hearing file pursuant to 10 C.F.R. § 2.1203 within 30 days of the issuance of this ruling.

³²The regulations recognize that expert opinions are evidence and that "scientific fact" can be key to the resolution of Part 2 proceedings. *See* 10 C.F.R. § 2.337(f) and (j). *See also* 69 Fed. Reg. at 2182 (recognizing that the presiding officer must be the finder of "technical fact[s]").

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD³³

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

Lester S. Rubenstein
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 16, 2004

³³ Copies of this Order were sent this date by Internet e-mail transmission to counsel for (1) Licensees Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.; (2) Petitioners Vermont Department of Public Service and New England Coalition of Brattleboro, Vermont; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ann Marshall Young, Chair
Anthony J. Baratta
Thomas S. Elleman

In the Matter of

Docket Nos. 50-413-OLA
50-414-OLA
(ASLBP No. 03-815-03-OLA)

DUKE ENERGY CORPORATION
(Catawba Nuclear Station, Units 1
and 2)

December 22, 2004

In this Partial Initial Decision concerning Duke Energy Corporation's application to amend the operating license for its Catawba Nuclear Station to allow the use of four mixed oxide (MOX) fuel lead test assemblies as part of a U.S.–Russian Federation nuclear nonproliferation program, the Licensing Board finds, with regard to all contested issues raised in Petitioner Blue Ridge Environmental Defense League's (BREDL's) one remaining safety contention, that despite some uncertainties, Duke has shown by a preponderance of the evidence that these are within sufficient ranges to assure to a reasonable degree that operation of Catawba with the four MOX assemblies will not endanger the health and safety of the public.

LICENSE AMENDMENTS: GOVERNING LEGAL STANDARDS

Under 10 C.F.R. § 50.90, whenever a holder of a license wishes to amend the license, including technical specifications in the license, an application for amendment must be filed, fully describing the changes desired.

LICENSE AMENDMENTS: GOVERNING LEGAL STANDARDS

Under 10 C.F.R. § 50.92(a), determinations on whether to grant an applied-for license amendment are to be guided by the considerations that govern the issuance of initial licenses or construction permits to the extent applicable and appropriate. Both the common standards for licenses and construction permits in 10 C.F.R. § 50.40(a), and those specifically for issuance of operating licenses in 10 C.F.R. § 50.57(a)(3), provide that there must be “reasonable assurance” that the activities at issue will not endanger the health and safety of the public.

TECHNICAL ISSUES DISCUSSED

Section 50.46 of 10 C.F.R., “Acceptance criteria for emergency core cooling systems for light-water nuclear power reactors,” defines the requirements that light-water reactors must meet with regard to their emergency core cooling systems (ECCSs). These include limits on peak cladding temperature, maximum cladding oxidation, and coolable core geometry during postulated loss-of-coolant accidents (LOCAs), which must be calculated by analyzing a number of postulated LOCAs using a “best estimate” method under section 50.46(a)(1)(i) or an Appendix K method permitted under section 50.46(a)(1)(ii). Technical issues that play central roles in the analysis of the matters in dispute in this decision include two related phenomena that can occur late in a LOCA scenario, clad ballooning and fuel relocation, as well as the relevance of the section 50.46 acceptance criteria — which relate specifically to boiling or pressurized light-water reactors that use low-enriched uranium (LEU) fuel consisting of “uranium oxide pellets within cylindrical zircaloy or ZIRLO cladding” — to a reactor using MOX fuel.

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**PARTIAL INITIAL DECISION
(Regarding BREDL Safety Contention I)**

This proceeding involves Duke Energy Corporation’s (Duke’s) February 2003 application to amend the operating license for its Catawba Nuclear Station, located in York, South Carolina, to allow the use of four mixed oxide (MOX) fuel lead test assemblies at the station. After considering the parties’ evidence and argument on the one safety-related contention of Petitioner Blue Ridge Environmental Defense League (BREDL) admitted and remaining in this proceeding, we rule herein, based on the findings of fact and conclusions of law below, that Duke has met its burden of persuasion with regard to all contested issues raised in this contention, showing by a preponderance of the evidence with regard to these issues that there is reasonable assurance that operation of Catawba with the four MOX assemblies will not endanger the health and safety of the public.

I. BACKGROUND AND PROCEDURAL HISTORY

Duke’s application is made as one part of a U.S.–Russian Federation nuclear nonproliferation program, in which it is proposed to dispose of surplus plutonium from nuclear weapons by converting it into MOX fuel (containing a mixture of plutonium and uranium oxides, with plutonium providing the primary fissile isotopes) to be used in nuclear reactors.¹ In its license amendment request (LAR) Duke seeks to modify certain technical specifications (TSs) to enable the use of four MOX fuel lead test assemblies in the Catawba plant, and also requests

¹ See 68 Fed. Reg. 44,107 (July 25, 2003); Letter from M.S. Tuckman, Executive Vice President, Duke Power, to NRC (Feb. 27, 2003), License Amendment Request [hereinafter LAR], Attachment 3 at 3-2 n.1.

exemption from certain NRC regulations.² Duke is part of a consortium, Duke Cogema Stone & Webster (DCS), that has contracted with the Department of Energy (DOE) to perform various functions associated with this program.³ Assuming approval of Duke's currently pending license application, DCS will, according to Duke, "provide for the design, construction, operation, and deactivation of a [MOX] Fuel Fabrication Facility (MFFF)," including agreements pursuant to which DCS "will process PuO₂ powder supplied by [DOE], blend it with depleted UO₂ powder, and fabricate it into MOX fuel pellets," which would then be loaded into MOX fuel assemblies.⁴ Duke's ultimate plan, assuming all necessary approvals, is to use MOX fuel assemblies containing fuel manufactured by DCS in the McGuire and Catawba Nuclear Stations in "batch" quantities, with core fractions up to 40% MOX fuel.⁵

Petitioners Blue Ridge Environmental Defense League (BREDL) and Nuclear Information and Resource Service (NIRS) submitted petitions to intervene and requests for hearing regarding the current LAR in August 2003, in response to a July 2003 *Federal Register* publication of notice of opportunity for hearing; these were supplemented in October 2003 by contentions raising specific areas of dispute regarding the LAR.⁶ After hearing oral argument on BREDL's safety-related and security-related contentions in December 2003 and March 2004, respectively,⁷ the Licensing Board granted BREDL's request for hearing and, in Memoranda and Orders dated March 5 and April 12, 2004, admitted two safety-related contentions and one security-related contention.⁸ After various prehearing

² Duke's original license amendment request involved both the McGuire Nuclear Station, Units 1 and 2, and the Catawba Nuclear Station, Units 1 and 2. In September 2003, Duke revised the LAR to restrict the request to the Catawba facility. Letter from M.S. Tuckman to NRC (Sept. 23, 2003). See LBP-04-4, 59 NRC 129 (2004), LBP-04-10, 59 NRC 296 (2004), for more detailed information about Duke's application and the technical specification modifications and exemptions involved.

³ LAR, Attachment 3 at 3-2.

⁴ *Id.*

⁵ *Id.*

⁶ See 68 Fed. Reg. 44,107; [BREDL]'s Hearing Request and Petition To Intervene (Aug. 25, 2003); Nuclear Information & Resource Service's [NIRS] Request for Hearing and Petition To Intervene (Aug. 21, 2003); [BREDL]'s Supplemental Petition To Intervene (Oct. 21, 2003) [hereinafter BREDL Contentions]; Contentions of [NIRS] (Oct. 21, 2003). See also [BREDL]'s Second Supplemental Petition To Intervene (Dec. 2, 2003); [BREDL]'s Contentions on Duke's Security Plan Submittal (Mar. 3, 2004).

⁷ Tr. 71-576 (Dec. 3-4, 2004); Tr. 1263-1513 (Mar. 18, 2004) (Safeguards Information [SI]).

⁸ LBP-04-4, 59 NRC 129 (2004); LBP-04-10, 59 NRC 296 (2004) (redacted public version of April 12, 2004, sealed Safeguards Memorandum and Order, issued May 28, 2004). None of NIRS's contentions were admitted. Of the three safety-related contentions admitted in LBP-04-4, the Board dismissed one in LBP-04-7, 59 NRC 259 (2004), and BREDL withdrew another, see Order
(Continued)

activities including discovery among the parties, an evidentiary hearing was held July 14 and 15, 2004,⁹ on the only safety contention then remaining in the proceeding, which we had admitted in the following form:

Contention I: The LAR is inadequate because Duke has failed to account for differences in MOX and LEU fuel behavior (both known differences and recent information on possible differences) and for the impact of such differences on LOCAs [loss-of-coolant accidents], and on the DBA [design-basis analysis] for Catawba.¹⁰

Subsequent to the hearing, the parties submitted proposed findings of fact and conclusions of law, and proposed reply findings.¹¹

On the same date that the parties filed their reply proposed findings, Duke informed the NRC and the parties in this proceeding of certain information that has had the impact of delaying the issuance of this Memorandum and Order. This information concerned certain errors Duke had discovered, associated with certain calculated doses in a table in the Catawba Updated Final Safety Analysis Report (UFSAR), with regard to which Duke indicated that it was “working to provide . . . updated material by September 10, 2004.”¹² On September 15, 2004, Duke counsel provided notification that the “new target date” for provision of this information was September 17, 2004.¹³ On September 20, 2004, Duke submitted letters providing corrections to the LAR materials, and also committing to providing a summary of an independent review of the LAR that was done to give additional assurance that the LAR conclusions were accurate and adequately

(Regarding Proposed Redacted Memorandum & Order, and Proposed Schedule Changes) (May 25, 2004) (unpublished), leaving one for litigation, that at issue herein. *See also* CLI-04-19, 60 NRC 5 (2004).

⁹ *See generally* Tr. 2072-2708.

¹⁰ LBP-04-4, 59 NRC at 167.

¹¹ [Duke]’s Proposed Findings of Fact and Conclusions of Law Regarding Contention I (Aug. 6, 2004) [hereinafter Duke Findings]; [BREDL]’s Proposed Findings of Fact and Conclusions of Law Regarding BREDL Contention I (Aug. 6, 2004) [hereinafter BREDL Findings]; NRC Staff’s Proposed Findings of Fact and Conclusions of Law Concerning BREDL Contention I (Aug. 6, 2004) [hereinafter Staff Findings]; [Duke]’s Reply Findings of Fact and Conclusions of Law Regarding Contention I (Aug. 31, 2004) [hereinafter Duke Reply]; [BREDL]’s Proposed Reply Findings of Fact and Conclusions of Law Regarding BREDL Contention I (Aug. 31, 2004) [hereinafter BREDL Reply]; NRC Staff’s Reply Findings of Fact and Conclusions of Law Concerning BREDL Contention I (Aug. 6, 2004) [hereinafter Staff Reply].

¹² Letter from David A. Repka to Administrative Judges (Aug. 31, 2004), and Attached Letter from W.R. McCollum to NRC Document Control Desk (Aug. 31, 2004) at 2.

¹³ E-mail from Anne Cottingham to service list for proceeding (Sept. 15, 2004).

supported.¹⁴ On October 6, 2004, Duke counsel notified the Licensing Board that Duke had on October 4 provided further information to the Staff regarding the independent review.¹⁵

During a closed session held September 1 to address certain matters related to the one security-related contention admitted by the Board, BREDL and Staff counsel were asked for their clients' responses to Duke's August 31 notification, with specific regard to any delay related to Contention I that might result from it. BREDL indicated that it would first need to see the information, and the Staff indicated that its review of the updated material would take "at least two weeks, and that is a minimum."¹⁶ On October 4, 2004, the Staff indicated that it would respond to the materials provided by Duke within 1 month of that date.¹⁷ On October 8, BREDL filed an e-mail statement that it would like an opportunity to review Duke's response to an expected Staff request for additional information (RAI) before commenting on the relevance of Duke's new information. On October 14, the Staff notified the Licensing Board by letter that it had concluded that the late-filed information provided by Duke had no impact on the Staff's testimony regarding Contention I and that the Staff's conclusions in its safety evaluation report (SER) on Duke's application and in Supplement 2 to the SER were unchanged with respect to fuel behavior and relevant LOCA analyses.¹⁸ On October 25, during another closed session held to address various security-related matters, BREDL counsel indicated that it did not intend to pursue anything further relating to Contention I in light of the Duke information, as BREDL did not consider the material relevant to Contention I.¹⁹

Meanwhile, regarding the one security-related contention in the proceeding, admitted as Security Contention 5, both prior to and since issuance of LBP-04-10 the Licensing Board and parties have engaged, on a fairly intensive basis, in numerous activities involving various sensitive information, the relevance of particular pieces of such information, and access to such information. A number of closed sessions have been held to address issues related to such information, and the Licensing Board has issued a number of rulings on related discovery and other disputes, involving BREDL's access to and "need-to-know" regarding

¹⁴ Letter from David A. Repka to Administrative Judges (Sept. 20, 2004); Letter (with attachments) from Henry B. Barron to Document Control Desk (Sept. 20, 2004).

¹⁵ Letter from David A. Repka to Administrative Judges (Oct. 6, 2004); Letter (with attachments) from Henry B. Barron to Document Control Desk (Oct. 4, 2004).

¹⁶ Tr. 3080, 3082-83 (SI); *see* Tr. 3078-84 (SI).

¹⁷ Letter from Susan L. Uttal to Administrative Judges (Oct. 4, 2004).

¹⁸ Letter from Susan L. Uttal to Administrative Judges (Oct. 14, 2004).

¹⁹ E-mail from Diane Curran to Administrative Judges (Oct. 8, 2004); Tr. 3575-77 (SI).

various sensitive information.²⁰ Some of these rulings have followed initial need-to-know determinations by the Staff and Duke, regarding documents held by each, and some Board rulings have been appealed to the Commission, leading to the issuance of several Commission Memoranda and Orders.²¹ Most recently, on December 17 and 20, 2004, the parties filed their prefiled direct testimony, along with various exhibits, for the evidentiary hearing on BREDL Security Contention 5. This hearing is scheduled to be held January 10-14, 2005.

II. RULINGS ON PENDING MATTERS

During the July 2004 evidentiary hearing Duke and NRC Staff counsel objected to BREDL's proposed Exhibit C, "Status of NSC Activities in the Field of Fuel Behaviour," Nuclear Energy Agency/Nuclear Science Committee, NEA/NSC/DOC(2003)12 (May 2003), on the grounds, respectively, that the document had not been timely disclosed and was beyond the scope of the proceeding.²² The Board heard BREDL's testimony relating to this and one other document

²⁰ See, e.g., Memorandum and Order (Protective Order Governing Duke Energy Corporation's September 15, 2003 Security Plan Submittal) (Dec. 15, 2003); Memorandum (Providing Notice of Granting BREDL Motion for Need To Know Determination and Extension of Deadline for Filing Security-Related Contentions) (Jan 29, 2004); Memorandum and Order (Ruling on BREDL Motion Regarding Staff February 6, 2004, Meeting with Duke Energy and Request for Need To Know Determination) (Feb. 4, 2004); Memorandum and Order (Ruling on BREDL Motion for Need To Know Determination Regarding Classified Documents) (Feb. 17, 2004); Memorandum and Order (Setting Schedule for Discovery and Hearing on Security-Related Matters) (Apr. 28, 2004); Order (Ruling on [Duke] Objection to BREDL Document Production Request No. 2 Regarding BREDL Security Contention) (June 28, 2004); LBP-04-13, 60 NRC 33 (2004); Memorandum and Order Suspending Discovery Proceedings Pending Further Commission Guidance (July 28, 2004); Memorandum and Order (Confirming August 10, 2004, Bench Ruling Finding Need To Know and Order Provision of Documents Sought by Intervenor in Discovery) (Aug. 13, 2004); LBP-04-21, 60 NRC 357 (2004); Memorandum and Order (Ruling on Objections of Duke and Staff to BREDL Discovery Requests (Oct. 6, 2004); Memorandum and Order (Ruling on Redactions to Documents 67 and 68) (Oct 6, 2004); Memorandum and Order (Confirming Sept. 28, 2004, Bench Ruling Upholding Staff Need-To-Know Determination on Access to Security Plan Revision) (Oct. 15, 2004); Memorandum and Order (Confirming Matters Addressed and Ruled on at Oct. 25, 2004, Closed Session) (Nov. 5, 2004); Memorandum and Order (Ruling on BREDL Access to NRC Guidance Document) (Nov. 5, 2004); Memorandum and Order (Ruling on BREDL Need-To-Know Appeal Regarding Lessons Learned Report) (Nov. 22, 2004); Memorandum and Order (Granting in Part Motion for Interim Discovery Measures) (Nov. 23, 2004); Memorandum and Order (Confirming Actions Taken at November 23, 2004, Closed Session); Memorandum and Order (Ruling on BREDL Motion To Amend Protective Order) (Dec. 17, 2004); Memorandum and Order (Need-To-Know Ruling on SECY Document) (Dec. 17, 2004).

²¹ See CLI-04-6, 59 NRC 62 (2004); CLI-04-19, 60 NRC 5 (2004); CLI-04-21, 60 NRC 21 (2004); CLI-04-29, 60 NRC 417 (2004); CLI-04-37, 60 NRC 646 (2004).

²² Tr. 2541.

submitted by BREDL that had not previously been disclosed, taking under advisement objections to the documents as well as all testimony on them. The Staff subsequently objected in writing, based on the lateness of the submission, extraneous material in the exhibit, and the cumulative nature of the information in the document.²³ Duke submitted rebuttal testimony, per the Board's request, stating, *inter alia*, that Exhibit C "does not provide evidence of a difference in fuel pellet-cladding chemical interaction between MOX and LEU fuel," and that the exhibit "does not provide any evidence that, if such a difference actually existed, . . . it would matter under LOCA conditions."²⁴

BREDL's expert, Dr. Edwin Lyman, explained at the hearing that the document was submitted because of discussion therein regarding properties of pellet-clad bonding with MOX fuel that may relate to fuel swelling and pellet expansion in transients.²⁵ Dr. Lyman stated that even though the information in the document related to a different kind of accident than a LOCA, he hypothesized that the differences with MOX fuel "could have an impact on the difference between MOX and LEU pellet clad interaction and the behavior in LOCAs," because MOX and LEU fuel "may have a pellet clad bond of a different nature."²⁶

Given the hypothetical nature of Dr. Lyman's statements, we find they do not change our decision herein, and thus the impact of the evidence we heard and took under advisement is small. We have, however, considered the evidence and it is included in the record, in order to assure a more complete record on the matters of concern herein.

Duke has also filed some proposed corrections to the transcript of the July 14-15, 2004, hearing.²⁷ No objection having been posed to these proposed corrections, the transcript may be amended to reflect them.²⁸

III. GOVERNING LEGAL STANDARDS

The legal standards that apply in this proceeding are found in various NRC regulations. First, under 10 C.F.R. § 50.90, whenever a holder of a license wishes to amend the license, including technical specifications in the license, an

²³Letter from Susan L. Uttal to the Atomic Safety and Licensing Board (July 20, 2004); Staff Findings at 4.

²⁴Supplemental Rebuttal Testimony of Steven P. Nesbit and J. Kevin McCoy on Behalf of Duke Energy Corporation on Contention I, July 20, 2004.

²⁵Tr. 2553.

²⁶Tr. 2554.

²⁷[Duke]'s Proposed Corrections to the July 14-15, 2004 Hearing Transcript in the [MOX] Lead Assembly License Amendment Proceeding (Aug. 6, 2004).

²⁸Duke counsel may wish to file a copy of the transcript with the corrections marked thereon, for the official record in the proceeding.

application for amendment must be filed, fully describing the changes desired. Under 10 C.F.R. § 50.92(a), determinations on whether to grant an applied-for license amendment are to be guided by the considerations that govern the issuance of initial licenses or construction permits to the extent applicable and appropriate. Both the common standards for licenses and construction permits in 10 C.F.R. § 50.40(a), and those specifically for issuance of operating licenses in 10 C.F.R. § 50.57(a)(3), provide that there must be “reasonable assurance” that the activities at issue will not endanger the health and safety of the public.

In addition, 10 C.F.R. § 50.46, “Acceptance criteria for emergency core cooling systems for light-water nuclear power reactors,” as its title indicates, defines the requirements that light-water reactors must meet with regard to their emergency core cooling systems (ECCSs); it relates specifically to boiling or pressurized light-water reactors that use low-enriched uranium (LEU) fuel consisting of “uranium oxide pellets within cylindrical zircaloy or ZIRLO cladding.” Duke seeks to utilize the same criteria of section 50.46 with regard to the proposed MOX fuel.²⁹

Under 10 C.F.R. § 50.46(a)(1)(i), an ECCS must be designed so that its “calculated cooling performance following postulated loss-of-coolant accidents [LOCA]” meets certain criteria. The criteria that are of particular relevance herein are found in 10 C.F.R. § 50.46(b)(1), (2), and (4), and require that:

- The calculated maximum fuel element cladding temperature, or “peak cladding temperature” (PCT), shall not exceed 2200°F;
- The calculated total oxidation of the cladding “shall nowhere exceed [17% of] the total cladding thickness before oxidation”; and
- Calculated changes in core geometry “shall be such that the core remains amenable to cooling.”

These criteria essentially set limits on the extent of fuel damage that can occur during a design basis LOCA. The 2200°F limit on peak cladding temperature and the 17% limit on maximum local oxidation together assure that the cladding will not become embrittled and will not lose its rod-like geometry during and after a LOCA.

Section 50.46(a)(1) also provides as follows:

- (i) ECCS cooling performance must be calculated in accordance with an acceptable evaluation model and must be calculated for a number of postulated loss-of-coolant accidents of different sizes, locations, and other properties sufficient to provide assurance that the most severe postulated loss-of-coolant accidents are

²⁹LAR, Attachment 6 at 6-8-6-12; *see also* 6-1-6-12, generally.

calculated. Except as provided in paragraph (a)(1)(ii) of this section, the evaluation model must include sufficient supporting justification to show that the analytical technique realistically describes the behavior of the reactor system during a loss-of-coolant accident. Comparisons to applicable experimental data must be made and uncertainties in the analysis method and inputs must be identified and assessed so that the uncertainty in the calculated results can be estimated. This uncertainty must be accounted for, so that, when the calculated ECCS cooling performance is compared to the criteria set forth in paragraph (b) of this section, there is a high level of probability that the criteria would not be exceeded. Appendix K, Part II Required Documentation, sets forth the documentation requirements for each evaluation model. . . .

(ii) Alternatively, an ECCS evaluation model may be developed in conformance with the required and acceptable features of appendix K ECCS Evaluation Models.³⁰

BREDL has agreed that it is “generally appropriate to apply the requirements of . . . § 50.46 to MOX fuel, as long as Appendix K [which does not include consideration of fuel relocation] is not strictly applied to exclude consideration of relocation of the fuel during LOCAs.”³¹

IV. FINDINGS OF FACT

A. General Information Relating to Matters at Issue

The MOX fuel assemblies at issue, which are currently being manufactured in France under the direction of AREVA,³² will be based on the AREVA Advanced Mark-BW fuel assembly, a standard-lattice 17-by-17 fuel assembly specifically designed for use in Westinghouse reactors such as Catawba.³³ Duke’s plans call

³⁰ Required features under Appendix K include assuming the heat generation rates from radioactive decay of fission products to be equal to 1.2 times the values for infinite operating time in the ANS Standard, “Decay Energy Release Rates Following Shutdown of Uranium-Fueled Thermal Reactors” (approved by Subcommittee ANS-5, ANS Standards Committee, October 1971), *see* 10 C.F.R. Part 50, Appendix K, § I.A.4; calculation of the rate of energy release, hydrogen generation, and cladding oxidation from the metal/water reaction, using the Baker-Just equation (L. Baker and L.C. Just, “Studies of Metal Water Reactions at High Temperatures, III, Experimental and Theoretical Studies of the Zirconium-Water Reaction,” ANL-6548 (May 1962), at 7), *see* 10 C.F.R. Part 50, Appendix K, § I.A.5; and inclusion of a provision for predicting cladding swelling and rupture in each evaluation model — all of which, we note, provide for conservatism in an Appendix K analysis, *see* 10 C.F.R. Part 50, Appendix K, § I.B.

³¹ Tr. 2257.

³² AREVA is the trade name of the Société des Participations du Commissariat à l’Énergie Atomique, an organization consisting of several businesses including Framatome Advanced Nuclear Power (ANP), Siemens, COGEMA, and AREVA T&D. AREVA Web site at www.aveva.com.

³³ LAR at Attachment 3, § 3.5.

for the assemblies, if ultimately approved, to be irradiated for a minimum of two cycles, in order to test the acceptability of the fuel assembly design, the ability of the Duke and AREVA models to predict fuel assembly performance, and the applicability of the European database on MOX fuel performance to Duke's use of MOX fuel.³⁴ As indicated above, the current proposal would, if successful, support the potential future use of larger, "batch" quantities of MOX fuel at either the Catawba or McGuire plant, which would require another license amendment application and associated licensing proceeding.³⁵

In addition to the four proposed MOX fuel assemblies at issue herein, the reactor core for Catawba would, if Duke's LAR is approved, contain 189 other fuel assemblies, the majority of which would be Westinghouse Robust Fuel Assemblies (RFAs), and eight of which would be Westinghouse Next Generation Fuel (NGF) assemblies. The NGF assemblies would be loaded into core locations that are not adjacent to the MOX fuel.³⁶

The matters at issue herein concern the ability to keep the fuel in a reactor cooled and intact in a hypothetical "loss of coolant accident," or "LOCA." The Catawba reactor is a pressurized water reactor, or "PWR," in which water is circulated, under pressure, through the reactor core, taking heat from the fuel and keeping it cool enough to avoid fuel damage.³⁷ Licensees are required to have emergency core cooling systems (ECCSs) that can function in the event of water loss from the primary cooling system, and must perform certain analyses to show that their cooling systems can withstand designated hypothetical LOCAs.

Under 10 C.F.R. § 50.46, ECCSs must meet certain requirements, as indicated above. ECCS performance and its ability to cool the fuel must be calculated by analyzing a number of postulated LOCAs with various characteristics sufficient "to provide assurance that the most severe postulated [LOCAs] are calculated."³⁸ The results of any LOCA analysis must show that a reactor can meet particular criteria, including a maximum, or "peak," cladding temperature that does not exceed 2200° Fahrenheit; a total cladding oxidation in any location that does not exceed 17% of the total cladding thickness before oxidation; and changes in core geometry that are sufficiently limited to assure the core remains amenable to cooling.³⁹ The parties are in dispute over the impact of the use of the four

³⁴ Tr. 2112.

³⁵ Tr. 2111.

³⁶ Tr. 2293, 2112.

³⁷ This pressurized circulating water transfers the heat to a secondary water system (the water in which is contained in a separate piping system from the primary system) by passing through a device called a steam generator. Steam produced in the secondary system operates steam turbines to produce power.

³⁸ 10 C.F.R. § 50.46(a)(1)(i).

³⁹ *Id.* § 50.46(b)(1), (2), (4).

proposed MOX fuel assemblies on Duke's LOCA analyses, and whether in light of such use Duke can satisfy the above-listed PCT, clad oxidation, and coolable core geometry requirements of 10 C.F.R. § 50.46, all of which are fundamental to providing reasonable assurance that such use will not endanger the health and safety of the public.

One postulated LOCA — a “large break” LOCA — assumes the 100% break, at full power, of the primary coolant line that carries the water from the reactor to the steam generator and back to the reactor. Such a break would result in escape of the water — i.e., a loss of coolant. The reactor protective system would automatically shut down the reactor and lead to a rapid drop in the power being produced. At a certain point in time the forced flow through the core will be so reduced that water will begin to boil away in the core region, reducing cooling capability so that it is no longer capable of removing the decay heat energy released from radioactive byproducts of the fission process. This leads to a rise in the temperature of the fuel above its normal steady-state level, accompanied by a rise in the fuel cladding temperature. During this heatup, internal pressure in the fuel rods will rise as gaseous fission products build up in the spaces between the fuel pellets and the cladding, and the cladding may weaken, could balloon in places, and may ultimately burst. As the temperature of the cladding rises it will also begin to oxidize rapidly. At some point in such a postulated accident, cold water would be injected into the core by the emergency core cooling system (ECCS) and the fuel cladding would cool down.⁴⁰ The results of the required LOCA analysis define the “LOCA limits,” or the allowable core power peaking limits,⁴¹ that are the constraints for meeting the requirements of section 50.46.⁴²

Two related phenomena that can occur late in a LOCA scenario play central roles in analysis of the matters at issue herein — *clad ballooning* and *fuel relocation*. We summarize here some basic facts about these two phenomena. With regard to the first of these, during a LOCA, as the fuel and cladding heat up, fission product gases collect within fuel pellets and cause the pellets to expand. At first this has the effect of removing the normal gap between fuel and clad. Then, at higher temperatures, the clad begins to distort and expand more than the fuel, as gases move through the fuel matrix and along grain boundaries to produce a gas layer at the fuel-clad interface. As this occurs, gaps can form between pellet and the cladding, and the cladding expansion produces an increase in surface area as well as in pellet-to-clad gap. Stresses on the cladding can concentrate in a particular region as a result of temperature increase and fuel expansion, and a “balloon” can form in the cladding due to increasing gas pressure. If the LOCA

⁴⁰ Tr. 2294.

⁴¹ The core power peaking limits define the maximum power at any one location in the core.

⁴² Tr. 2119.

progresses unimpeded (prior to ECCS injection beginning to become effective in reestablishing cooling), the cladding would continue to balloon and eventually rupture.

Meanwhile, the increase in the pellet-to-clad gap reduces the heat conducted from the pellets to the cladding, while the greater surface area of the cladding increases heat transfer from the cladding to the coolant. Also, flow turbulence develops around the area of cladding expansion and rupture, thereby generally increasing heat transfer to the coolant from the cladding and fuel. The net effect on the cladding temperature of (1) the reduction in heat transfer from pellet to cladding, and (2) the increase in heat transfer from the cladding to the coolant, can be short-term cooling of the cladding at the location of ballooning and rupture.⁴³ Because of this cooling effect, the ballooned or ruptured location is generally not the location of the peak clad temperature.⁴⁴

With regard to the second phenomenon, however, BREDL asserts that *fuel relocation* may negate this cooling effect, and have an impact on PCT. Fuel relocation may occur during a LOCA when irradiation-induced cracks develop in fuel pellets, causing the pellets to lose their integrity and break into small fragments, which fall to lower portions of fuel rods where the cladding has swelled and ballooned. In order for this to occur, a pellet must have been irradiated to a sufficient level of burnup (BU)⁴⁵ for cracks and the potential for fragmentation to develop, and the cladding must balloon sufficiently prior to rupture to provide room for the pellet fragments to collect.⁴⁶ Relevant with regard to Contention I is the concern that relocated fuel may generate too much power in a localized area and thereby increase the cladding temperature at that location.⁴⁷

The effect of relocation will depend in part on the size of the cladding balloon and the “filling fraction” — i.e., the percentage of the expansion space filled by relocated fuel. Duke contends that the above-described cooling effect at the ballooning area of the cladding will mitigate any effects of fuel relocation so as to produce a “reasonable bound of uncertainty well within the conservatism . . . under Appendix K.”⁴⁸

Duke has had LOCA analyses performed for Catawba using both of the alternative methods permitted under 10 C.F.R. § 50.46 — i.e., both a “best estimate” method under section 50.46(a)(1)(i), and an Appendix K method as

⁴³ Tr. 2123.

⁴⁴ Tr. 2305-08.

⁴⁵ “Burnup” is a measure of the amount of energy provided by the fuel at a given point in time, and is usually expressed as total energy produced per metric ton of material, or GWD/t (gigawatt days per metric ton).

⁴⁶ Tr. 2147.

⁴⁷ Tr. 2149.

⁴⁸ Tr. 2400, 2149.

permitted under section 50.46(a)(1)(ii). Westinghouse performed the section 50.46(a)(1)(i) best-estimate LOCA analysis for the Catawba core *without* the MOX assemblies, using its own WCOBRA/TRAC code.⁴⁹ Best-estimate methods are newer than those allowed under Appendix K, and are considered to be more advanced and state-of-the-art; they compute lower peak clad temperatures assuming the same input, which indicates a greater margin between the calculation results and the 2200° limit of section 50.46(b)(1).⁵⁰ Use of a best-estimate method requires a nominal calculation that considers an accounting of all variations and uncertainties. Under the Westinghouse approach, a large number of calculations are performed, and then a “Monte Carlo”⁵¹ simulation is done to determine uncertainties.⁵²

Framatome ANP also performed a LOCA analysis, assuming utilization of the MOX lead assemblies. In its analysis Framatome used its NRC-approved Appendix K deterministic evaluation model (EM)⁵³ and its approved computer code, RELAP5/MOD2-B&W.⁵⁴ This method is more conservative than the best-estimate method in the sense of generally computing temperatures that are higher than should reasonably be expected to actually occur.⁵⁵ To address the fact that EMs permitted under Appendix K apply only to light-water reactors that use uranium oxide, or LEU, fuels, Duke in its LAR describes potential differences between LEU and MOX fuel that could affect the Appendix K analysis for Catawba, related changes made to the evaluation techniques and model, and its justification for the changes.⁵⁶

According to Duke, the LEU-based EM did not require a great degree of adaptation in order to predict the LOCA behavior for MOX fuel, because, of the thirteen categories of phenomena that have an impact on LOCA results listed

⁴⁹ Tr. 2296. WCOBRA/TRAC refers to the Westinghouse “transient reactor analysis code” that is approved by the NRC for use with pressurized water reactors.

⁵⁰ See Tr. 2376.

⁵¹ The “Monte Carlo” simulation is so called because it is based on performing a large number of individual histories for a given technical process, and then using a random sampling of calculations to obtain both an average result and its uncertainty.

⁵² Tr. 2377.

⁵³ According to Duke expert Bert M. Dunn, the NRC approved the EM for application to Westinghouse-designed four-loop PWRs (such as Catawba) that use LEU fuel. Tr. 2124.

⁵⁴ Tr. 2296-97.

⁵⁵ Tr. 2374, 2376. We note also in this regard BREDL’s reference to several “known non-conservatisms” in Appendix K, including the effects of fuel relocation, particularly when applied to MOX fuel. Tr. 2258.

⁵⁶ LAR, Attachment 3, § 3.7.

in NUREG/CR-5249,⁵⁷ twelve are specifically related to the reactor system and are independent of the fuel type. Only one category — Stored Energy and Fuel Response — includes phenomena that relate to the nuclear material. Four such phenomena are listed as significant contributors: fuel pellet enthalpy (heat content of the fuel) at operating conditions, fuel decay heat, gap conductance (potential for heat conduction across the gas-filled gap between the fuel and its cladding), and cladding oxidation. Only the first three of these relate to the nuclear material. Thus, Duke asserts, most of the approved EM was already appropriate to the modeling of MOX fuel with no adjustments.⁵⁸

Framatome reviewed MOX fuel characteristics that have the potential to affect the results of an Appendix K LOCA calculation, concentrating on decay heat and reactor kinetics, and thermal and mechanical properties, including MOX pellet enthalpy.⁵⁹ In its LAR Duke documents these phenomena and how it addresses each one.⁶⁰ For the Catawba core with the MOX lead assemblies, Duke states, the reactor kinetics would be dominated by the LEU fuel because the MOX assemblies would comprise only 2% of the core. Those differences that would exist — lower beta effective value and a more negative moderator temperature coefficient in MOX fuel — would act to *reduce* the power generation in the MOX fuel relative to the surrounding LEU fuel.⁶¹ Thus, in Duke's view, a MOX/LEU decay heat comparison could indicate a beneficial result for MOX fuel, in that for the first several thousand seconds (well beyond the time of PCT following a LOCA), the decay heat for a MOX fuel assembly operated at the same power as an LEU assembly would be lower than the corresponding LEU fuel assembly. For both beta effective value and moderator temperature coefficient, however, the MOX assemblies were conservatively evaluated, according to Duke, using

⁵⁷NUREG/CR-5249, EGG-2552, "Quantifying Reactor Safety Margins — Application of Code Scaling, Applicability, and Uncertainty Evaluation Methodology to a Large-Break, Loss-of-Coolant Accident" (Dec. 1989).

⁵⁸Tr. 2124.

⁵⁹Tr. 2125.

⁶⁰LAR, Attachment 3, § 3.7.1.1.

⁶¹Tr. 2125. The term "Beta effective" (or " β_{eff} ") refers to the fraction of the neutrons that are produced through the decay of fission products sometime after the fission event has occurred. The word "effective" implies that the value of beta has been adjusted to reflect the fact that these neutrons are produced at lower energies than those in fission and are therefore more "effective" in producing subsequent fissions. "Moderator temperature coefficient" refers to the change in moderation caused by a change in the temperature of the coolant/moderator. The term "moderation" refers to the process by which the water in a reactor's cooling system slows down the neutrons that are emitted from the fissioning atoms in the fuel, which increases the likelihood of fission of the nuclei, thus sustaining the nuclear chain reaction in the fuel that produces a controlled level of heat, and ultimately power.

neutron power-related characteristics and decay heat characteristics appropriate for LEU assemblies.⁶²

With regard to pellet thermal properties and the fuel-to-cladding heat transfer coefficient, or gap conductance, only thermal conductivity differs in any substantive way when comparing LEU and MOX pellets of the design planned for Catawba.⁶³ Because the initial enthalpy of a MOX pellet is slightly greater, Framatome used the MOX thermal conductivity from the COPERNIC computer code,⁶⁴ which supplies the stored energy and thermal conductivity values in the LOCA analysis code,⁶⁵ and has been approved for MOX applications.⁶⁶ Also, because MOX fuel has higher fission gas release rates and thus produces a slightly different gas composition and pressure, which can affect gap conductance, the Framatome LOCA analysis was based on MOX-specific gap gas compositions obtained from the COPERNIC computer code.⁶⁷

Finally, also of note with regard to Duke's LOCA analysis, Duke points out that, because Appendix K requires that the degree of cladding swelling and incidence of rupture not be underestimated, and "[b]ecause all claddings tend to (i) embrittle with irradiation, and (ii) potentially accrue added strength [with irradiation] due to pellet-cladding bonding," it incorporated unirradiated cladding properties to maximize the predicted strain in its Appendix K LOCA analysis.⁶⁸ (This is a generally used approach in deterministic LOCA evaluation models, employed to maximize strain in the required calculations.)⁶⁹

B. MOX Fuel Characteristics and Fuel Relocation

Contention I was originally derived from BREDL proposed Contention 10,⁷⁰ which was based on a presentation made to the NRC on October 23, 2003, by the Institut de Radioprotection et de Sûreté Nucléaire (IRSN).⁷¹ The October 2003

⁶² Tr. 2125.

⁶³ Tr. 2126.

⁶⁴ The COPERNIC computer code is a fuel performance code used to analyze individual fuel rods. BAW-10231P, COPERNIC Fuel Rod Design Computer Code (September 1999). The computer code is used for mechanical analyses of MOX and LEU fuel. Tr. 2133.

⁶⁵ Tr. 2300.

⁶⁶ Tr. 2126.

⁶⁷ *Id.*

⁶⁸ Tr. 2128.

⁶⁹ *Id.* The fuel-clad bonding issue is discussed in greater detail below in section IV.B.2, which includes a discussion of the testimony of BREDL expert Dr. Edwin Lyman.

⁷⁰ See [BREDL]'s Second Supplemental Petition To Intervene (Dec. 2, 2003) at 2-4 [hereinafter BREDL Second Supplemental Petition].

⁷¹ Exhibit 28. IRSN is an agency in the French government that conducts nuclear research, formerly known as IPSN, the Institut de Protection et de Sûreté Nucléaire. See Tr. 2245-46.

IRSN presentation was offered as the basis for the assertion that fuel relocation may introduce a significant uncertainty with respect to the LOCA analysis for the MOX fuel lead assemblies.⁷²

BREDL asserts through the testimony of its expert, Dr. Lyman, that Duke's LOCA analysis is inadequate because it does not address the uncertainties associated with fuel relocation effects that the MOX fuel, which will be manufactured using "M5" cladding rather than the Zircaloy-4 cladding more often used in the U.S., may experience under LOCA conditions. BREDL suggests these uncertainties counter Duke's assertion that the action proposed in the LAR will not result in a violation of the PCT, clad oxidation, and coolable core geometry criteria of 10 C.F.R. § 50.46.⁷³ Noting that fuel relocation has been observed in experiments with irradiated LEU fuel under LOCA conditions, Dr. Lyman points out that no such experiments have been done with MOX fuel, but that "there are technical reasons to believe that the impact of fuel relocation effects during a LOCA may be more severe for MOX fuel rods than for LEU fuel rods of the same burnup, due to differences in characteristics such as fuel fragment sizes and fuel-clad interactions."⁷⁴ Noting also calculations in Duke's LAR indicating that MOX fuel is generally more limiting than LEU fuel with respect to design basis LOCAs, BREDL asserts that "the consequences of fuel relocation, and the non-conservatism associated with neglecting them, may be of greater concern for MOX fuel rods than for LEU fuel rods with respect to compliance with LOCA regulatory criteria."⁷⁵

Because Duke has failed to address these uncertainties in MOX fuel behavior, BREDL asserts, Duke's LAR does not satisfy relevant section 50.46 requirements, and therefore Duke has failed to demonstrate compliance with the general reasonable assurance standard of section 50.40(a).⁷⁶ BREDL cites in support of its assertions information from various French sources, based on or related to use of MOX fuel in nuclear reactors in France.⁷⁷ BREDL points out that the authors of

⁷² Exhibit 28; *see* BREDL Second Supplemental Petition at 3-4.

⁷³ Tr. 2256.

⁷⁴ Tr. 2243.

⁷⁵ *Id.*; BREDL Findings at 5.

⁷⁶ *Id.*

⁷⁷ Sources cited by BREDL include C. Grandjean, G. Hache, and C. Rongier, "High Burnup UO₂ Fuel LOCA Calculations To Evaluate the Possible Impact of Fuel Relocation After Burst," *OECD/NEA Proceedings of the Topical Meeting on LOCA Fuel Safety Criteria, Aix-en-Provence*, at 7 (Mar. 22-23, 2001) [hereinafter Grandjean, Hache, and Rongier] (Exhibit 29); Slides presented by A. Mailliat and J.C. Mélis, IRSN, at "PHEBUS STLOC Meeting" with NRC Staff (Oct. 23, 2003) (Exhibit 28); Grandjean and Hache "LOCA Issues Related to Ballooning, Fuel Relocation, Flow Blockage and Coolability" [hereinafter Grandjean, *LOCA Issues*], SEGFSM Topical Meeting on LOCA Issues, Argonne National Laboratory, slides at 8-9 (May 25-26, 2004) [hereinafter SEGFSM

(Continued)

one of these sources state that “[a] lack of knowledge on these [sic] parameters [important for relocation] for irradiated UO₂ and particularly MOX fuel may lead to reduce [sic] safety margins.”⁷⁸

Areas in which such fuel-relocation-related uncertainties are asserted to lie, on the significance of which the parties are in dispute, include (1) a collection of issues related to fuel composition, fragmentation, particle size, and “filling ratio”; (2) fuel-clad bonding; and (3) the effects of M5 clad characteristics on ballooning and fuel relocation. We discuss each of these areas next. In Sections IV.C, D, and E, we turn to the impact of fuel relocation on PCT, clad oxidation, and coolable core geometry. We next, in Section IV.F, consider questions raised by BREDL on the adequacy of the current database on MOX fuel in LOCAs. We close, in section V, with our ultimate conclusions in the safety-related portion of this proceeding.

1. Fuel Composition, Fragmentation, Particle Size, and “Filling Ratio”

The fuel relocation phenomenon, a generic issue that is not unique to MOX fuel,⁷⁹ has been observed in LEU fuel for rod burnups exceeding around 48 gigawatt days per metric ton (GWD/t), which are considered to be “high” burnup levels.⁸⁰ The related phenomenon of *fuel fragmentation* has been observed by IRSN to be “clearly associated to [sic] burnup, with finer fragments at higher BU.”⁸¹ In LEU fuel, high-burnup “rim” regions are known to emerge with burnups exceeding about 40-45 GWD/t. Thus it has been suggested that vulnerability to fuel relocation in LEU fuel is associated with the development of such high-burnup “rim” regions.⁸²

For MOX fuel, the situation is somewhat similar and possibly more severe. During manufacture of MOX fuel using the MIMAS⁸³ process to be used for

Topical Meeting, May 2004] (Exhibit 36); and V. Guillard, C. Grandjean, S. Bourdon, and P. Chatelard, “Use of CATHARE2 Reactor Calculations To Anticipate Research Needs,” SEGFMS Topical Meeting, May 2004 (Exhibit 30). See BREDL Findings at 6.

⁷⁸ See Exhibit 30, Abstract.

⁷⁹ The possible impact of fuel relocation on LOCA analyses for LEU fuel was recognized by the NRC Staff in Generic Issue (“GI”) 92, which was initially assigned a low priority and was subsequently dropped. More recently, the issue was acknowledged in a memorandum from Ashok C. Thadani, Director, Office of Nuclear Regulatory Research, to Samuel J. Collins, Director, Office of Nuclear Reactor Regulation, re: Information Letter 0202, Revision of 10 CFR 50.46 and Appendix K (June 20, 2002) (NRC ACN #ML 021720690) (Exhibit 27). See Tr. 2257.

⁸⁰ See Grandjean, Hache, and Rongier at 2.

⁸¹ *Id.*; Tr. 2247.

⁸² Tr. 2246.

⁸³ MIMAS stands for MICronized MASTer mix, an industrial process used by COGEMA to manufacture MOX fuel. COGEMA Home Page at www.cogema-inc.com/FAQs/MOX_fuel.htm.

the Duke LTAs, plutonium agglomerates — macroscopic clumps of plutonium-rich particles — develop in the fuel.⁸⁴ As pointed out by BREDL's expert, Dr. Lyman, because the fissile material is concentrated in these clumps, very high local burnups would result, due to the fact that the fission is occurring in a heterogeneous fashion. The ratio of local burnup within the agglomerates could be several times the rod-average burnup, depending on the irradiation time.⁸⁵ For instance, the agglomerate burnup reaches about 60 GWD/t when the rod average is only around 18 GWD/t, and reaches 100 GWD/t when the rod average is only 28.4 GWD/t. As a result, BREDL asserts, high-burnup rim-like regions may emerge in the outer layers of the plutonium agglomerates for much lower rod-average burnups than 40-45 GWD/t, because the local burnups within the plutonium agglomerates increase much more rapidly than the rod-average burnups. Thus, BREDL argues, it is reasonable to expect that the onset of fuel relocation in MOX fuel may occur at lower rod-average burnups than in LEU fuel. This would imply that MOX fuel would be more vulnerable earlier in its irradiation history (and consequently for a longer time) than LEU fuel.

BREDL further asserts that the particle size distribution in fragmented MOX fuel will be smaller than in LEU fuel at the same rod average burnup, because of fine fragments that are generated when micro-cracking occurs in the ultra-high-burnup plutonium agglomerate regions as a result of fission gas accumulation and migration.⁸⁶ The smaller particle size in turn leads to greater "filling ratios," which refers to the ratio of the volume of relocated fuel material to the volume of a given ballooned region of a fuel rod in which the material has collected.⁸⁷ BREDL contends that greater filling ratios can lead to greater PCT, which we address in more detail below.

NRC Staff expert Dr. Ralph Meyer acknowledged that the particles produced by MOX fracture might be slightly smaller than particles from LEU as a result of the slightly higher fission gas release for MOX to the rim material. According to Dr. Meyer:

This rim material, which forms in high-burnup regions around the circumference of LEU fuel and also around the agglomerates in MOX fuel, is the result of fission gas migration with the uranium-plutonium oxide crystalline grains. Fission gas migrates, coalesces, and precipitates in small bubbles, which attach themselves to the grain boundaries. As the number of bubbles increases with burnup, the grain boundaries subdivide to form more surface area to accommodate the bubbles, thus producing the smaller grained rim material. Because fission gas release, which is

⁸⁴ Tr. 2260.

⁸⁵ BREDL Findings at 13.

⁸⁶ Tr. 2234, 2260; *see* BREDL Findings at 14.

⁸⁷ Tr. 2258.

also related to the migration process, is a little higher in MOX fuel than in LEU fuel, the volume of rim material might be roughly 25% greater in MOX fuel than in LEU fuel. On the other hand, MOX fuel has a little more plasticity than LEU fuel, so I would expect fewer of the larger fragments in MOX Fuel.

....

In recent high-burnup integral tests in our program at ANL, we have observed a black deposit on the quartz tube of the apparatus just opposite the burst opening. . . . It thus appears that the small particles or fines are blown out of the burst opening when the rod depressurizes. Thus, there would be few or no small particles in the ballooned region, and it is these small particles that have been postulated to make a difference between the mass of fuel in the balloon in MOX fuel and LEU fuel.⁸⁸

BREDL disagrees, pointing out that Dr. Meyer failed to take into account the fact that the tests in question were performed on BWR fuel rods and not PWR rods,⁸⁹ and, moreover, asserts that fuel fragmentation can also be caused by the stress induced by the stored-energy redistribution during the initial, “blowdown” phase of a LOCA.⁹⁰ Because MOX fuel has a lower thermal conductivity — i.e., lower ability to transfer heat from the center to the surface of a pellet — and therefore a higher temperature in the center of a pellet than LEU fuel, it could experience greater fuel fragmentation during the blowdown phase of a LOCA and more severe relocation effects as a result.⁹¹

NRC Staff experts who participated in a 2001 PIRT (phenomenon identification and ranking table) panel disagreed on the impact of fuel composition on fuel relocation, with one finding it to be of low importance, one finding it to be of medium importance (finding a greater impact with MOX fuel but also finding that the viscoelastic properties of MOX would mitigate the effect), and two finding the composition of MOX fuel to be of high importance for consideration of fuel

⁸⁸ Tr. 2304-05.

⁸⁹ Tr. 2270; see BREDL Findings at 15.

⁹⁰ *Id.*; Exhibit 31, A. Mailliat and M. Schwarz, “Need for Experimental Programmes on LOCA Issues Using High Burn-Up and MOX Fuels,” NUREG/CP-0176, *Proceedings of the Nuclear Safety Research Conference* (May 2002), at 436 (NRC ACN #ML021710793) [hereinafter “Mailliat and Schwarz”]. A large-break LOCA evolves through three phases, which overlap, although AREVA in its Appendix K analysis treated the phases as being distinct in order to make the analysis more conservative. The first phase, blowdown, initiates with the opening of a break in the coolant system and lasts until the system has depressurized to an approximate equilibrium in pressure with the reactor building. This phase ends, in an Appendix K analysis, with the coolant system nearly empty and the fuel and cladding beginning to increase in temperature. The second phase, refill, is defined as the time required to inject sufficient emergency coolant to fill the lower head and lower plenum of the reactor vessel and reinitiate flow of coolant into the reactor core. When the coolant in the reactor vessel rises to the bottom of the core, the third phase, reflood, initiates and continues for the remainder of an accident simulation. Tr. 2119-22.

⁹¹ Tr. 2260.

relocation effects.⁹² BREDL suggests this disagreement “highlights the inadequacies of the experimental database with regard to integral tests of MOX fuel under design-basis LOCA conditions, and underscores the significant uncertainties in Duke’s design-basis LOCA analysis.”⁹³

Duke expert Robert Harvey pointed out that members of the same PIRT panel “actually looked at a number of aspects of high burnup fuel with respect to a LOCA event,” and that “under the category of ‘plant transient analysis’ none of the PIRT panel rated *fuel relocation* as important, two rated it as ‘low medium importance,’ and four rated it as low importance, stating that it has a small effect on the system analysis and it could make the burst (ruptured) node limiting.”⁹⁴

Based on the preceding, we find that fuel fragmentation and relocation can have an impact on PCT during a LOCA, and there is some uncertainty regarding the magnitude of such impact. We discuss *infra* in greater detail the extent of such impact, and whether in light of it Duke has performed adequate LOCA analysis relative to the applied-for LAR.

In addition, the particle size of fuel fragments entering the ballooned region during a LOCA is potentially important, as the energy generation rate in the ballooned volume increases as the mass of contained fuel increases, and this in turn potentially increases the surface temperature of the adjacent cladding. The calculation of surface temperature increase is a complex one, however, given that the heat dissipation rate also increases with increased clad surface area and thus can mitigate any temperature increase. We discuss these issues further in Section IV.C, below, “Impact of Fuel Relocation on Peak Clad Temperature.”

2. *Fuel-Clad Bonding*

Dr. Lyman also expressed concern that differences between MOX and LEU fuel with regard to tightness of fuel-clad bonding prior to ballooning could have an impact on fuel relocation behavior during a design-basis LOCA. Tight bonding can delay the onset of ballooning, by constraining the movement of fission gases and the expansion of gas bubbles along the fuel-cladding interface.⁹⁵ Dr. Lyman noted that all four of the experts on the 2001 PIRT panel agreed that “chemical and mechanical bonding between the fuel pellet and the cladding . . . was of high importance to the fuel relocation phenomenon, because ‘bonding could

⁹² Tr. 2260; Exhibit 32, NUREG/CR-6744, “Phenomenon Identification and Ranking Tables for Loss-of-Coolant Accidents in Pressurized and Boiling Water Reactors Containing High-Burnup Fuel,” Appendix D, Table D-1 at D-67 (Dec. 2001) (NRC ACN #013540623) [hereinafter NUREG/CR-6477].

⁹³ Tr. 2260.

⁹⁴ Tr. 2211 (emphasis added).

⁹⁵ Tr. 2261; BREDL Findings at 17; *see* Exhibit 31 at 433.

significantly affect the relocation characteristics by impeding pellet fragment movement.’⁹⁶ Dr. Lyman further proposed that observed differences between MOX and LEU fuel behavior during irradiation — namely, MOX fuel being more resistant to clad failures due to pellet-clad mechanical interaction than LEU fuel⁹⁷ — “may imply that the pellet-clad bond is weaker for MOX fuel, in which case MOX fuel may have a greater propensity to earlier and more extensive fuel relocation than LEU.”⁹⁸ Therefore, BREDL asserts, Duke’s failure to account for this phenomenon “contributes another uncertainty to the safety margin associated with Duke’s design basis LOCA calculation.”⁹⁹

Experts testifying for both Duke and NRC questioned whether this conclusion could be supported by the data and also questioned the concept that a MOX fuel pellet with only a small concentration of MOX could exhibit significantly different bonding behavior from a quite similar LEU pellet. Duke expert Dr. J. Kevin McCoy noted that the report cited by BREDL made “no suggestion that pellet-to-cladding chemical bonding is a possible explanation for differences that may exist between the PCMI [Pellet-Clad Mechanical Interaction] performance of MOX and LEU fuels.”¹⁰⁰ He opined further that “the processes that lead to bonding are the same for LEU and MOX fuels, and the bond strengths are expected to be similar because of the similarities in fuel chemistry and in operating conditions.”¹⁰¹

NRC Staff expert Meyer said that he and the PIRT experts originally thought that the very tight pellet-clad bonding in MOX fuel would have a significant effect on balloon size, but found that this was not the case when performing experiments at Argonne National Laboratory with 15-inch-long segments of fuel rods. “It must simply snap that layer when you start developing this uniform outward deformation as the temperature rises with the large pressure differential,” according to Dr. Meyer.¹⁰² He explained MOX fuel’s greater resistance to cladding failures as being “the result of the greater plasticity of the MOX pellets.”¹⁰³ Because MOX pellets are softer than LEU pellets, they are “able to deform

⁹⁶ Tr. 2261; Exhibit 32, Table D-1 at D-69.

⁹⁷ Tr. 2261; Nuclear Energy Agency, NEA/NSC/DOC(2004)8, *International Seminar on Pellet-Clad Interactions with Water Reactor Fuels* (May 6, 2004), at 20.

⁹⁸ Tr. 2261. In BREDL’s prefiled testimony Dr. Lyman also cites another report of the Nuclear Energy Agency, a specialized agency with the Organization for Economic Co-operation and Development (OECD), an intergovernmental organization of twenty-eight industrialized countries including the United States. See www.nea.fr. See Exhibit 33, Nuclear Energy Agency, NEA/CSNI/R(2003)9, *Ongoing and Planned Fuel Safety Research in NEA Member States*, at 9.

⁹⁹ BREDL Findings at 18.

¹⁰⁰ Duke Findings at 23.

¹⁰¹ Tr. 2165; see Duke Findings at 24.

¹⁰² Tr. 2641-42.

¹⁰³ Tr. 2313.

somewhat and relax the stress they apply to the cladding,” which “has nothing to do with bonding between the pellets and the cladding,” according to Dr. Meyer.¹⁰⁴

We find, with regard to any relationship between pellet-clad interactions and time occurrence and size of clad ballooning, that at this time the study of irradiated fuel materials is not sufficiently advanced to resolve the questions raised by BREDL. Moreover, it is unlikely that this can at this time be experimentally resolved since there is no obvious way to study fuel-clad bonding as an irradiation experiment is proceeding. And, finally, although uncertainty exists regarding fuel-clad bonding, the question before us is how much of an uncertainty is it, and how well does Duke’s LOCA analysis allow for such uncertainty? We address these questions in our discussion below.

3. Effect of M5 Clad Characteristics on Ballooning and Fuel Relocation

Dr. Lyman expressed concern that the M5 cladding used on the MOX fuel would produce larger balloons during a LOCA event than the Zircaloy-4 cladding on LEU fuel, and that this would contribute to a greater fuel relocation effect on PCT. Relying on IRSN, BREDL noted its prediction that “M5 will form larger balloons than Zircaloy-4 in a design-basis LOCA because it remains more ductile during irradiation.”¹⁰⁵ According to Dr. Lyman, “[t]he greater retained ductility of M5 as a function of burnup compared to Zircaloy-4 can result in a greater M5 balloon size during a design-basis LOCA for fuel rods of the same burnup.”¹⁰⁶ Further, “[l]arger balloons increase the space available for fuel fragments to fall and hence result in a greater propensity for fuel relocation during a LOCA, with an associated increase in PCT and local clad oxidation.”¹⁰⁷

Dr. Lyman subsequently acknowledged that Electricity de France (EDF) and Framatome ANP had used ramp creep tests to conclude that similar balloon sizes would occur for M5 and Zircaloy-4.¹⁰⁸ Duke notes that these tests showed “that M5 cladding actually does not develop larger balloons than Zircaloy-4 under LOCA conditions.”¹⁰⁹ Dr. Lyman criticized the ramp tests, however, for not properly reflecting the true oxide film thickness that would occur on M5 during a LOCA, stating that he did not believe that the EDF presentation “fully addresses the differences that would be observed in actual irradiated fuel with regard to the ductility and the balloon size of M5 compared to that of Zircaloy-4.” He also

¹⁰⁴ *Id.*

¹⁰⁵ Tr. 2262.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Duke Findings at 22.

continued to emphasize “the absence of experimental data on the performance of high-burnup M5 clad fuel, under design-basis LOCA conditions.”¹¹⁰

NRC Staff expert Meyer acknowledged that the EDF presentation “does not entirely address the differences in the size of balloons between M5 and Zircaloy,” but insisted that it “clearly shows that the large difference claimed by IRSN is a consequence of using inappropriate data.”¹¹¹ Based on his knowledge and experience, he saw “no valid reason to expect that the size of the balloons will be affected by the type of fuel inside.”¹¹² Noting that, “[a]lthough confirmatory research on M5 cladding under LOCA conditions is continuing,” it was his opinion that Dr. Lyman’s concerns are not valid, and it is the Staff’s view that ballooning size has been adequately accounted for in Duke’s analysis.¹¹³ Also, as pointed out by NRC Staff expert Undine Shoop, Framatome actually developed a model to specifically describe the clad ballooning properties of M5, which was approved in December 1999 and revised in February 2000.¹¹⁴

Duke responded further to the questions related to M5 cladding by noting that they are not specifically a MOX issue since M5 is used both on LEU and MOX fuel. Noting that M5 experiences less strain at rupture than Zircaloy-4 in the unirradiated state, Duke expert Dunn pointed out that the two materials have “approximately equal strain potential near the end of irradiation,” and asserted that “[o]verall, therefore, there is little expected difference in the consequences of fuel relocation due to cladding differences.”¹¹⁵

We find that, as Dr. Lyman asserts, there are uncertainties in the current data base for both MOX and LEU fuel using M5 cladding. We do not, however, see a pattern in the data presented to us suggesting that the use of MOX fuel with M5 cladding poses a significant additional risk over LEU fuel in the event of a LOCA — particularly given that the application herein is for four lead test assemblies, and particularly in light of the fact that the use of M5 cladding is not strictly a MOX issue, as it is also used with LEU fuel. We find, to the contrary, that the preponderance of the evidence presented to us is that any risk relating to the M5 cladding alone is not significantly greater with MOX fuel.

We turn now to one of the more critical of the penultimate issues before us, the impact of fuel relocation on PCT, which involves consideration of combined effects of the preceding phenomena.

¹¹⁰ Tr. 2262-63.

¹¹¹ Tr. 2315.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Tr. 2300; “Revised Safety Evaluation by the Office of Nuclear Reactor Regulation, Topical Report BAW-10227P, Evaluation of Advanced Cladding and Structural Material (M5) in PWR Reactor Fuel, Framatome Cogema Fuels, Inc.” (Feb. 4, 2000).

¹¹⁵ Tr. 2160.

C. Impact of Fuel Relocation on Peak Clad Temperature

The NRC does not require modeling of fuel relocation under Appendix K.¹¹⁶ BREDL contends that fuel relocation has a significant impact and should be modeled by Duke.¹¹⁷ Duke insists, however, that any possible impact of MOX fuel relocation on compliance with the acceptance criteria must be considered in the context of all of the conservatisms already built into the Appendix K models and the criteria.¹¹⁸ Relative to a best-estimate approach (the Westinghouse version of which does account for fuel relocation¹¹⁹), Duke suggests through its expert, Steven Nesbit, that an Appendix K methodology provides more than 600°F in margin for PCT.¹²⁰ Nevertheless, NRC Staff has more recently acknowledged that omission of fuel relocation effects is a nonconservatism in Appendix K with a very large potential impact on PCT, and that an early “resolution” of this issue (i.e., Generic Issue 92) may have been in error or is no longer applicable because of new information.¹²¹

As indicated above, BREDL suggests that the impact of fuel relocation effects during a LOCA may be more severe for MOX fuel rods than for LEU fuel rods of the same burnup, due to differences in characteristics such as fuel fragment sizes and fuel-clad interactions.¹²² As also discussed above, the basis for Contention I as admitted was largely certain information from IRSN. One source of information was certain tests from the “VERCORS” series conducted by IRSN and its predecessor organization. These VERCORS tests involved irradiated MOX fuel, but Duke argues they are not directly relevant to a LOCA analysis because they dealt with severe accident consequences and were conducted at temperatures much higher than fuel temperatures experienced during a design basis LOCA.¹²³

Separately, at a 2001 conference in Aix-en-Provence, France, IRSN presented a calculation of the possible effect of fuel relocation on cladding temperature at the ruptured location on an LEU fuel rod.¹²⁴ BREDL cites this 2001 IRSN report as illustrating the effect of fuel “filling ratio” on the PCT for cladding adjacent to the clad balloon. One parameter evaluated was the ratio of the volume of relocated fuel material to the volume of the ballooned region, and the consequential effect of this “filling ratio” on the resulting surface temperature. Using the CATHARE2

¹¹⁶ See 10 C.F.R. Part 50, Appendix K; Tr. 2667.

¹¹⁷ Tr. 2256-57.

¹¹⁸ See Tr. 2132, 2376.

¹¹⁹ Tr. 2374.

¹²⁰ See Tr. 2383-84.

¹²¹ See Exhibits 26, 27, Attachment 4 at 4-5; see also Tr. 2520, 2532-33; Exhibit 53 (E-mail message from Ralph Meyer forwarded to various PIRT participants (Oct. 13, 2000)).

¹²² Tr. 2243; BREDL Findings at 5.

¹²³ See Tr. 2153-56.

¹²⁴ Exhibit 4.

computer code to calculate the impact of fuel relocation on a large-break LOCA PCT for a high-burnup UO_2 fuel rod as a function of the filling ratio, the authors among other things identified the importance of filling ratio to the resulting clad temperature.¹²⁵ As BREDL states, “For the scenario evaluated, the authors found that the PCT in the absence of relocation effects was 970°C. For a filling ratio of 70%, the maximum considered, the PCT was 1144°C. For a filling ratio of 40%, the PCT was about 20°C greater than for the no-relocation case.”¹²⁶ BREDL points out that the maximum impact on PCT of relocation was therefore, in this study, a ΔPCT of +174°C (or 313°F) for high-burnup UO_2 fuel with a filling ratio of 70% as compared to no relocation, noting further that it is “not clear from the study whether higher filling ratios, and hence larger impacts on PCT, are possible.”¹²⁷ Given that Duke’s calculated PCT is 2018°F, BREDL asserts, a relocation-associated increase in PCT of 313°F (associated with a 70% filling ratio for LEU fuel) would result in exceeding the 2200°F limit by 131°F.¹²⁸

The 2001 IRSN calculation takes no credit for heat transfer and cladding cooling benefits associated with swelling and rupture of the cladding, which are demonstrated in the KfK tests discussed below. On the other hand, that 2001 calculation, as pointed out by BREDL, was for LEU fuel, not MOX fuel, and included no estimate of an additional relocation effect on cladding temperature or oxidation due to LEU-MOX fuel differences.¹²⁹

IRSN presented an updated calculation of relocation effects at Argonne National Laboratory in May 2004. This calculation suggests a difference in fuel relocation impact on PCT between LEU fuel and MOX fuel of only 18°F.¹³⁰ IRSN attributed the 18°F MOX fuel increment to the higher initial stored energy in MOX fuel.¹³¹ The MOX fuel lead assemblies, however, as pointed out by Duke, will have lower initial stored energy than the LEU fuel assemblies in the Catawba core, due to operation at lower peaking. They will also have lower decay heat, due to the characteristics of MOX fuel.¹³² Based on these factors, Duke suggests the MOX fuel assemblies should involve a benefit, not a penalty, relative to LEU fuel and the potential impact of fuel relocation.¹³³

¹²⁵ Tr. 2459-60; *see also* Tr. 2223; Exhibit 4, “Discussion” following paper and presentation material, First “Answer by C. Grandjean.”

¹²⁶ Tr. 2258.

¹²⁷ *Id.*; Exhibit 29.

¹²⁸ Tr. 2264. We note that in the 2001 study, the increase in local oxidation was 7% at the ruptured location under the calculation, which involved no actual test. Tr. 2174; *see* Tr. 2459, 2482.

¹²⁹ Tr. 2482.

¹³⁰ Tr. 2175.

¹³¹ Exhibit 5 at 8.

¹³² Tr. 2170-72; *see also* Tr. 2147-50.

¹³³ Tr. 2173.

According to Duke, the most comprehensive experimental evidence available for evaluation of fuel relocation comes from certain “KfK” tests performed at the FR2 reactor in Germany.¹³⁴ These tests, which were done for LEU fuel that cracked and relocated as well as for fuel that did not relocate, show increased cooling at the ruptured location in the case where there is no relocation.¹³⁵ They further show, according to Duke expert Harvey, that with relocation the cooling benefits are a near match for the detrimental effect of relocation on cladding temperature.¹³⁶ In addition, the PCT still occurs at a nonballooned location on the fuel pin; the relocation effect therefore remains bounded.

The NRC Staff utilized the Duke-calculated maximum temperature increase in the balloon of 1750°F, and adjusted that temperature for the effect of relocation by adding the temperature increment found in parametric studies of the relocation effect. This value of 270°F, when added to maximum clad temperature, yielded a maximum temperature in the balloon of 2020°F.¹³⁷ According to the Staff, “[t]his bounding increase in peak cladding temperature is almost identical to the peak cladding temperature of 2018°F reported by Duke and would still be well below the allowable temperature of 2200°F.”¹³⁸

According to NRC Staff expert Dr. Meyer, the lower decay heat of MOX fuel also mitigates PCT with MOX fuel. For the Catawba plant, Dr. Meyer stated, the peak cladding temperature occurs a couple of minutes after the loss of coolant has shut down the power, by which time most of the stored heat in the fuel has been dissipated and the chemical heat from the metal–water reaction is small, so that the heat source is dominated by decay heat.¹³⁹ Because decay heat for MOX is lower than it is for LEU fuel at the time the MOX peak cladding temperature occurs, the total heat source in the balloon would be lower for MOX fuel than for LEU fuel.¹⁴⁰ Finally, according to Dr. Meyer, “[i]f fuel relocation has any effect [for LEU or MOX fuel], it would increase the temperature only in the ballooned region of the fuel rod.”¹⁴¹

According to the MOX lead test assemblies LAR, the peak temperature at the hot pin rupture location is 1841°F.¹⁴² If the 313°F increase in clad temperature associated with fuel relocation with a filling ratio of 0.7 is added to this value, the resulting clad temperature at the rupture location is 2154°F. According to Duke’s

¹³⁴ Tr. 2174, 2148, 2151-53; *see* Exhibits 15, 16.

¹³⁵ Tr. 2151.

¹³⁶ Tr. 2174; *see* Tr. 2404.

¹³⁷ Tr. 2500.

¹³⁸ NRC Staff Findings at 18.

¹³⁹ Tr. 2305.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² LAR, Attachment 3, Table 3-5.

calculations, the PCT in a rod where relocation occurs appears to be about 20°F greater than the maximum temperature at the rupture location.¹⁴³ Therefore, the peak clad temperature associated with an LEU rod with 0.7 filling ratio due to relocation could be as high as 2174°F — a value with substantially less margin to the 10 C.F.R. § 50.46 limit of 2200°. The 313°F figure was, however, an upper-bound number, not an average number.¹⁴⁴ This approach is an approximation, but according to NRC Staff expert Meyer, it is not “a bad way of getting some estimate on the outside effect” of fuel relocation on rupture node temperature during a LOCA.¹⁴⁵

Duke’s experts testified that the effect on Duke’s LOCA analysis of using the LEU decay heat curve instead of the MOX decay heat curve is a conservatism of “up to 75°F on PCT.”¹⁴⁶ BREDL expert Lyman agreed that this is a conservatism, but pointed out that the effect of using the LEU decay heat curve on PCT is “considerably smaller than the effect of relocation on PCT,” which, as indicated above, BREDL contends could be on the order of several hundred degrees Fahrenheit.¹⁴⁷

Duke and NRC Staff experts both expressed the view that the behavior of MOX fuel would be little different from LEU fuel in the effects of relocation,¹⁴⁸ with Duke challenging the concept that a “rim” structure in MOX fuel would lead to smaller particle sizes following the fracture of the pellet surface. According to Duke expert J. Kevin McCoy, “the ‘rim’ regions are tougher than the balance of the fuel, so the reasoning [of a rim effect] fails,”¹⁴⁹ and micrographs of irradiated LEU and MOX pellets show similar cracking patterns. Also, the presence of Pu-rich agglomerates do not appear to alter the cracking pattern.¹⁵⁰

With regard to filling ratio, Duke experts McCoy and Dunn cited the results of certain PBF and FR-2 experiments on LEU fuel, reported at a May 2004 meeting at Argonne, according to which “the [filling] ratio falls between 0.55 and 0.8. However, the upper portion of this range may be discounted. The most reliable relocation data is from the FR-2 tests, and those values lie in the 0.55 to 0.65 range.”¹⁵¹ Dr. McCoy indicated that “available measures of relative fuel material

¹⁴³ Tr. 2153.

¹⁴⁴ Tr. 2669.

¹⁴⁵ *Id.*

¹⁴⁶ Tr. 2131.

¹⁴⁷ Tr. 2271.

¹⁴⁸ *See* Tr. 2164, 2304.

¹⁴⁹ Tr. 2209.

¹⁵⁰ Tr. 2162.

¹⁵¹ Tr. 2164.

density . . . indicate that a filling ratio less than 0.7 would be expected for LOCA conditions.’’¹⁵²

From the preceding, several observations follow. First, we note that the arguments for a significant effect of filling ratio on PCT come into play only at a relatively high filling ratio, on the order of 70%. Calculated PCT values drop significantly at lower filling fractions. Given the evidence that MOX fuel cracking patterns are shown to be quite similar to the patterns for LEU and the additional evidence that filling ratios will not likely be as high as 70%, it does not appear likely that this effect could produce a PCT increase that exceeds the allowed maximum value. This is particularly true when it is recognized that Duke implemented certain conservatisms in its Appendix K calculations that were not required — specifically, the use of LEU decay-heat curves rather than MOX curves alone provide a conservatism of ‘‘up to 75°F’’ on PCT.¹⁵³

Second, it may be found that, even if the cooling effects of the ballooning are ignored and it is assumed that the fuel relocates at a filling ratio of 0.7 to the ballooned region, the PCT in that area would not be expected to exceed 2174°F. While close to the 2200°F limit, this value is still below it. If the benefit of the lower decay heat is included, then this value would drop by 75°F to 2099°F. Such a calculation is conservative in light of the FR-2 tests suggesting the cooling effects of the ballooning are, if not equal, nearly equal to the heating effects associated with relocation, at least for LEU fuel. It would be expected that the cooling effects would be similar for LEU and MOX fuels, since the cooling is dominated by the thermal hydraulic phenomenon near the balloon and clad rupture.

In addition, as pointed out by Duke, despite its failure explicitly to account for fuel relocation, Appendix K is conservative in producing PCTs that are 600°F or more above best-estimate calculations.¹⁵⁴ Thus, a 300-325°F increase in temperature would be well within the conservatisms of an Appendix K calculation.

We make these observations in light of the fact that, for a best-estimate LOCA calculation for LEU fuel, the effects of fuel relocation are modeled explicitly. There would clearly be merit in gaining a better understanding of the effects of fuel relocation with MOX fuel by performing a best-estimate analysis, such as that used for the Westinghouse NGF, for a MOX fuel assembly. Development of improved MOX-specific models for fuel relocation would allow for a best-estimate analysis to be performed, and in turn would improve the understanding of MOX behavior during LOCA conditions. With that said, however, we find that

¹⁵² *Id.*

¹⁵³ Tr. 2131.

¹⁵⁴ *Id.*

Duke's analysis of PCT during a LOCA is sufficiently conservative to account for any uncertainties in fuel relocation characteristics of MOX.

D. Impact of Fuel Relocation on Cladding Oxidation

As indicated above, Appendix K limits the allowed cladding oxidation during a LOCA to 17%. The purpose of this limitation is to insure adequate cladding integrity in unruptured regions of the clad during a LOCA transient. BREDL contends that the use of M5 cladding on MOX fuel poses a risk of exceeding this limit during a LOCA.

We note that both surfaces of the clad in a LOCA would be exposed to an oxidizing environment at a clad rupture site, and this is proposed to be the region of maximum concern. In addition, oxidation rates are temperature-dependent. BREDL expert Lyman suggests that Duke may have underestimated the clad temperature at the rupture point in its safety analysis. Dr. Lyman asserts:

According to the MOX LTA LAR at 3-43, the peak temperature at the hot pin rupture location is 1841°F. . . . If the 313°F increase in clad temperature associated with fuel relocation with a filling ratio of 0.7 is added to this value, the resulting clad temperature at the rupture location is 2154°F. From [Exhibit 16] in Duke's testimony, the PCT in a rod where relocation occurs appears to be about 20°F greater than the maximum temperature at the rupture location. Therefore, the peak clad temperature associated with an LEU rod with [a] 0.7 filling ratio due to relocation could be as high as 2174°F — a value with substantially less margin to the 10 CFR § 50.46 limit. Consideration of additional MOX effects, such as a greater filling ratio, could shrink this margin even further.¹⁵⁵

Further, he notes, “[t]he oxidation rate for M5 is substantially greater at 2154°F than at 1841°F.”¹⁵⁶ BREDL in its proposed findings cites two studies substantiating an oxidation rate increase.¹⁵⁷

BREDL also cites an IPSN study in which the impact on maximum cladding oxidation for two-sided oxidation at a ruptured region is evaluated.¹⁵⁸ Using a rate law model to calculate the percentage of oxidation, the maximum cladding oxidation “was 12.6% for the no-[fuel-]relocation case, and 19.7% for the 70% filling ratio case. Thus the maximum impact on ECR (equivalent cladding reacted)

¹⁵⁵ Tr. 2269.

¹⁵⁶ *Id.*

¹⁵⁷ BREDL Findings at 12; Yan et al., Post Quench Ductility Results for Zry-4 and M5 Oxidized at 1000°C, and 1100°C (Jan. 15, 2004); and Post Quench Ductility Results for Zry-4 and M5 Oxidized at 1200°C, Slow Cooled to 800°C and Quenched (Mar. 23, 2004) (Exhibits 56, 57).

¹⁵⁸ See Exhibit 29.

resulting from relocation was calculated as $\Delta ECR=7.1\%$.¹⁵⁹ BREDL also points out in its proposed findings that the IPSN calculation was terminated at less than 200 seconds, whereas the Catawba LOCA analysis was run for a longer period of time.¹⁶⁰

BREDL expert Lyman suggests that clad oxidation may be even more severe for MOX fuel because of the fuel-clad interaction effects and pellet fragment size effects discussed above.¹⁶¹ In response, Duke states that the calculated clad oxidation for M5-clad MOX fuel was 5.2%, based on the AREVA Appendix K LOCA evaluation model, which is consistent with all approved Appendix K models. Looking just at the rupture location, Duke asserts the following:

The highest PCT at the ruptured location in the LOCA calculations for Catawba described in the MOX fuel lead assembly license amendment request was approximately 1750°F and the local oxidation on that fuel pin is 3%. Adding the IRSN (IPSN) predictions to the Catawba MOX fuel results gives an estimated PCT of 2070°F and a local oxidation of 10%. Thus, even if the pessimistic IRSN predictions are simply added to the current Catawba MOX fuel LOCA evaluations, the results remain well below the acceptance criteria of 10 C.F.R. 50.46.¹⁶²

The NRC Staff only briefly addressed the oxidation issue, but noted that “[t]he increase in the amount of oxidation was estimated by IRSN in their parametric study to be about 10 percent.”¹⁶³ This is a significant increase, Duke acknowledges, “but when added to the 3% [oxidation at the point of PCT] reported by Catawba, the total is still less than the 17% licensing limit.”¹⁶⁴

We note that Dr. Lyman did not predict a clad oxidation percentage that exceeds the allowed 17% (even when his proposals for increased PCT values were applied). Rather, he suggested several phenomena, which, if he is correct regarding their effects, would increase the percentage of clad oxidation above the values calculated by Duke in their LOCA analysis. We find, however, that this is not a sufficient basis for requiring revision to the LOCA model as presented, particularly given that the suggested corrections are themselves open to question.

¹⁵⁹ Tr. 2259.

¹⁶⁰ See Tr. 2664; Exhibit 30; Exhibit 6. BREDL indicates that the Duke analysis was run for 400 seconds, but we note that Exhibit 6 indicates it was actually run for 600 seconds.

¹⁶¹ Tr. 2259-62, 2549-50.

¹⁶² Tr. 2175.

¹⁶³ Tr. 2684.

¹⁶⁴ Tr. 2175.

E. Impact of Fuel Relocation on Ability To Maintain Coolable Core Geometry

BREDL has also raised questions about the ability of a MOX LTA core to preserve a coolable core geometry, noting that IRSN suggests that the impact of fuel relocation in fuel rod balloons on the coolability of blocked regions is “fully questionable and should be addressed by specific analytical tests with a simulation of fuel relocation.”¹⁶⁵ Duke points out that the coolability of a blocked region given fuel relocation is not unique to MOX fuel, noting that in its LOCA analysis for a core with MOX LTAs, “[t]he maximum calculated cladding strain for the most limiting case [evaluated at a burnup of 30 GWD/t] is 51 percent and the flow blockage due to this ballooning is 52 percent of the coolant channel surrounding the hot pin.”¹⁶⁶ This amount, Duke states, “is well within the coolable geometry limit (specified by the AREVA LOCA evaluation model) of 90 percent.”¹⁶⁷

The maximum flow blockage that will preserve a coolable geometry depends, however, as BREDL points out, on the assumed heat source and the heat transfer properties of the fuel bundle. BREDL cites IRSN for the fact that bundle blockage ratios accepted and used by the nuclear industry have been derived based upon arrays of unirradiated fuel rods, and do not take into account fuel relocation and its associated impacts on the redistribution of the decay heat source within the fuel rods.¹⁶⁸ IRSN has also referred to the impact of fuel relocation on the coolability of a blocked region as “still fully questionable.”¹⁶⁹ We find, however, that the 90% blockage figure used by Duke in its calculation is sufficient to bracket the calculated blockage plus uncertainty, and therefore is not a safety concern that would overcome Duke’s showing on coolable core geometry.

F. Adequacy of Database on MOX Fuel in a LOCA

Irradiation testing of MOX fuel to burnups anticipated by the Catawba LTA has not been carried out, which raises potential questions over differences in performance under irradiation relative to LEU fuel. BREDL suggests that “currently, the data base is insufficient to permit a demonstration that the significant uncertainties associated with MOX fuel behavior in a LOCA do not undermine reasonable assurance of adequate protection of public health and safety.”¹⁷⁰ In addition, Dr. Lyman has stated that because of the substantial differences in

¹⁶⁵ Tr. 2250.

¹⁶⁶ Tr. 2128-29.

¹⁶⁷ Tr. 2129.

¹⁶⁸ Tr. 2263 (citing Grandjean, *LOCA Issues*, at 23).

¹⁶⁹ *Id.*

¹⁷⁰ BREDL Findings of Fact at 24.

MOX fuel — including different microstructure and different physical material — the use of MOX should not be regarded in the same way as an LTA approval involving, for example, a change of mid-span mixing grid position, or similar change.¹⁷¹ Because there is a substantial change to the nature of the fuel in this case, Dr. Lyman contends, prior to approval of the proposed MOX lead test assemblies, there should be testing in actual test facilities, both in the United States and abroad, where experimental fuels are not only irradiated, they are also subject to severe accident, LOCA, and other accident testing.¹⁷²

Dr. Lyman further suggests that irradiation and testing should be done in a test reactor prior to lead test assembly irradiation in a commercial reactor, because of questions and uncertainties involving the proposed MOX LTAs. According to Dr. Lyman:

the fact that there is relatively little on MOX fuel under accident conditions relative to the long experience with uranium fuel that's been acquired over the history of commercial nuclear power in this country, that leads to an effective discrepancy in the confidence we can have that we know enough about the LTAs to put them in a U.S. reactor. . . . [T]he goal is to make sure that U.S. commercial reactors are not test reactors. There are different safety criteria for test reactors. That's where testing of experimental fuels should be performed, not in a commercial reactor in a densely populated area. . . .¹⁷³

According to NRC Staff expert Dr. Meyer, the problem with Dr. Lyman's suggestion is that, to do tests, one needs fuel specimens, and these would come from the LTA program. He noted that it is true that during normal operation in a commercial reactor, one can obtain only a limited amount of information from lead test assemblies because they are not fully instrumented, having only limited numbers of thermocouples, pressure transducers, and other instruments. Accident conditions must be created in a laboratory, as they are not created in power reactors to test fuel. Thus, for studies of LOCA behavior, one has to do all of the testing in the laboratory or in a test reactor. But to do so, one needs fuel specimens, which are obtained from a lead test assembly program. The process is not a step-by-step sequential process but rather a parallel one with each type of testing complementing the other.¹⁷⁴

Moreover, according to the testimony of NRC Staff expert Shoop, there is actually a preference on the part of the NRC Staff for prototypical irradiations of the sort produced in operating reactors, assuming all relevant safety considerations

¹⁷¹ Tr. 2588.

¹⁷² See Tr. 2592-2600.

¹⁷³ Tr. 2589.

¹⁷⁴ See Tr. 2696-99.

are addressed. Such prototypical irradiations typically cannot be produced in a test reactor because the irradiation spectrum differs from that of a power reactor. The NRC Staff wants to see the results of fuel performance under thermo-hydraulic and irradiation conditions of a power reactor as part of its approval for any new fuel design before allowing batch loading, and thus, in NUREG-800, in-reactor testing is preferred, whether the change is to a component of a fuel assembly or in the fuel material itself.¹⁷⁵

Taking all of the evidence presented in this matter into account, we recognize that there would be considerable value to having test reactor irradiation results on well-instrumented test specimens at burnups at or above the values anticipated for commercial application of any new reactor fuel.¹⁷⁶ We also recognize, on the other hand, that evidence presented by both Duke and NRC Staff experts provides strong support for their argument that the behavior of MOX fuel would be little different from LEU fuel in the effects of fuel relocation, the principal phenomenon under consideration in this case.¹⁷⁷ We note in this regard the quite low concentration of plutonium oxide fuel in a MOX fuel core — necessarily considerably less than the 2% figure for the percentage of MOX fuel lead assemblies in the core.¹⁷⁸ In addition, the NRC Staff's preference for prototypical irradiations of the sort that are produced in operating reactors, and its reasons for such preference, we find to be persuasive argument against requiring testing in test reactors — absent safety concerns that would cause Duke's application to fail to meet relevant criteria for approval.

What we are left with is a situation in which there are, without question, some uncertainties about MOX fuel and its performance under irradiation. We find, however, that the preponderance of the evidence with regard to the matters at issue in Contention I is that all of the uncertainties raised by BREDL are within sufficient ranges, particularly given the conservatisms in Appendix K, to assure to a reasonable degree that the use of the proposed four MOX lead test assemblies will not endanger the health and safety of the public. Under these circumstances, and given that only four LTAs are to be irradiated, with post-irradiation examination of them planned, we do not find the absence of test reactor performance data to be sufficient reason not to permit use of the MOX LTAs at Catawba.

¹⁷⁵ Tr. 2699-2700; *see* NUREG-800, § 4.2.

¹⁷⁶ It appears that no such studies are now under way or planned for the near future.

¹⁷⁷ *See* Tr. 2164, 2304.

¹⁷⁸ *See* Tr. 2125.

V. CONCLUSIONS OF LAW

We conclude, under the provisions of 10 C.F.R. §§ 50.90, 50.92, 50.40(a), and 50.57(a)(3), that Applicant Duke Energy Corporation has shown, by a preponderance of the evidence, that with regard to the matters at issue in Safety Contention I there is reasonable assurance that its proposed use of the four MOX lead test assemblies in the Catawba plant will not endanger the health and safety of the public. In reaching this conclusion we observe that Duke's LOCA analysis under Appendix K, although it does not take into account fuel relocation, is informed by sufficient compensating conservatisms that such reasonable assurance is provided.

Appendix K has been in effect since 1974, and over the years some extra conservatisms and some nonconservatisms have been identified in it.¹⁷⁹ The Appendix K model does not account for relocation, which has a nonconservative impact, but it also does not take credit for other known extra-conservative factors.¹⁸⁰ For example, among the required features in Appendix K is the use of October 1971 American Nuclear Society "Decay Energy Release Rates Following Shutdown of Uranium-Fueled Thermal Reactors."¹⁸¹ Also included is the use of the Baker-Just equation for the rate of energy release, hydrogen generation, and cladding oxidation from the metal-water reaction of the cladding.¹⁸² Appendix K also requires that each evaluation model shall include provisions for predicting cladding swelling and rupture during a LOCA.¹⁸³

We find that these and other conservatisms provide adequate compensatory effect for the fuel relocation effects presented to us in this proceeding. Thus, we do not find the absence of an accounting for fuel relocation in Appendix K to invalidate Duke's Appendix K LOCA analysis for Catawba with use of the four MOX lead test assemblies.

Further, although BREDL has demonstrated various uncertainties related to the use of MOX fuel, fuel relocation, and related phenomena, to which we expect Duke will be alert in its irradiation of the applied-for MOX lead test assemblies, we find the preponderance of the evidence in this proceeding to be that use of the four MOX test assemblies as planned will not, as required under 10 C.F.R. § 50.46(b)(1), (2), and (4), cause peak cladding temperature to exceed 2200°F, nor cause total cladding oxidation to exceed 17% of total cladding thickness before oxidation, and that calculated changes in core geometry will be such that the core will remain amenable to cooling with use of the MOX LTAs. This showing, we conclude, provides the requisite reasonable health and safety assurances with

¹⁷⁹ Tr. 2312.

¹⁸⁰ Tr. 2669-70.

¹⁸¹ 10 C.F.R. Part 50, Appendix K, § I.A.4.

¹⁸² *Id.* § I.A.5.

¹⁸³ *Id.* § I.B.

regard to the issues arising from Contention I, by a preponderance of the evidence as a whole.

VI. ORDER

1. This Memorandum and Order is effective immediately and, in accordance with 10 C.F.R. § 2.760 of the Commission's Rules of Practice, shall become the final action of the Commission forty (40) days from the date of its issuance (on *January 31, 2005*), unless any party petitions the Commission for review in accordance with 10 C.F.R. § 2.786 or the Commission takes review on its own motion.

2. Within fifteen (15) days after service of this Memorandum and Order, any party may seek review by filing a petition for review with the Commission on the grounds specified in 10 C.F.R. § 2.786(b)(4). The filing of a petition for review is mandatory for a party to exhaust its administrative remedies before seeking judicial review. 10 C.F.R. § 2.786(b)(1).

3. Any petition for review shall be no longer than ten (10) pages and shall contain the information set forth in 10 C.F.R. § 2.786(b)(2). Any other party may, within ten (10) days after service of a petition for review, file an answer supporting or opposing Commission review. Any such answer shall be no longer than ten (10) pages and, to the extent appropriate, should concisely address the matters in 10 C.F.R. § 2.786(b)(2). 10 C.F.R. § 2.786(b)(3). A petitioning party shall have no right to reply, except as permitted by the Commission. *Id.*

It is so ORDERED.

THE ATOMIC SAFETY AND
LICENSING BOARD

Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

Anthony J. Baratta
ADMINISTRATIVE JUDGE

Thomas S. Elleman
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 22, 2004¹⁸⁴

¹⁸⁴ Copies of this Memorandum and Order were sent this date by Internet e-mail to counsel for all parties.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Anthony J. Baratta
Lester S. Rubenstein

In the Matter of

Docket No. 50-271
(ASLBP No. 04-832-02-OLA)

ENTERGY NUCLEAR VERMONT
YANKEE, L.L.C., and ENTERGY
NUCLEAR OPERATIONS, INC.
(Vermont Yankee Nuclear Power
Station)

December 27, 2004

In this proceeding concerning an amendment authorizing a power increase to the operating license of the Vermont Yankee Nuclear Power Station, the Board concludes that the thirteen application supplements submitted after the notice of opportunity to request a hearing was published did not violate due process, change the basic nature of the proceeding, or render the Board without jurisdiction over the supplements, and thus denies the motion to dismiss.

DUE PROCESS: OPPORTUNITY FOR HEARING

Due process requires that a notice of proposed action published in the *Federal Register* must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

DUE PROCESS: OPPORTUNITY FOR HEARING

In this case, where the notice of opportunity to request a hearing mentioned that the application included several supplements, where most of the subsequent supplements were clarifications and additional material submitted by the applicant in response to requests for additional information by the agency, and where the supplements were generally available on the agency's Web site, the original notice was reasonably calculated to apprise interested parties of the scope and pendency of the proceeding and thus satisfied due process.

**RULES OF PRACTICE: RESPONSIBILITIES OF STAFF
STAFF REQUESTS FOR ADDITIONAL INFORMATION**

An application may be "sufficiently complete for purposes of docketing, and for starting the adjudicatory process" even though the Staff subsequently asks for additional information from the applicant. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 350 (1998).

RULES OF PRACTICE: JURISDICTION (LICENCING BOARDS)

A licensing board established to preside over a "proceeding" concerning a license amendment maintains jurisdiction over issues based on supplementary filings for the application when the supplements are essentially clarifications and updates submitted in response to Staff questions and there is no "large transformation" of the application or the scope of this proceeding.

RULES OF PRACTICE: TIME LIMITS FOR FILING MOTIONS

The timeliness of a motion to dismiss a proceeding pursuant to 10 C.F.R. § 2.323(a) on the ground that subsequent events have transformed the proceeding beyond the scope of the original notice is measured from the date of the transforming events, not the date of the original notice. In this case, the motion was timely.

**MEMORANDUM AND ORDER
(Denying Motion for Dismissal and Renotice of Hearing)**

Before the Board is a motion by the New England Coalition (NEC), a Petitioner herein, to dismiss this proceeding and to require that notice of opportunity for

hearing in this matter be reissued only after a “completed application” is filed with the NRC. For the reasons set forth below, we deny NEC’s motion.

On July 1, 2004, the Commission published a notice of opportunity to request a hearing on an application by Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc. (collectively, Entergy), for an extended power uprate (EPU) to Facility Operating License No. DPR-28 for operation of the Vermont Yankee Nuclear Power Station in Windham County, Vermont. 69 Fed. Reg. 39,976 (July 1, 2004). NEC filed a timely request for hearing and seven proposed contentions.¹ Then, on October 20, 2004, NEC filed this motion to dismiss and a supporting memorandum.² Following a brief discussion of this motion at the October 21, 2004 prehearing conference, the Board declined to delay the proceeding. Tr. at 85-92. We indicated that we would rule on the matter only after Entergy and the NRC Staff had the opportunity to file their responses. *Id.* at 91. The responses were filed on November 1, 2004.³

I. ARGUMENT OF THE PARTIES

NEC argues that dismissal and renoticing of the hearing in this case is required because Entergy’s application was incomplete as of July 1, 2004, and thus the notice was fatally defective. NEC Memorandum at 2-3. NEC asserts that, as of October 19, Entergy had filed at least twenty supplements to the application, many of which were filed after July 1, 2004. *Id.* at 2. NEC declares that these supplements resulted in a “large transformation” of Entergy’s original license amendment application, and that even now the application is “still being completed.” *Id.*

On this basis, NEC argues several legal points. First, NEC declares that the notice does not meet the requirements of due process because it fails to provide “persons of average intelligence” with reasonable notice of the “subject matter

¹On November 22, 2004, this Board ruled that NEC had standing and that two of its contentions were admissible under 10 C.F.R. § 2.309(f). LBP-04-28, 60 NRC 548, 551 (2004). That decision also found that another petitioner, the Department of Public Services of the State of Vermont, had standing and had raised two admissible contentions.

²[NEC’s] Motion To Dismiss Proceeding Due to Failure To Provide Proper Notice (Oct. 20, 2004) [hereinafter NEC Motion]; [NEC’s] Memorandum of Fact and Law Supporting Its Motion To Dismiss the Proceeding Due to Failure To Provide Proper Notice (Oct. 20, 2004) [hereinafter NEC Memorandum]. NEC filed its motion electronically and then distributed paper copies of it to the participants and the Board at the outset of our October 21, 2004 prehearing conference in Brattleboro, Vermont. The State did not join or participate in the instant motion.

³Entergy’s Answer to [NEC’s] Motion To Dismiss Proceeding Due to Failure To Provide Proper Notice (Nov. 1, 2004) [hereinafter Entergy Answer]; NRC Staff Answer to [NEC’s] Motion To Dismiss Proceeding Due to Failure To Provide Proper Notice (Nov. 1, 2004) [hereinafter Staff Answer].

of the license amendment at issue.” *Id.* at 3. Next, NEC asserts that the Board’s authority and jurisdiction are limited to the matters set forth in the notice, and since the notice “referred only to the portions of the application referenced in [it],” the Board lacks jurisdiction and authority to consider the subsequent supplements. *Id.* Accordingly, NEC asks the Board to dismiss and renotice this matter. *Id.* at 4.

Entergy and the Staff oppose the motion. First, both argue that the July 1, 2004 notice is adequate and that NEC has failed to identify any change to the nature or scope of the proceeding as a result of the supplements to Entergy’s license amendment application. Entergy Answer at 4; Staff Answer at 4. In this regard, they note that 10 C.F.R. § 2.309(c) and (f) provide petitioners the opportunity to file new or amended contentions if material new information becomes available via these supplements. Entergy Answer at 6; Staff Answer at 4. Second, in response to NEC’s claim that the supplements fall outside the Licensing Board’s jurisdiction, both Entergy and the Staff take the position that because the September 22, 2004 notice establishing the Licensing Board encompasses the entire proceeding, the claim is without merit. Entergy Answer at 4 n.8; Staff Answer at 5. Third, both assert that NEC has neglected to offer any legal authority for the proposition that supplements to an application require the issuance of a new notice, or that the Board possesses the authority to reissue the notice or to order the Staff to do so. Entergy Answer at 4; Staff Answer at 5 n.8.

In addition, Entergy also claims that NEC’s motion was not timely. It notes that 10 C.F.R. § 2.323(a) requires that a motion be made within 10 days of the “occurrence or circumstance” from which it arises. Entergy asserts that since the motion complains about the inadequacy of the July 1, 2004 notice, NEC’s failure to submit its motion within 10 days of that date requires its rejection. Entergy Answer at 2-3.

II. ANALYSIS

A. Due Process

NRC regulations require that the NRC publish a notice of proposed action in the *Federal Register* in the event that an application for an amendment to an operating license for a facility is filed. 10 C.F.R. § 2.105(a). Among other things, the notice must set forth the nature of the proposed action and indicate, to persons whose interests may be affected by the proceeding, the existence of an opportunity to file a request for hearing or a petition for leave to intervene. 10 C.F.R. § 2.105(b) and (d). Due process requires that such notice be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The purpose of the notice is to “apprise the affected individual of, and permit adequate preparation for, an

impending ‘hearing.’” *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 14 (1978). “The operative test is that ‘the notice as published must reasonably apprise any interested person of the issues involved in the proceeding.’” *North Alabama Express, Inc. v. United States*, 585 F.2d 783, 787 (5th Cir. 1978) (quoting *Buckner Trucking, Inc. v. United States*, 354 F. Supp. 1210, 1219 (S.D. Tex. 1973)).

The notice published on July 1, 2004, stated that the proposed action is to change Entergy’s operating license “to increase the maximum authorized power level . . . to 1912 MWt” and to alter “the VYNPS technical specifications to provide for implementing uprated power operation.” 69 Fed. Reg. at 39,976. In addition, the notice reflected that seven supplements to the Entergy application had been filed as of July 1, 2004. *Id.* at 39,977. Subsequent to that date and prior to the date of NEC’s motion, thirteen additional supplements were filed.

Upon examination of the thirteen supplements filed after July 1, 2004, we do not see how the application has sustained a “large transformation.” Nine of the supplements were submitted in response to various requests for additional information (RAIs) by the Staff. The remaining four were to update, correct, or clarify previously filed materials. These types of RAIs, responses, and updating/clarification submissions are a “standard and ongoing part of NRC licensing reviews.” *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998).⁴ NEC has not pointed to any change in the basic nature or the scope of the proceeding that has occurred as a result of the filing of the supplemental information.

Nor do post-docketing RAIs necessarily indicate that an application was too incomplete to launch this proceeding or that it must be dismissed. An application may be “sufficiently complete for purposes of docketing, and for starting the adjudicatory process” even though the Staff subsequently asks for additional information from the applicant. *Calvert Cliffs*, CLI-98-25, 48 NRC at 350. Further, allowing an application to be modified or improved as the Commission’s review moves forward is consistent with “the dynamic licensing process followed in Commission licensing proceedings.” *Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 395 (1995).

In this instance, because the supplements have not changed the nature of the proceeding from that which was noticed on July 1, we believe that NEC’s right to due process has not been violated. The notice explicitly states that the proceeding relates to the license amendment sought by Entergy to increase the maximum power level of the plant to 1912 MWt and to modify certain technical

⁴ This is not to say that the subject matter of an RAI cannot be adjudicated. Rather, if a party believes that the RAI or the applicant’s response to the RAI raises a legitimate issue related to the adequacy of the application, the petitioner may submit that issue in the form of a new or amended contention. *Id.* at 350.

specifications of the license to support the requested power increase. 69 Fed. Reg. at 39,976. The fact that the notice reflects that seven supplements had already been filed, served to reasonably inform the public that further refinement or supplementation of the application might be expected. In addition, the notice indicates how an interested party can access and review documents and other materials related to the application, either at the NRC's public document room or via the ADAMS Public Electronic Reading Room on the Internet. *Id.* at 39,977. Certainly, the July 1 notice has served to "apprise interested parties of the pendency" of the proposed 20% uprate in the Vermont Yankee station license and has given all interested parties "the opportunity to present their objections." *Mullane*, 339 U.S. at 314.⁵

Nor is there any showing that NEC, or any other person, may have been prejudiced in any way by the filing of supplements to Entergy's application.⁶ As noted, a participant in a proceeding has the ability to file new, amended, or late-filed contentions when additional documentation becomes available. 10 C.F.R. § 2.309(c) and (f)(2). Newly available material information has long been held to provide good cause to file a new contention. *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982). With these existing procedures available to all participants, we believe that NEC has adequate means by which to address all newly docketed supplements to the Entergy application.

B. Jurisdiction Over Supplemental Material

NEC also claims that these supplements to the application have expanded the scope of the proceeding beyond that which was noticed in the *Federal Register*, and thus has placed those issues outside the Board's jurisdiction. This Licensing Board was established to preside over the "proceeding" concerning Entergy's request to "change the operating license for the Vermont Yankee Nuclear Power Station to increase the maximum authorized power level from 1593 megawatts thermal (MWt) to 1912 MWt." 69 Fed. Reg. 56,797, 56,798 (Sept. 22, 2004).

⁵ We find somewhat analogous the "logical outgrowth" test used in the context of administrative rulemaking. Where a final regulation is a logical outgrowth of the proposed rule originally noticed in the *Federal Register*, the notice provisions of the Administrative Procedure Act are satisfied, and challenges related to the adequacy of the notice must fail. *Shell Oil Co. v. EPA*, 950 F.2d 741, 759 (D.C. Cir. 1992). In the situation before us today, the supplements to the Entergy application are essentially clarifications and responses to Staff questions that do not change the nature or scope of the proceeding and are, at most, simply a logical outgrowth of the application noticed on July 1, 2004.

⁶ The Board also questions whether NEC has standing to raise a due process complaint in this situation. It is clear that NEC is aware of NRC's normal RAI process that triggers applicants to file supplementary information, and has actual knowledge of the publicly available contents of the supplements to the Entergy application. Thus, we are not aware of any "injury in fact" that NEC has suffered or will suffer based upon these additions to the application.

Since the thirteen additional supplements are essentially clarifications and updates submitted in response to Staff questions, we see no “large transformation” of the application or the scope of this proceeding, and we conclude that they clearly fall within this Board’s jurisdiction. This aspect of NEC’s challenge is without merit.

C. Authority To Renotify

Given that we have rejected NEC’s substantive arguments, we need not address the question of a Board’s authority to reissue the notice, or to order the Staff to do so.

D. Timeliness of the Motion

We reject Entergy’s argument that NEC’s motion necessarily was untimely under 10 C.F.R. § 2.323(a) because it was not filed within 10 days of July 1, 2004. To the contrary, we conclude that the 10-day deadline is logically triggered not on the date of the notice, but on the date when the “transforming” supplement (which allegedly renders the original notice inadequate) becomes available to the public. Here, NEC claims that at least one supplement (Supplement 16) was first made available to the public on October 19, 2004, one day prior to the filing of the NEC motion. Thus, whatever its other defects, the motion was not necessarily untimely.

III. CONCLUSION

In light of that discussed above, we see no reason to dismiss or to renotify this proceeding. NEC’s motion seeking these actions is thus DENIED.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND
LICENSING BOARD⁷

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 27, 2004

⁷Copies of this Memorandum and Order were sent this date by Internet e-mail transmission to counsel for (1) Licensees Entergy Nuclear Vermont Yankee, L.L.C., and Entergy Nuclear Operations, Inc.; (2) Petitioners Vermont Department of Public Service and New England Coalition of Brattleboro, Vermont; and (3) the Staff.

CLI-04-27 can be found as Attachment 2 to CLI-05-8, 61 NRC 129, 145 (2005). This is the redacted public version of the Commission's sealed Memorandum and Order dated October 7, 2004, and does not include the proprietary information contained in the sealed version.

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in cases where NRC's own rules do not prescribe a particular process or evidentiary approach, it frequently has looked to analogous outside sources of law; CLI-04-24, 60 NRC 194 (2004)
- Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285, 297 (1994), *aff'd*, *Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6th Cir. 1995)
appellant bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims; CLI-04-23, 60 NRC 158 (2004); CLI-04-36, 60 NRC 639 n.25, 643 (2004)
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the precise enforcement sanction to impose is within the Staff's sound discretion, and it is wrong for a Board in effect to try to supervise the Staff's actions; CLI-04-26, 60 NRC 410 (2004)
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a reconsideration motion, to be successful, cannot simply republish prior arguments, but must give the Commission a good reason to change its mind; CLI-04-35, 60 NRC 622 n.13 (2004)
- A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324 (1961)
Commission decision that is a final agency action is appealable only to the federal courts; CLI-04-18, 60 NRC 4 (2004)
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because agencies are neither constrained by article III nor governed by judicially created standing doctrines, the criteria for establishing administrative standing may be less demanding than the criteria for judicial standing; LBP-04-16, 60 NRC 111 (2004)
- American Nuclear Resources, Inc. v. Department of Labor*, 134 F.3d 1292, 1294-95 (6th Cir. 1998)
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- American Nuclear Resources, Inc. v. Department of Labor*, 134 F.3d 1292, 1296 (6th Cir. 1998)
an employer may fire an employee for any reason at all, so long as the reason does not violate a congressional statute; CLI-04-24, 60 NRC 214 n.161 (2004)
- Amgen Inc. v. Smith*, 357 F.3d 103, 117 (D.C. Cir. 2004)
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- Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985)
a clearly erroneous finding is one that is not even plausible in light of the record viewed in its entirety; CLI-04-24, 60 NRC 189 (2004)
- Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991)
a contention basis is rejected if it fails to establish with specificity any genuine dispute, impermissibly challenges the Commission's regulations or rulemaking-associated generic determinations, lacks adequate factual or expert opinion support, and/or fails to properly challenge the license application; CLI-04-22, 60 NRC 131 (2004)
as with a summary disposition motion, a board may appropriately view petitioners' support for its contention in a light that is favorable to the petitioner; LBP-04-28, 60 NRC 556 (2004)

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- failure to comply with any of the contention pleading requirements is grounds for the dismissal of a contention; CLI-04-36, 60 NRC 636 (2004); LBP-04-15, 60 NRC 88 (2004)
- failure to provide factual information and expert opinions regarding the bases of a proffered contention requires that the contention be rejected; LBP-04-14, 60 NRC 55 (2004); LBP-04-17, 60 NRC 242 (2004); LBP-04-18, 60 NRC 265 (2004); LBP-04-19, 60 NRC 289 (2004)
- Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991)
- failure to comply with any of the pleading requirements is grounds for dismissing a contention; LBP-04-14, 60 NRC 54 (2004); LBP-04-17, 60 NRC 240 (2004); LBP-04-18, 60 NRC 264 (2004); LBP-04-19, 60 NRC 288 (2004); LBP-04-28, 60 NRC 555 (2004)
- petitioner is obliged to provide the analysis and expert opinion showing why its bases support its contentions, and the Board may not make factual inferences on the petitioner's behalf; LBP-04-15, 60 NRC 89 (2004)
- Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 156 (1991)
- petitioner must provide an explanation of the bases for a contention, a statement of fact or expert opinion upon which it intends to rely, and sufficient information to show a dispute with the applicant on a material issue of law or fact; LBP-04-15, 60 NRC 89 (2004)
- Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-91-19, 33 NRC 397, 410, *aff'd in part and rev'd in part on other grounds*, CLI-91-12, 34 NRC 149 (1991)
- contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking are inadmissible; LBP-04-17, 60 NRC 241 (2004); LBP-04-18, 60 NRC 264 (2004); LBP-04-19, 60 NRC 289 (2004)
- Armed Forces Radiobiology Institute* (Cobalt-60 Storage Facility), ALAB-682, 16 NRC 150, 153-54 (1982)
- in proceedings involving nonpower reactors or materials licensing, proximity must be coupled with a showing that the facility's activities involve a significant source of radioactivity producing an obvious potential for offsite consequences; LBP-04-24, 60 NRC 486 (2004)
- Atlantic Research Corp.* (Alexandria, Virginia), ALAB-594, 11 NRC 841, 845-46 (1980)
- if a hearing is held on a civil penalty, an order will be issued after the hearing by the presiding officer or the Commission dismissing the proceeding or imposing, mitigating, or remitting the civil penalty; CLI-04-24, 60 NRC 216 n.169 (2004)
- Atlantic Research Corp.* (Alexandria, Virginia), ALAB-594, 11 NRC 841, 849 (1980)
- civil penalty adjudications are de novo proceedings, not limited proceedings for review of NRC Staff decisions; CLI-04-24, 60 NRC 201 (2004)
- if deemed to be warranted in the totality of circumstances, an adjudicator is entirely free to mitigate or remit an assessed penalty; CLI-04-24, 60 NRC 217 (2004)
- the penalty assessed by Staff constitutes the upper bound of the penalty that may be imposed after a hearing; CLI-04-24, 60 NRC 202 (2004)
- Atlantic Research Corp.* (Alexandria, Virginia), ALAB-594, 11 NRC 841, 851 (1980)
- the Appeal Board quite properly did not feel bound by the NRC Staff's Inspection and Enforcement Manual, as that document reflected only Staff policy and did not have the Commission's imprimatur; CLI-04-24, 60 NRC 218 n.176 (2004)
- Atlantic Research Corp.* (Alexandria, Virginia), CLI-80-7, 11 NRC 413, 421 (1980)
- the Commission has discretion to impose civil penalties when a violation has been established and if penalties may positively affect the conduct of the licensee or other similarly situated persons and are not grossly disproportionate to the gravity of the offense; CLI-04-24, 60 NRC 216 (2004)
- Atlantic Research Corp.* (Alexandria, Virginia), CLI-80-7, 11 NRC 413, 425 (1980)
- a proceeding is remanded to the Appeal Board to consider whether the circumstances of the case would justify mitigation of the amount of a civil penalty; CLI-04-24, 60 NRC 219 (2004)
- Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349 (1998)
- a license application has not sustained a large transformation when supplements to it are a standard and ongoing part of NRC licensing reviews; LBP-04-33, 60 NRC 753 (2004)

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- absent a showing to the contrary, the issuance of requests for additional information by the NRC Staff in the context of NRC licensing reviews is properly viewed as the Staff's conscientious performance of its duties; LBP-04-25, 60 NRC 526 (2004)
- Staff assuredly would not grant a license renewal application if the responses to the requests for additional information suggested unresolved safety concerns; LBP-04-25, 60 NRC 526 (2004)
- Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 350 (1998)
- an application may be sufficiently complete for purposes of docketing, and for starting the adjudicatory process even though the Staff subsequently asks for additional information from the applicant; LBP-04-33, 60 NRC 753 (2004)
- if a party believes that a request for additional information or the applicant's response to the RAI raises a legitimate issue related to the adequacy of the application, the petitioner may submit that issue in the form of a new or amended contention; LBP-04-33, 60 NRC 753 n.4 (2004)
- Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), LBP-98-26, 48 NRC 232, 243, *aff'd*, CLI-98-25, 48 NRC 325, 350-51 (1998), *petition for review denied sub nom. National Whistleblower Center v. NRC*, 208 F.3d 256 (D.C. Cir. 2000)
- activities of the Staff occurring after the notice of opportunity for hearing do not give cause for a board to delay the deadline for hearing requests specified in the notice; LBP-04-28, 60 NRC 577-78 (2004)
- Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926, 931-32 (11th Cir. 1995)
- in determining whether an employee has engaged in a protected activity, NRC is concerned with whether the employee gave management at least some form of notice of the safety or regulatory compliance problem; CLI-04-24, 60 NRC 210 (2004)
- Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983), *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982)
- petitioners may not obtain licensing board hearings to challenge NRC Staff enforcement orders as too weak or otherwise insufficient; CLI-04-38, 60 NRC 654 (2004)
- Bellotti v. NRC*, 725 F.2d 1380, 1381 (D.C. Cir. 1983), *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982)
- a contention seeking additional measures as a substitute for those imposed by the Staff is properly rejected; CLI-04-26, 60 NRC 405 (2004)
- as part of its standing determination, a board must consider whether the issues petitioner seeks to raise fall within the scope of the proceeding; LBP-04-16, 60 NRC 112 (2004)
- the Commission has the authority to define the scope of the hearing, including narrowly limiting the proceeding; CLI-04-23, 60 NRC 158 (2004)
- the Commission's authority to define the scope of the hearing includes limiting the hearing to the question of whether the order should be sustained; CLI-04-26, 60 NRC 405 (2004)
- Bellotti v. NRC*, 725 F.2d 1380, 1382 (D.C. Cir. 1983)
- a petitioner may not seek to litigate issues that would impermissibly expand the scope of a proceeding beyond the very narrow scope that has been defined by the Commission in the order; LBP-04-16, 60 NRC 112 (2004)
- Bellotti v. NRC*, 725 F.2d 1380, 1382 n.2 (D.C. Cir. 1983)
- on an order issued to a licensee, the scope of the proceeding is limited to whether the order should be sustained; LBP-04-16, 60 NRC 112 (2004)
- Bellotti v. NRC*, 725 F.2d 1380, 1383 (D.C. Cir. 1983), *aff'g Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982)
- injury alleged as a result of failure to grant more extensive relief is not cognizable in a proceeding on a confirmatory order; CLI-04-23, 60 NRC 158 (2004)
- petitioners who wish to litigate the need for still more safety measures, perhaps including the closing of the facility, will be remitted to procedures under section 2.206; LBP-04-16, 60 NRC 112 (2004)
- the Commission's power to define the scope of a proceeding will lead to denial of intervention only when the Commission requires additional or better safety measures; CLI-04-26, 60 NRC 405 n.25 (2004); LBP-04-16, 60 NRC 112, 120 (2004)

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- the notice of opportunity for hearing on a confirmatory order provides the public with a safety valve because such an order may remove a restriction upon a licensee or otherwise have the effect of worsening the safety situation; CLI-04-26, 60 NRC 406 n.28 (2004)
- Boston Edison Co.* (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 46 (1982), *aff'd*, *Bellotti v. NRC*, 725 F.2d 1380 (D.C. Cir. 1983)
- petitioner properly challenges the Staff's assessment and analysis of the facts underlying the issuance of a confirmatory order; LBP-04-16, 60 NRC 115 (2004)
- Branzburg v. Hayes*, 408 U.S. 665 (1972)
- a reporter asserts that an NRC subpoena violates his First Amendment rights under the reporter's privilege; CLI-04-34, 60 NRC 615 (2004)
- Branzburg v. Hayes*, 408 U.S. 665, 689-91 (1972)
- reporter's privilege is a qualified privilege that can be overcome by a showing of need and the unavailability of the information from other sources; CLI-04-34, 60 NRC 615 (2004)
- Buckner Trucking, Inc. v. United States*, 354 F. Supp. 1210, 1219 (S.D. Tex. 1973)
- the operative test is that the notice of a proposed action as published must reasonably apprise any interested person of the issues involved in the proceeding; LBP-04-33, 60 NRC 753 (2004)
- Bullcreek v. NRC*, 359 F.3d 536 (D.C. Cir. 2004)
- it is doubtful that a congressional preference for at-reactor storage exists; CLI-04-22, 60 NRC 152 (2004)
- Business and Professional People for the Public Interest v. Atomic Energy Commission*, 502 F.2d 424, 428 (D.C. Cir. 1974)
- the purpose of the contention rule is to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-04-28, 60 NRC 554 (2004)
- Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001)
- the Commission deems waived any arguments not raised before the Board or not clearly articulated in the petition for review; CLI-04-24, 60 NRC 202 n.91 (2004); CLI-04-33, 60 NRC 592 (2004)
- Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 250 (2001)
- Commission precedents, drawing on guidance from the Federal Rules of Evidence, place the burden of demonstrating that a witness is qualified to serve as an expert on the party who offers the witness; CLI-04-21, 60 NRC 27 (2004)
- testimony of an expert witness is given appropriate weight commensurate with his expertise and qualifications; LBP-04-13, 60 NRC 38-39 (2004)
- Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-01-9, 53 NRC 239, 251 (2001)
- a witness who possesses the technical competence necessary to evaluate relevant portions of a nuclear plant security plan and has extensive training and experience in fields closely related to nuclear plant security is qualified as an expert; LBP-04-13, 60 NRC 38 (2004)
- gaps in specific knowledge may go to the weight of expert testimony rather than to its admissibility; CLI-04-21, 60 NRC 29 (2004)
- Chevron U.S.A. Inc., v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984)
- if the intent of Congress is clear, that is the end of the matter because the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress; LBP-04-31, 60 NRC 705 n.21 (2004)
- Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991)
- in considering alternatives under NEPA, an agency must take into account the needs and goals of the parties involved in the application; CLI-04-22, 60 NRC 146 (2004)
- Citizens Awareness Network, Inc. v. United States*, No. 04-1145, 2004 WL 2827697, at *6 (1st Cir. Dec. 10, 2004)
- because the new Part 2 rules adopted by the Commission meet the requirements of the Administrative Procedure Act, it does not matter what type of hearing the NRC is required to conduct in reactor licensing cases; LBP-04-31, 60 NRC 697 (2004)
- Citizens Awareness Network, Inc. v. United States*, No. 04-1145, 2004 WL 2827697, at *7-8 (1st Cir. Dec. 10, 2004)
- State's argument that it is entitled to discovery under 42 U.S.C. § 2021(*l*) is rejected because the statute does not explicitly mention discovery, nor is it necessarily implicit in the other granted rights; LBP-04-31, 60 NRC 708 n.28 (2004)

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- the new mandatory disclosure rules in Subpart L provide meaningful access to information, and thus the new rules do not conflict with the Administrative Procedure Act; LBP-04-31, 60 NRC 698 n.15 (2004)
- Citizens Awareness Network, Inc. v. United States*, No. 04-1145, 2004 WL 2827697, at *8 (1st Cir. Dec. 10, 2004)
- Subpart L regulations do not violate a petitioner's right to cross-examine witnesses under the APA and are valid; LBP-04-31, 60 NRC 710 (2004)
- Citizens Awareness Network, Inc. v. United States*, No. 04-1145, 2004 WL 2827697, at *8-9 (1st Cir. Dec. 10, 2004)
- the opportunity for cross-examination under Subpart L is equivalent to the opportunity for cross-examination under the Administrative Procedure Act; LBP-04-31, 60 NRC 691 (2004)
- Citizens Awareness Network, Inc. v. United States*, No. 04-1145, 2004 WL 2827697, at *11-12 (1st Cir. Dec. 10, 2004)
- should the NRC's administration of the new Subpart L rules contradict its present representations or otherwise flout the provision for cross examination as may be required for a full and true disclosure of the facts, nothing in this opinion will inoculate the rules against further challenges; LBP-04-31, 60 NRC 710 (2004)
- Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-95-17, 42 NRC 137, 145 (1995)
- when the meaning of a regulation is clear and obvious, the regulatory language is conclusive, and a Board is not free to go outside the express terms of an unambiguous regulation to extrinsic aids such as regulatory history; LBP-04-31, 60 NRC 705 (2004)
- Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1114 (1982)
- the added delay and expense occasioned by the admission of a contention, even if erroneous, does not alone distinguish the case so as to warrant interlocutory review; CLI-04-31, 60 NRC 466 (2004)
- Commonwealth Edison Co.* (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980)
- the scope of the proceeding spelled out in the notice of hearing identifies the subject matter of the hearing, and the hearing judge can neither enlarge nor contract the jurisdiction conferred by the Commission; CLI-04-24, 60 NRC 204 (2004)
- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-74-35, 8 AEC 374 (1974)
- mitigation determinations are inherently fact-based, and the licensing board is responsible in the first instance for factfinding; CLI-04-24, 60 NRC 215 (2004)
- Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 189 (1999)
- to be admissible, a management character contention must show some direct and obvious relationship between the character issues and the licensing action in dispute; LBP-04-14, 60 NRC 70 (2004)
- Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-01-25, 54 NRC 368, 374 & n.13 (2001)
- additional potential costs associated with delaying Commission consideration of intervenors' NEPA argument until after a final Board decision do not amount to a serious irreparable impact warranting immediate Commission review; CLI-04-31, 60 NRC 466 (2004)
- Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-03-7, 58 NRC 1, 7 (2003)
- compliance with applicable NRC regulations ensures that public health and safety are adequately protected in areas covered by the regulations; CLI-04-19, 60 NRC 12 (2004)
- Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), CLI-03-7, 58 NRC 1, 8 (2003)
- a party may petition that the application of a specified regulation be waived or an exception be made for a particular proceeding if special circumstances are such that the application of the rule or regulation would not serve the purposes for which the rule or regulation was adopted; CLI-04-19, 60 NRC 13 n.25 (2004)
- Consolidated X-Ray Service Corp.* (P.O. Box 20195, Dallas, Texas 75220), ALJ-83-2, 17 NRC 693, 698 (1983)
- in a whistleblower adjudication, to introduce newly discovered facts, Staff may either issue a revised Notice of Violation or initiate a new enforcement action; CLI-04-24, 60 NRC 205 (2004)

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- Consolidated X-Ray Service Corp.* (P.O. Box 20195, Dallas, Texas 75220), ALJ-83-2, 17 NRC 693, 705 (1983)
the Commission's enforcement policy applies just as much to the Board in its review of Staff enforcement actions as it does to the Staff itself; CLI-04-24, 60 NRC 218 n.176 (2004)
- Consolidated X-Ray Service Corp.* (P.O. Box 20195, Dallas, Texas 75220), ALJ-83-2, 17 NRC 693, 707-08 (1983)
a board may take into account mitigating factors when determining whether to reduce a penalty amount; CLI-04-24, 60 NRC 219 (2004)
- Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-235, 8 AEC 645, 647 (1974)
the scope of the proceeding spelled out in the notice of hearing identifies the subject matter of the hearing and the hearing judge can neither enlarge nor contract the jurisdiction conferred by the Commission; CLI-04-24, 60 NRC 204 (2004)
- Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 577 (1982)
newly available material information has long been held to provide good cause to file a new contention; LBP-04-33, 60 NRC 754 (2004)
- Consumers Power Co.* (Palisades Nuclear Plant), LBP-79-20, 10 NRC 108, 124 (1979)
an NRC adjudicatory proceeding is not the proper forum for seeking to litigate and resolve controversies about other governmental agencies' permitting authority; LBP-04-17, 60 NRC 248 (2004); LBP-04-18, 60 NRC 271 (2004)
NRC licensing is in no way dependent upon the existence of a Federal Water Pollution Control Act permit; LBP-04-15, 60 NRC 93 n.54 (2004)
- Crockett Telephone Co. v. FCC*, 963 F.2d 1564, 1570 (D.C. Cir. 1992)
use of the words "may" and "shall" in same provision shows them to have their usual, different meanings; LBP-04-31, 60 NRC 705 (2004)
- Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985)
likelihood of success on the merits and irreparable injury are the two most important stay factors, and the moving party has the burden of demonstrating that they weigh in its favor; LBP-04-15, 60 NRC 87 n.15 (2004)
- Curators of the University of Missouri* (TRUMP-S Project), CLI-95-1, 41 NRC 71, 98 (1995)
only statutes, regulations, orders, and license conditions can impose requirements upon applicants and licensees; LBP-04-25, 60 NRC 525 (2004)
- Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 390-91 (1995)
the Commission will sometimes entertain a reconsideration motion in order to clarify the meaning or intent of language in one of its decisions; CLI-04-37, 60 NRC 648 (2004)
- Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 395 (1995)
allowing an application to be modified or improved as the Commission's review moves forward is consistent with the dynamic licensing process followed in Commission licensing proceedings; LBP-04-33, 60 NRC 753 (2004)
- Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 397 (1995)
guidance documents are, by nature, only advisory, and therefore are not binding; CLI-04-29, 60 NRC 424 (2004); LBP-04-28, 60 NRC 559, 576 (2004)
- Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 400 (1995)
in determining the admissibility of contentions challenging certain applicant or licensee conduct, a board must assume that the applicant or licensee will obey the agency's regulations; LBP-04-16, 60 NRC 111 (2004)
- Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993)
in judicial counterparts of administrative adjudications, the trial judge must ensure that scientific testimony admitted is not only relevant, but reliable; CLI-04-21, 60 NRC 28 n.14 (2004)
- Davis v. Latschar*, 202 F.3d 359, 369 (D.C. Cir. 2000)
a supplement to the FEIS is compelled by only those changes that cause effects that are significantly different from those already studied; LBP-04-23, 60 NRC 448 (2004)
- Department of Transportation v. Public Citizen*, 124 S. Ct. 2204 (June 7, 2004), 2004 WL 1237361
NEPA is governed by a rule of reason, which frees the agency from pursuing unnecessary or fruitless inquiries; CLI-04-22, 60 NRC 139 (2004)

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- Desert Palace v. Costa*, 539 U.S. 90 (2003)
indirect or circumstantial evidence also suffices to trigger the “dual motive” approach in whistleblower discrimination cases; CLI-04-24, 60 NRC 191 (2004)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 213 (2003)
each contention must state sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact; CLI-04-19, 60 NRC 11 n.21 (2004)
the contention rule is strict by design, insisting upon some reasonably specific factual or legal basis for a petitioner’s allegations; CLI-04-22, 60 NRC 134 (2004)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 218 (2003)
a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible; LBP-04-17, 60 NRC 241 (2004); LBP-04-18, 60 NRC 264 (2004); LBP-04-19, 60 NRC 289 (2004)
with limited exception, no rule or regulation of the Commission can be challenged in an adjudicatory proceeding; LBP-04-14, 60 NRC 54-55 (2004); LBP-04-28, 60 NRC 557-58 (2004)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-18, 58 NRC 433 (2003), *aff’d*, *Connecticut Coalition Against Millstone*, No. 04-0109 (2d Cir., Oct. 14, 2004)
the Commission does not lightly revisit its own already-issued and well-considered decisions; CLI-04-35, 60 NRC 622 (2004)
- Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-02-22, 56 NRC 213, 227 (2002)
longstanding practice in licensing cases requires adjudicatory boards to adhere to the terms of admitted contentions in order to give opposing parties advance notice of claims and a reasonable opportunity to rebut them; CLI-04-24, 60 NRC 203 (2004)
- Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-02-22, 56 NRC 213, 228 (2002)
licensee’s noncompliance with past licensing conditions does not presumptively impugn its integrity or character but may be a pertinent factor in predicting its ability to comply with future licensing conditions of a similar nature; LBP-04-25, 60 NRC 527 n.7 (2004)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 356-57 (2001)
to obtain a hearing, a petitioner must demonstrate standing and proffer at least one admissible contention; CLI-04-23, 60 NRC 157 (2004)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-1, 55 NRC 1 (2002)
the rules on contention admissibility are strict by design so that the Commission should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing; LBP-04-28, 60 NRC 554 (2004)
- Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 366 (2001)
issues relating to the credibility of a witness cannot be historical but must instead be something that he may be accused of doing here and now that affects his credibility as a witness here; LBP-04-31, 60 NRC 702 (2004)
- Doyle v. Oklahoma Bar Association*, 998 F.2d 1559, 1566-67 (10th Cir. 1993)
a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution by another individual; CLI-04-26, 60 NRC 407 n.34 (2004)
- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393, 398 (2001)
to obtain a hearing, a petitioner must demonstrate standing and proffer at least one admissible contention; CLI-04-23, 60 NRC 157 (2004)
- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 213 (2002)
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- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-7, 55 NRC 205, 214 & n.15 (2002)
although the Commission disfavors interlocutory review, it will take review if an appeal meets one of two criteria in section 2.786(g), irreparable harm or pervasive or unusual effect on the basic structure of the proceeding; CLI-04-21, 60 NRC 26 (2004)
the "basic structure" standard for interlocutory review comprehends disputes over the very nature of the hearing in a particular proceeding, for example, whether a licensing hearing should proceed in one step or in two; CLI-04-31, 60 NRC 467 (2004)
the Commission sometimes takes interlocutory review as an exercise of its inherent supervisory authority over agency adjudicatory proceedings; CLI-04-21, 60 NRC 27 (2004)
- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-9, 55 NRC 245, 248 (2002)
the Commission continues to disfavor interlocutory appeals largely due to its general unwillingness to engage in piecemeal interference in ongoing licensing board proceedings; CLI-04-31, 60 NRC 466 (2004)
- Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001)
if a petitioner neglects to provide the requisite support for its contentions, it is not within the board's power to make assumptions of fact that favor the petitioner, nor may the board supply information that is lacking; LBP-04-14, 60 NRC 56 (2004); LBP-04-17, 60 NRC 242 (2004); LBP-04-18, 60 NRC 265 (2004); LBP-04-19, 60 NRC 290 (2004); LBP-04-28, 60 NRC 556 (2004)
- Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 70-71 (2004)
although the Commission disfavors interlocutory review, it will take review if an appeal meets one of two criteria in section 2.786(g), irreparable harm or pervasive or unusual effect on the basic structure of the proceeding; CLI-04-21, 60 NRC 26 (2004)
- Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 72 (2004)
a party's need to know may be different at different stages of an adjudicatory proceeding, depending on the purpose of the request for information; LBP-04-21, 60 NRC 366-67 (2004)
- Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 73 (2004)
boards must keep in mind the delicate balance between fulfilling the NRC mission to protect the public and providing the public with enough information to help discharge that mission; CLI-04-21, 60 NRC 31 (2004)
- Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 75 (2004)
boards should restrict access to safeguards information to qualified, cleared representatives of intervenors; CLI-04-21, 60 NRC 27 n.11 (2004)
- Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-11, 59 NRC 203 (2004)
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- Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-21, 60 NRC 21, 26-27 (2004)
the Commission sometimes takes interlocutory review as an exercise of its inherent supervisory authority over agency adjudicatory proceedings; CLI-04-31, 60 NRC 466 (2004)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358, 363 (2002)
contentions must state sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact; CLI-04-19, 60 NRC 11 n.21 (2004)
contentions related to terrorism are beyond the scope of the NRC Staff's safety review under the Atomic Energy Act and a license renewal proceeding; CLI-04-36, 60 NRC 638 (2004); LBP-04-15, 60 NRC 92 (2004)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 379 (2002)
although licensing boards generally are to litigate contentions rather than bases, it has been recognized that the reach of a contention necessarily hinges upon its terms coupled with its stated bases; LBP-04-14, 60 NRC 57 (2004); LBP-04-17, 60 NRC 243 (2004); LBP-04-18, 60 NRC 266 (2004); LBP-04-19, 60 NRC 291 (2004); LBP-04-28, 60 NRC 557 (2004)

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- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382 (2002)
if an environmental impact statement addresses the concerns alleged in a contention, the original contention becomes moot and the intervenor must raise a new contention if it claims the EIS discussion is still inaccurate or incomplete; CLI-04-22, 60 NRC 130, 131 (2004)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 386 (2002)
an intervenor may not freely change the focus of an admitted contention at will as litigation progresses, but is bound by the terms of the contention; CLI-04-24, 60 NRC 202 (2004)
- Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428-29 (2003)
NRC contention admissibility and timeliness requirements demand a level of discipline and preparedness on the part of petitioners, who must examine the publicly available material and set forth their claims and the support for their claims at the outset; CLI-04-25, 60 NRC 225 (2004); LBP-04-22, 60 NRC 384 (2004)
there would be no end to NRC licensing proceedings if petitioners could disregard the timeliness requirements and add new bases or new issues that simply did not occur to them at the outset; CLI-04-25, 60 NRC 225 (2004); CLI-04-33, 60 NRC 591 (2004)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999)
contentions attacking generic NRC regulations or policies are not admissible; CLI-04-22, 60 NRC 129 (2004)
NRC strictly limits the contentions that may be raised in licensing adjudications so that individual adjudications are limited to deciding genuine, substantive safety and environmental issues placed in contention by qualified intervenors; CLI-04-22, 60 NRC 129 (2004)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999)
an intervenor is precluded from making general allegations with the hope of generating through discovery sufficient facts to show that there is a genuine dispute; CLI-04-22, 60 NRC 130 (2004)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336 (1999)
issuance of a request for additional information by the NRC Staff does not suggest that a license application is deficient; LBP-04-25, 60 NRC 526 (2004)
petitioners must do more than rest on the mere existence of requests for additional information as the basis of their contention; LBP-04-25, 60 NRC 526 (2004)
- Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 337 (1999)
for a contention to be admissible, petitioner must provide analysis, discussion, or information showing with specificity that the request for additional information is evidence that the license application fails to conform with governing regulations or directives; LBP-04-25, 60 NRC 526 (2004)
- Duke Power Co.* (Amendment to Materials License SNM-1773 — Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-651, 14 NRC 307, 323 (1981)
without affecting the critical path of a high-level waste adjudication, there will be time enough to answer academic questions when and if they arise in a nonacademic context; CLI-04-32, 60 NRC 473 (2004)
- Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985)
a licensing board appropriately looks to the Commission's hearing notice to ascertain its subject matter jurisdiction; LBP-04-15, 60 NRC 90 (2004)
the scope of the proceeding spelled out in the notice of hearing identifies the subject matter of the hearing, and the hearing judge can neither enlarge nor contract the jurisdiction conferred by the Commission; CLI-04-24, 60 NRC 204 (2004)
- Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985)
all proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board; LBP-04-14, 60 NRC 55 (2004); LBP-04-17, 60 NRC 241 (2004); LBP-04-18, 60 NRC 265 (2004); LBP-04-19, 60 NRC 289 (2004); LBP-04-28, 60 NRC 555 (2004)

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- Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-82-51, 16 NRC 167, 176 (1982)
a witness who possesses the technical competence necessary to evaluate relevant portions of a nuclear plant security plan and has extensive training and experience in fields closely related to nuclear plant security is qualified as an expert; LBP-04-13, 60 NRC 38 (2004)
- Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 473-77 (1982)
the Commission is reluctant to overturn a licensing board's decision about the suitability or qualifications of a witness that a party offers as an expert; CLI-04-21, 60 NRC 28 (2004)
- Duke Power Co.* (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 475 (1982)
a witness qualified as an expert by knowledge, skill, experience, training, or education may testify if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue; CLI-04-21, 60 NRC 27-28 (2004); LBP-04-13, 60 NRC 36 (2004)
Commission precedents, drawing on guidance from the Federal Rules of Evidence, place the burden of demonstrating that a witness is qualified to serve as an expert on the party who offers the witness; CLI-04-21, 60 NRC 27 (2004)
gaps in specific knowledge may go to the weight of expert testimony rather than to its admissibility; CLI-04-21, 60 NRC 29 (2004)
the Commission's standard for review of a board evidentiary ruling is abuse of discretion; CLI-04-21, 60 NRC 27 (2004)
when NRC's own rules do not prescribe a particular process or evidentiary approach, NRC frequently has looked to analogous outside sources of law; CLI-04-24, 60 NRC 194 (2004)
- Dysert v. Secretary of Labor*, 105 F.3d 607, 610 (11th Cir. 1997)
whistleblowers will prevail if they demonstrate, by a preponderance of the evidence, that a protected activity was a contributing factor to an adverse personnel action; CLI-04-24, 60 NRC 187 n.24 (2004)
- Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943)
at the subpoena enforcement stage, courts need not determine whether the subpoenaed party is within the agency's jurisdiction or is covered by the statute it administers, but only that the coverage determination should wait until an enforcement proceeding is brought against the subpoenaed party; CLI-04-34, 60 NRC 613 (2004)
- Entergy Nuclear Operations, Inc.* (Indian Point, Units 1, 2, and 3), DD-02-6, 56 NRC 296, 300-304, 308-11 (2002), *appeal dismissed, Riverkeeper, Inc., v. Collins*, 359 F.3d 156, 170 (2nd Cir. 2004)
sufficient security measures are in place to defend the plant from a broad spectrum of potential terrorist attacks; DD-04-03, 60 NRC 346 (2004)
- Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999)
to obtain a hearing, a petitioner must demonstrate an interest affected by the proceeding; CLI-04-26, 60 NRC 405 (2004)
- Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 74 (D.C. Cir. 1999)
because agencies are neither constrained by article III nor governed by judicially created standing doctrines, the criteria for establishing administrative standing may be less demanding than the criteria for judicial standing; LBP-04-16, 60 NRC 111 (2004)
- Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72, 75 (D.C. Cir. 1999)
NRC generally applies judicial concepts of standing but it has imposed requirements more stringent than those of the federal courts; LBP-04-28, 60 NRC 552 n.8 (2004)
- Environmental Action v. Federal Energy Regulatory Commission*, 996 F.2d 401, 406 (D.C. Cir. 1993)
it is unnecessary to evaluate the standing of all participants on one side if one of them is found to have standing; LBP-04-24, 60 NRC 486 n.15 (2004)
- Exelon Generation Co., LLC* (Early Site Permit for the Clinton ESP Site), CLI-04-31, 60 NRC 461, 466-67 (2004)
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- Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003)
neither mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention; LBP-04-14, 60 NRC 55-56 (2004); LBP-04-17, 60 NRC 242 (2004); LBP-04-18, 60 NRC 265 (2004); LBP-04-19, 60 NRC 289-90 (2004); LBP-04-28, 60 NRC 556 (2004)
- Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 205 (2003)
providing any material or document as a basis for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention; LBP-04-14, 60 NRC 56 (2004); LBP-04-17, 60 NRC 242 (2004); LBP-04-18, 60 NRC 265 (2004); LBP-04-19, 60 NRC 290 (2004)
- First Tennessee Bank National Association v. Barreto*, 268 F.3d 319, 333 (6th Cir. 2001)
gaps in specific knowledge may go to the weight of expert testimony rather than to its admissibility; CLI-04-21, 60 NRC 29 (2004)
- FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 157 (2004)
for an enforcement order, the threshold question, related to both standing and admissibility of contentions, is whether the hearing request is within the scope of the proceeding as outlined in the order; CLI-04-26, 60 NRC 405 (2004)
to obtain a hearing, a petitioner must demonstrate standing and submit at least one admissible contention; CLI-04-26, 60 NRC 405 (2004)
- FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-04-23, 60 NRC 154, 158 (2004)
a hearing on a confirmatory order is limited to whether the confirmatory order should be sustained; CLI-04-26, 60 NRC 406 (2004)
- Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989)
in cases involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been considered sufficient to establish the requisite injury-in-fact for standing to intervene; LBP-04-17, 60 NRC 238 (2004); LBP-04-18, 60 NRC 262 (2004); LBP-04-19, 60 NRC 286 (2004)
- Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 330 (1989)
petitioner with offices within 10 miles of the facility has standing because if the amendment is granted, there would be an increase in the radioactivity in the reactor core with an obvious potential for offsite consequences; LBP-04-28, 60 NRC 553-54 (2004)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000)
all proffered contentions must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the Licensing Board; LBP-04-14, 60 NRC 55 (2004); LBP-04-17, 60 NRC 241 (2004); LBP-04-18, 60 NRC 265 (2004); LBP-04-19, 60 NRC 289 (2004)
in operating license renewal proceedings, the scope 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 analysis; LBP-04-15, 60 NRC 90 (2004)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7 (2001)
NRC license renewal inquiry is narrow, focusing on the potential impacts of an additional 20 years of nuclear power plant operation, not on everyday operational issues; CLI-04-36, 60 NRC 637 (2004)
- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 9 (2001)
emergency planning issues fall outside the scope of license renewal proceedings; CLI-04-36, 60 NRC 640 (2004); LBP-04-15, 60 NRC 97 (2004)
everyday operational issues are effectively addressed and maintained by ongoing agency oversight, review, and enforcement; CLI-04-36, 60 NRC 638 (2004)

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- Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 159 (2001)
contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking are inadmissible; LBP-04-14, 60 NRC 55 (2004); LBP-04-17, 60 NRC 241 (2004); LBP-04-18, 60 NRC 264 (2004); LBP-04-19, 60 NRC 289 (2004)
- Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218 (10th Cir. 1997)
the question of whether new information or circumstance requiring a supplement to the FEIS is significant ordinarily raises a factual dispute; LBP-04-23, 60 NRC 448 (2004)
- Frobose v. American Savings and Loan Association*, 152 F.3d 602, 612 (7th Cir. 1998)
a “contributing factor” means any factor that, alone or in connection with other factors, tends to affect in any way the outcome of the decision; CLI-04-24, 60 NRC 197 (2004)
in using a “contributing factor” test in whistleblower protection laws, Congress quite clearly made it easier for the plaintiff to make its case under the statute and more difficult for the defendant to avoid liability; CLI-04-24, 60 NRC 196 (2004)
- General Electric Co.* (Wilmington, North Carolina Facility), DD-89-1, 29 NRC 325, 332 n.10 (1989)
employees are protected against retaliation even if their perceptions of noncompliance or safety problems are not validated; CLI-04-24, 60 NRC 214 (2004)
- General Electric Co. v. Joiner*, 522 U.S. 136, 141 (1997)
a trial court’s discretion will not ordinarily be disturbed on appeal unless there is an abuse of that discretion; CLI-04-21, 60 NRC 28 n.14 (2004)
- General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 473 (1987)
the Commission will not overturn a hearing judge’s findings simply because it might have reached a different result; CLI-04-24, 60 NRC 189 (2004)
- General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 1), ALAB-881, 26 NRC 465, 476 (1987)
the scope of the proceeding spelled out in the notice of hearing identifies the subject matter of the hearing, and the hearing judge can neither enlarge nor contract the jurisdiction conferred by the Commission; CLI-04-24, 60 NRC 204 (2004)
- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995)
although petitioner bears the burden of demonstrating standing, the licensing board must construe the petition in the light most favorable to petitioner; LBP-04-16, 60 NRC 105, 108, 114 (2004); LBP-04-17, 60 NRC 238 (2004); LBP-04-18, 60 NRC 262 (2004); LBP-04-19, 60 NRC 286 (2004); LBP-04-28, 60 NRC 553 (2004)
the test for redressability is that the asserted injury is likely to be redressed by a favorable decision; LBP-04-16, 60 NRC 110-11 (2004)
to establish the requisite interest to intervene in a proceeding, a petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; LBP-04-16, 60 NRC 105, 112 (2004); LBP-04-24, 60 NRC 486 (2004)
- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116 (1995)
in proceedings involving nonpower reactors or materials licenses, something more than proximity is needed to establish standing; LBP-04-24, 60 NRC 486 (2004)
- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 117 n.21 (1995)
the combination of the short distance from an irradiator facility and the large sources of radioactivity make petitioners within 1/3 of a mile from a facility susceptible to injury; LBP-04-24, 60 NRC 487 (2004)
- Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305, vacated in part and remanded on other grounds, CLI-95-10, 42 NRC 1, aff’d in part, CLI-95-12, 42 NRC 111 (1995)
if a petitioner neglects to provide the requisite support for its contentions, it is not within the Board’s power to make assumptions of fact that favor the petitioner, nor may the Board supply information

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- that is lacking; LBP-04-14, 60 NRC 56 (2004); LBP-04-17, 60 NRC 242 (2004); LBP-04-18, 60 NRC 265 (2004); LBP-04-19, 60 NRC 290 (2004); LBP-04-28, 60 NRC 556 (2004)
- petitioner is obliged to present the factual information and expert opinions necessary to support its contention adequately; LBP-04-14, 60 NRC 55 (2004); LBP-04-17, 60 NRC 241 (2004); LBP-04-18, 60 NRC 265 (2004); LBP-04-19, 60 NRC 289 (2004); LBP-04-28, 60 NRC 555 (2004)
- Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), 1991 WL 215290 (NRC), n.5 (Licensing Board, Mar. 30, 1995)
- in a whistleblower adjudication, to introduce newly discovered facts, Staff may either issue a revised Notice of Violation or initiate a new enforcement action; CLI-04-24, 60 NRC 205 (2004)
- Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-15, 40 NRC 319, 321 (1994)
- the Commission has declined interlocutory review even where it concluded that aspects of the Licensing Board's decision appear highly questionable; CLI-04-31, 60 NRC 467 (2004)
- Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-15, 40 NRC 319, 322 (1994)
- the Commission does not sit simply to correct erroneous interlocutory licensing board rulings; CLI-04-31, 60 NRC 467 n.22 (2004)
- Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979)
- to determine whether petitioners have standing, a board must accept as true all material allegations of a complaint and construe the complaint in favor of the complaining party; LBP-04-16, 60 NRC 105 (2004)
- Gonzales v. NBC*, 194 F.3d 29, 32-36 (2d Cir. 1999)
- a subpoena for a reporter's outtakes is upheld because they contain information that is not reasonably obtainable from other available sources; CLI-04-34, 60 NRC 616 (2004)
- where the protection of confidential sources is not involved, the nature of the press interest protected by privilege is narrower; CLI-04-34, 60 NRC 615 (2004)
- GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000)
- an organization may establish standing in a representational capacity if it can show that at least one of its members would fulfill the standing requirements and the member has authorized the organization to represent his or her interests; LBP-04-16, 60 NRC 106 (2004)
- GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 207 (2000)
- absent support, NRC declines to assume that licensees will contravene our regulations; LBP-04-16, 60 NRC 111 (2004); LBP-04-28, 60 NRC 569 (2004)
- GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000)
- a petitioner's issue will be ruled inadmissible if the petitioner has offered no tangible information, no experts, no substantive affidavits, but instead only bare assertions and speculation; LBP-04-28, 60 NRC 556 (2004)
- Haig v. Agee*, 453 U.S. 280, 294 n.26 (1981)
- in statutory construction, the language "may" is discretionary; LBP-04-31, 60 NRC 705 n.20 (2004)
- Heckler v. Chaney*, 470 U.S. 821 (1985)
- the agency's decision not to take the requested enforcement action was not subject to judicial review; CLI-04-26, 60 NRC 409 (2004)
- the scope of judicial review of the agency's section 2.206 determinations is extremely limited; LBP-04-16, 60 NRC 121 n.2 (2004)
- Heckler v. Chaney*, 470 U.S. 821, 831 (1985)
- the NRC adjudicatory process is not an appropriate forum for petitioners to second-guess enforcement decisions on resource allocation, policy priorities, or the likelihood of success at hearings; CLI-04-26, 60 NRC 407 (2004)
- Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 155 (3d Cir. 1999)
- each stage of an expert's testimony must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules; CLI-04-21, 60 NRC 31 n.28 (2004)
- Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 649 (1979)
- bare assertions are insufficient to support admission of a contention under either the new or the old contention rules; LBP-04-15, 60 NRC 91 (2004)

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- Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996)
overstated benefits in an environmental impact statement could persuade an agency to approve a project despite significant adverse environmental impacts, while the EIS would also misinform the public; CLI-04-22, 60 NRC 145 (2004)
- Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 466 (4th Cir. 1996)
on review, the Commission asks not whether every assumption contained in the final environmental impact statement was the best or whether it will turn out true, but whether the economic assumptions of the FEIS were so distorted as to impair fair consideration of those environmental effects; CLI-04-22, 60 NRC 145 (2004)
- Hurley Medical Center* (One Hurley Plaza, Flint, Michigan), ALJ-87-2, 25 NRC 219, 238 (1987)
the licensing board, like all subsidiary offices within the NRC, implements Commission policy; CLI-04-24, 60 NRC 218 n.176 (2004)
- Huval v. Offshore Pipelines, Inc.*, 86 F.3d 454, 457-58 (5th Cir. 1996)
although an expert witness's expertise is general rather than specific, experience that is broad and general may be useful; CLI-04-21, 60 NRC 29 (2004)
- Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320 (1998)
Commission review of interlocutory matters in a materials license proceeding is governed by section 2.786(g); CLI-04-39, 60 NRC 658 n.2 (2004)
the mere issuance of important rulings does not, without more, merit interlocutory review; CLI-04-31, 60 NRC 467 n.23 (2004)
- Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314, 320 & n.4 (1998)
under longstanding NRC jurisprudence, mere potential legal error does not justify review; CLI-04-31, 60 NRC 467 (2004)
- Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-16, 48 NRC 119, 122 n.3 (1998)
an NRC adjudicatory proceeding is not the proper forum for seeking to litigate and resolve controversies about other governmental agencies' permitting authority; LBP-04-17, 60 NRC 248 (2004); LBP-04-18, 60 NRC 271 (2004)
- Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-1, 49 NRC 1, 2 (1999)
the Commission sometimes takes interlocutory review as an exercise of its inherent supervisory authority over agency adjudicatory proceedings; CLI-04-31, 60 NRC 466 (2004)
- Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-99-22, 50 NRC 3, 14 (1999)
a supplement to the final environmental impact statement is not required every time new information comes to light; LBP-04-23, 60 NRC 448 (2004)
new circumstances that require a supplement to the final environmental impact statement must present a seriously different picture of the environmental impact of the proposed project; LBP-04-23, 60 NRC 448 (2004)
- Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-00-8, 51 NRC 227, 243 (2000)
the Commission ordinarily will not consider on appeal either new arguments or new evidence supporting a contention, which the Board never had the opportunity to consider; CLI-04-22, 60 NRC 140, 152 (2004); CLI-04-36, 60 NRC 640 (2004)
- Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 46 (2001)
parties are expected to identify their strongest arguments clearly and concisely in a petition for review; CLI-04-33, 60 NRC 592 (2004)
- Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 48-51 (2001)
contentions challenging cost-benefit analyses are accepted for review because NEPA cost-benefit questions have proved troublesome in the past and the record would benefit from a written decision on these issues; CLI-04-22, 60 NRC 140 (2004)

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- Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 52 (2001)
new information requiring a supplemental environmental impact statement must present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned; CLI-04-39, 60 NRC 659 (2004); LBP-04-23, 60 NRC 448 (2004)
- In re Grand Jury Proceedings: Storer Communications v. Giovan*, 810 F.2d 580, 585 (6th Cir. 1987)
reporter's privilege is a qualified privilege that can be overcome by a showing of need and unavailability from other sources; CLI-04-34, 60 NRC 615 n.5 (2004)
- In re Grand Jury Subpoena American Broadcasting Companies, Inc.*, 947 F. Supp. 1314, 1322 (E.D. Ark. 1996)
television network's request to quash grand jury subpoena is denied on the basis that DOJ guidelines were not fulfilled because DOJ regulations, by their own terms, confer no enforceable rights on the subpoenaed person; CLI-04-34, 60 NRC 613 (2004)
- Indiana Regional Cancer Center*, LBP-94-21, 40 NRC 22, 34 n.5 (1994)
the precise enforcement sanction to impose is within the Staff's sound discretion, and it is wrong for a board in effect to try to supervise the Staff's actions; CLI-04-26, 60 NRC 410 (2004)
- Inland Empire Public Lands Council v. U.S. Forest Service*, 88 F.3d 754, 761 (9th Cir. 1996)
NRC Staff, as it must, bases its analyses on assumptions that are reasonable at the time; CLI-04-22, 60 NRC 151 (2004)
- International Union, UAW v. Dole*, 919 F.2d 753, 756 (D.C. Cir. 1990)
in statutory construction or interpretation, the usual presumption is that "may" confers discretion, whereas "shall" imposes an obligation to act; LBP-04-31, 60 NRC 705 (2004)
- International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-98-6, 47 NRC 116, 117 n.1 (1998)
in proceedings involving nonpower reactors or materials licenses, something more than proximity is needed to establish standing; LBP-04-24, 60 NRC 486 (2004)
- International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001)
in cases where NRC's own rules do not prescribe a particular process or evidentiary approach, it frequently has looked to analogous outside sources of law; CLI-04-24, 60 NRC 194 (2004)
- International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-02-13, 55 NRC 269, 273 (2002)
the Commission is very hesitant to disturb procedural case management decisions made by the Board; CLI-04-35, 60 NRC 629 (2004)
- Keene v. Houston Lighting & Power Co.*, ARB No. 96-004, ALJ No. 95-ERA-4, at 7 (ARB Feb. 19, 1997)
employees are protected against retaliation even if their perceptions of noncompliance or safety problems are not validated; CLI-04-24, 60 NRC 214 (2004)
- Kelley v. Selin*, 42 F. 3d 1501, 1507-08 (6th Cir. 1995)
to determine whether petitioners have standing, a board must accept as true all material allegations of a complaint and construe the complaint in favor of the complaining party; LBP-04-16, 60 NRC 105 (2004)
- Kelley v. Selin*, 42 F. 3d 1501, 1508 (6th Cir. 1995)
although petitioner bears the burden of demonstrating standing, the licensing board must construe the petition in favor of the petitioner; LBP-04-16, 60 NRC 105 (2004)
- Kenneth G. Pierce* (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995)
a clearly erroneous finding is one that is not even plausible in light of the record viewed in its entirety; CLI-04-24, 60 NRC 189 (2004)
an effort to show that the record evidence in this case may be understood to support a view sharply different from that of the Board does not, in and of itself, establish the Board's view as clearly erroneous; CLI-04-24, 60 NRC 198 (2004)
- Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999)
whether a witness is sufficiently qualified as an expert is a matter within the discretion of the trial court, and the trial court must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable; CLI-04-21, 60 NRC 28 n.14 (2004)
- Kundrat v. District of Columbia*, 106 F. Supp. 2d 1, 4 (D.D.C. 2000)
remedial legislation, such as whistleblower and antidiscrimination statutes, should be broadly interpreted in order to accomplish its goals; CLI-04-24, 60 NRC 208 (2004)
Title VII of the Civil Rights Act is a remedial statute that is generally broadly construed; CLI-04-24, 60 NRC 208 n.129 (2004)

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- Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973)
a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another individual; CLI-04-26, 60 NRC 407 n.34 (2004)
- Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988)
although administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation's language, its interpretation may not conflict with the plain meaning of the wording used in that regulation; LBP-04-31, 60 NRC 705 n.21 (2004)
if the plain language of the regulations is ambiguous, a board looks to the legislative history; LBP-04-20, 60 NRC 331 (2004)
the language and structure of the regulations is the board's starting point in construing their meaning; LBP-04-20, 60 NRC 329 (2004)
- Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 290-91 (1988)
while guidance found in regulatory guides and Statements of Considerations that conflict with or are inconsistent with a regulation cannot trump the plain meaning of the regulation, guidance consistent with the regulations and at least implicitly endorsed by the Commission is entitled to correspondingly special weight; LBP-04-20, 60 NRC 331 n.50 (2004)
- Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 394-95 (1987)
absent a waiver, NRC regulations are not subject to enhancement or collateral attack in agency hearings; CLI-04-19, 60 NRC 13 n.25 (2004)
- Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 395 (1987)
any contention that seeks to impose stricter requirements than those set forth by the regulations is inadmissible; LBP-04-14, 60 NRC 55 (2004)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-92-7, 35 NRC 93 (1992)
to resolve issues concerning uranium enrichment licensing, this decision may be relied upon as precedent; CLI-04-30, 60 NRC 436 (2004)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 4 (1997)
a reconsideration motion is not an opportunity to present new arguments or evidence or a new thesis unless the moving party can demonstrate that the new material's availability could not reasonably have been anticipated and its consideration demonstrates compelling circumstances, such as a clear and material error that renders the decision invalid; LBP-04-22, 60 NRC 381 (2004)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997)
to resolve issues concerning uranium enrichment licensing, this decision may be relied upon as precedent; CLI-04-30, 60 NRC 436 (2004)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 299 (1997)
the language and structure of the regulations is the board's starting point in construing their meaning; LBP-04-20, 60 NRC 329 (2004)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 308 (1997)
a contention that constitutes a general challenge to the financial assurance obligations related to decommissioning and disposal is an impermissible challenge to the Commission's regulations; LBP-04-14, 60 NRC 61-62 (2004)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 309 (1997)
Part 70 financial criteria can be met by conditioning the enrichment facility license to require funding commitments to be in place prior to construction and operation; CLI-04-30, 60 NRC 437 (2004)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998)
to resolve issues concerning uranium enrichment licensing, this decision may be relied upon as precedent; CLI-04-30, 60 NRC 436 (2004)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87 (1998)
the requisite hard look at the environmental consequences mandated by NEPA is subject to a rule of reason, meaning that the assessment need not include every environmental effect that could potentially result from the action, but rather may be limited to effects that are shown to have some likelihood of occurring; LBP-04-23, 60 NRC 447 (2004)

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- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87-100 (1998)
contentions challenging cost-benefit analyses are accepted for review because NEPA cost-benefit questions have proved troublesome in the past and the record would benefit from a written decision on these issues; CLI-04-22, 60 NRC 140 (2004)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 88 (1998)
the waste confidence rule's restrictions on considering environmental impacts do not expressly address how the agency evaluates a project's potential economic benefits; CLI-04-22, 60 NRC 148 (2004)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 88-89 (1998)
determination of economic benefits and costs that are tangential to environmental consequences are within a wide area of agency discretion; CLI-04-22, 60 NRC 145 (2004)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998)
Commission decisions relating to a licensing proceeding supplement the final environmental impact statement; CLI-04-22, 60 NRC 150 (2004)
on review, the Commission asks not whether every assumption contained in the final environmental impact statement was the best or whether it will turn out true, but whether the economic assumptions of the FEIS were so distorted as to impair fair consideration of those environmental effects; CLI-04-22, 60 NRC 145 (2004)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 93-94 (1998)
although the Commission has the authority to reject or modify a licensing board's factual findings, it will not do so lightly; CLI-04-24, 60 NRC 189 (2004)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 100 (1998)
an environmental report fails to address the environmental impacts of the proposed reactor in light of the factors peculiar to the minority and low-income community; LBP-04-19, 60 NRC 293 (2004)
- Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-5, 47 NRC 113, 114 (1998)
where applicant's motion to withdraw its license and terminate the proceeding renders moot all remaining issues in the case, the Commission dismissed pending petitions for review and vacated the disputed unreviewed orders, but refused to vacate other orders entered in the proceeding; CLI-04-18, 60 NRC 3 n.7 (2004)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-3, 59 NRC 10, 22 (2004)
unless applicant demonstrates a use for the uranium in the depleted tails as a potential resource, the depleted tails may be considered waste; CLI-04-25, 60 NRC 226 (2004)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 224-25 (2004)
NRC contention admissibility and timeliness requirements demand a level of discipline and preparedness on the part of petitioners, who must examine the publicly available material and set forth their claims and the support for their claims at the outset; LBP-04-22, 60 NRC 384 (2004)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225-26 (2004)
an approach for disposition of tails that is consistent with section 3113 of the USEC Privatization Act constitutes a "plausible strategy" for disposition of the USEC depleted tails; CLI-04-30, 60 NRC 437 (2004)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 & nn.11-12 (2004)
a petition for reconsideration must demonstrate a compelling circumstance, such as the existence of a clear and material error in a decision, that could not have been reasonably anticipated, which renders the decision invalid; CLI-04-38, 60 NRC 653 (2004)
- Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 626-27 (2004)
the plain terms of section 2.315(c) allow government entities to claim interested state participation only if they are not already admitted parties; LBP-04-31, 60 NRC 707 (2004)
- Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1107 (1983)
a contention challenging whether an emergency response plan's provisions provide the requisite reasonable assurance based on the adequacy of implementing procedures for those provisions fails to present a material issue; LBP-04-17, 60 NRC 243 (2004); LBP-04-18, 60 NRC 266 (2004); LBP-04-19, 60 NRC 290 (2004)

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- Louisiana Wildlife Federation v. York*, 751 F.2d 1044, 1048 (5th Cir. 1985)
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- Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56 (2004)
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the Commission has the authority to define the scope of the hearing, including narrowly limiting the proceeding; CLI-04-23, 60 NRC 158 (2004)
- Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 56 n.14 (2004)
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- Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 57 n.16 (2004)
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- Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 58-59 (2004)
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- Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), CLI-04-5, 59 NRC 52, 60 (2004)
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- Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), LBP-03-26, 58 NRC 396, 401 (2003), *aff'd*, CLI-04-5, 59 NRC 52 (2004)
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- Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)
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- Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989)
a supplement to the final environmental impact statement is not required every time new information comes to light; CLI-04-39, 60 NRC 659 (2004); LBP-04-23, 60 NRC 448 (2004)
- Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-74 (1989)
similar to the determination to prepare an EIS in the first place, agency decisions regarding whether to supplement an FEIS are also governed by the rule of reason; LBP-04-23, 60 NRC 448 (2004)
- Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989)
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- Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376-77 (1989)
the question whether the new information or circumstance requiring a supplement to the FEIS is significant ordinarily raises a factual dispute; LBP-04-23, 60 NRC 448 (2004)
- Massachusetts Public Interest Research Group, Inc. v. NRC*, 852 F.2d 9, 19 (1st Cir. 1988)
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- McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)
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- McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003)
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- Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 549 (10th Cir. 1999)
Staff could supplement its Notice of Violation or its enforcement order, just as complainants regularly supplement their discrimination claims under Title VII of the Civil Rights Act; CLI-04-24, 60 NRC 205 (2004)
- Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 14 (1978)
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- Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411, 413 (1958)
the agency alone is empowered to develop the enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically; CLI-04-26, 60 NRC 409 n.41 (2004)
- Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)
due process requires that notice of a proposed action be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections; LBP-04-33, 60 NRC 752 (2004)
- National Mining Association v. U.S. Department of the Interior*, 70 F.3d 1345, 1349 (D.C. Cir. 1995)
it is unnecessary to evaluate the standing of all participants on one side if one of them is found to have standing; LBP-04-24, 60 NRC 486 n.15 (2004)
- New York Public Interest Research Group v. Whitman*, 321 F.3d 316, 331 (2d Cir. 2003)
the Chaney presumption avoids entangling courts in a calculus involving variables better appreciated by the agency charged with enforcing the statute and respects the deference often due to an agency's construction of its governing statutes; CLI-04-26, 60 NRC 409 n.41 (2004)
- Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 354 (1975)
it is well settled that an agency may not change theories in midstream without giving respondents reasonable notice of the change; CLI-04-24, 60 NRC 221 (2004)
- North Alabama Express, Inc. v. United States*, 585 F.2d 783, 787 (5th Cir. 1978)
the operative test is that the notice of a proposed action as published must reasonably apprise any interested person of the issues involved in the proceeding; LBP-04-33, 60 NRC 753 (2004)
- North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-98-18, 48 NRC 129, 130 (1998)
the Commission sometimes takes interlocutory review as an exercise of its inherent supervisory authority over agency adjudicatory proceedings; CLI-04-31, 60 NRC 466 (2004)
- Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 44 (2001)
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- Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 53 (2001)
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- Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-10, 53 NRC 353, 366 (2001)
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- Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), ALAB-207, 7 AEC 957, 958 (1974)
in determining the admissibility of contentions challenging certain applicant or licensee conduct, a board must assume that the applicant or licensee will obey the agency's regulations; LBP-04-16, 60 NRC 111 (2004)
- Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 45 (1990)
in proceedings involving nonpower reactors or materials licensing, proximity must be coupled with a showing that the facility's activities involve a significant source of radioactivity producing an obvious potential for offsite consequences; LBP-04-24, 60 NRC 486 (2004)
- Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-252, 8 AEC 1175, 1181 *aff'd*, CLI-75-1, 1 NRC 1 (1975)
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- Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 48 (1978)
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- Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, 49 (1978)
the proper inquiry under NEPA's hard-look standard is not whether an effect is theoretically possible, but rather whether it is reasonably probable that that situation will obtain; LBP-04-23, 60 NRC 447 (2004)
- Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1269 (D.C. Cir. 2004)
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- Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 4 (1980)
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- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398, 1404, *review denied*, CLI-77-23, 6 NRC 455 (1977)
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- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-77-23, 6 NRC 455, 456 (1977)
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- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1 (1986)
to resolve some questions, the Commission sometimes must consider matters that arguably touch on the merits; CLI-04-37, 60 NRC 650 (2004)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-03-2, 57 NRC 19, 29 (2003)
in determining the admissibility of contentions challenging certain applicant or licensee conduct, a board must assume that the applicant or licensee will obey the agency's regulations; LBP-04-16, 60 NRC 111 (2004)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-36, 8 NRC 567 (1978)
a witness who possesses the technical competence necessary to evaluate relevant portions of a nuclear plant security plan and has extensive training and experience in fields closely related to nuclear plant security is qualified as an expert; LBP-04-13, 60 NRC 38 n.3 (2004)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-78-36, 8 NRC 567, 569 (1978)
the burden to demonstrate technical competence to evaluate the components of a security plan will not have been met unless there exists evidence of actual practical knowledge or its equivalent; CLI-04-21, 60 NRC 30 (2004)
- Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-93-1, 37 NRC 5, 29-30 (1993)
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- Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-12, 58 NRC 185, 191 (2003)
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- Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), *petition for review denied*, CLI-03-12, 58 NRC 185, 191 (2003)
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- Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 453-57 (2002), *petition for review denied*, CLI-03-12, 58 NRC 185, 191 (2003)
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- Patel v. Sun Co.*, 141 F.3d 447, 462 (3d Cir. 1998)
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- Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974)
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the purpose of the contention rule is to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-04-28, 60 NRC 554 (2004)
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- Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974)
no contention is admitted for adjudication if it attacks applicable statutory requirements or Commission regulations, raises issues that are not applicable to the facility in question, or raises a question that is not concrete or litigable; CLI-04-22, 60 NRC 129 (2004); LBP-04-14, 60 NRC 55 (2004); LBP-04-28, 60 NRC 558 (2004)
- Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 & n.33, *aff'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974)
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- Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 n.33 (1974)
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- Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 58, *rev'd in part on other grounds*, CLI-74-32, 8 AEC 217 (1974)
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- Pittsburgh & W. Va. Ry. v. United States*, 281 U.S. 479, 486 (1930)
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- Portland Cement Association v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied sub nom.*
Portland Cement Corp. v. Administrator EPA, 417 U.S. 921 (1974)
"materiality" requires that a petitioner show why the alleged error or omission is of possible significance to the result of the proceeding; LBP-04-28, 60 NRC 556-57 (2004)
- Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n.6 (1979)
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- Potomac Electric Power Co.* (Douglas Point Nuclear Generating Station, Units 1 and 2), ALAB-218, 8 AEC 79, 85, 89 (1974)
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- Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-2, 51 NRC 77, 80 (2000)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 28-29 (2000)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23, 29 (2000)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 (2000)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-5, 57 NRC 279 (2003)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 25-26 (2003)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 26 (2003)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139-40 (2004)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179-80, *aff'd in part*, CLI-98-13, 48 NRC 26 (1998)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-13, 53 NRC 319, 324-26 (2001)
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- Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-03-4, 57 NRC 69, 92 n.28 (2003)
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- Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976)
the scope of the proceeding spelled out in the notice of hearing identifies the subject matter of the hearing, and the hearing judge can neither enlarge nor contract the jurisdiction conferred by the Commission; CLI-04-24, 60 NRC 204 (2004)
- Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438 (1980)
the Commission has the authority to define the scope of the hearing, and this authority includes limiting the hearing to the question of whether the order should be sustained; CLI-04-26, 60 NRC 405 (2004)
- Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441 (1980)
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- Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), CLI-80-10, 11 NRC 438, 441-42 (1980)
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- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-899, 28 NRC 93, 97 (1988), *aff'd sub nom. Massachusetts v. NRC*, 924 F.2d 311 (D.C. Cir.), *cert. denied*, 502 U.S. 899 (1991)
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- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-932, 31 NRC 371, 396 (1990)
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- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 595-97 (1988)
a party to an adjudicatory proceeding may petition that the application of a specified regulation be waived or an exception be made for a particular proceeding if special circumstances are such that the application of the rule or regulation would not serve the purposes for which it was adopted; CLI-04-19, 60 NRC 13 n.25 (2004)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988), *reconsideration denied*, CLI-89-3, 29 NRC 234 (1989)
a "special circumstance" may be established by a petitioner demonstrating that facts unique either to the applicant or the facility were not contemplated in the regulation's adoption, and thus that the regulation should not apply in that instance; LBP-04-24, 60 NRC 492 (2004)
- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 240-41 (1989)
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- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-3, 29 NRC 234, 241 (1989)
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- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-76, 16 NRC 1029, 1035 (1982)
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- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1654 (1982)
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- Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-82-106, 16 NRC 1649, 1656 (1982)
contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking are inadmissible; LBP-04-14, 60 NRC 55 (2004); LBP-04-17, 60 NRC 241 (2004); LBP-04-18, 60 NRC 264 (2004); LBP-04-19, 60 NRC 289 (2004)
- Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-723, 17 NRC 555, 557-58 (1983)
the precedential value of a final determination on a generic legal issue litigated in a particular proceeding should not hinge upon the presence or absence of wholly extraneous subsequent developments in that proceeding; CLI-04-18, 60 NRC 3 (2004)
- Puget Sound Power and Light Co.* (Skagit Nuclear Power Project, Units 1 and 2), CLI-80-34, 12 NRC 407 (1980)
the precedential value of a final determination on a generic legal issue litigated in a particular proceeding should not hinge upon the presence or absence of wholly extraneous subsequent developments in that proceeding; CLI-04-18, 60 NRC 3 (2004)
- Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 n.2 (1998), *petition for review denied, Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999)
in determining standing, the Commission's principal concern is to ensure that parties participating in its adjudicatory proceedings have interests that are cognizable under the Atomic Energy Act; LBP-04-16, 60 NRC 111 (2004)
- Radiation Oncology Center at Marlton* (Marlton, New Jersey), LBP-95-25, 42 NRC 237, 239 (1995)
a board may take into account mitigating factors when determining whether to reduce a penalty amount; CLI-04-24, 60 NRC 219 (2004)
- Radiation Technology, Inc.* (Lake Denmark Road, Rockaway, New Jersey 07866), ALAB-567, 10 NRC 533, 536 (1979)
it is the presiding officer at the hearing, not the Director of Inspection and Enforcement, who finally determines on the basis of the hearing record whether the charges are sustained and civil penalties are warranted; CLI-04-24, 60 NRC 217 n.173 (2004)
- Radiation Technology, Inc.* (Lake Denmark Road, Rockaway, New Jersey 07866), ALAB-567, 10 NRC 533, 537 (1979)
Staff is required to give licensees written notice of specific violations and consider their responses in deciding whether penalties are warranted; CLI-04-24, 60 NRC 201 (2004)
- Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000)
the ultimate burden of persuasion is on the employee alleging discrimination to show, by a preponderance of the evidence, that the employer's asserted reason is a pretext, and that the real motivation was a prohibited discriminatory animus; CLI-04-24, 60 NRC 190 (2004)
- Reich Geo-Physical, Inc.* (1019 Arlington Drive, Billings, Montana), ALJ-85-1, 22 NRC 941, 965 (1985)
a board may take into account mitigating factors when determining whether to reduce a penalty amount; CLI-04-24, 60 NRC 219 (2004)
- Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 160-62 & nn.4-6 (2d Cir. 2004)
NRC takes its security responsibilities seriously and has taken numerous regulatory steps to enhance security at nuclear power reactors; CLI-04-36, 60 NRC 638 (2004)

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- Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 170 (2d Cir. 2004)
the Chaney presumption avoids entangling courts in a calculus involving variables better appreciated by the agency charged with enforcing the statute and respects the deference often due to an agency's construction of its governing statutes; CLI-04-26, 60 NRC 409 n.41 (2004)
- Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)
there are procedural constraints upon an agency's decisionmaking process, requiring an agency to assess the environmental impacts of its actions without mandating any particular result related to that action; LBP-04-23, 60 NRC 447 (2004)
- Rochester Gas and Electric Corp.* (Sterling Power Project, Nuclear Unit No. 1), ALAB-596, 11 NRC 867 (1980)
where applicant's motion to withdraw its license and terminate the proceeding renders moot all remaining issues in the case, the Commission dismisses pending petitions for review and vacates the disputed unreviewed orders, but refuses to vacate other orders entered in the proceeding; CLI-04-18, 60 NRC 3 n.7 (2004)
- Rodale Press, Inc. v. Federal Trade Commission*, 407 F.2d 1252, 1256 (D.C. Cir. 1968)
it is well settled that an agency may not change theories in midstream without giving respondents reasonable notice of the change; CLI-04-24, 60 NRC 221 (2004)
- Rouse v. Farmers State Bank*, 866 F. Supp. 1191, 1208 (D. Iowa 1994)
"a contributing factor" means any factor that, alone or in connection with other factors, tends to affect in any way the outcome of the decision; CLI-04-24, 60 NRC 197 (2004)
in using a "contributing factor" test in whistleblower protection laws, Congress made it easier for the plaintiff to make its case under the statute and more difficult for the defendant to avoid liability; CLI-04-24, 60 NRC 196 (2004)
- Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93-94 (1994)
mere expansion of issues rarely, if ever, has been found to affect the basic structure of a proceeding in a pervasive or unusual manner so as to warrant interlocutory review; CLI-04-31, 60 NRC 467 (2004)
- Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994)
any contention that fails directly to controvert the application or that mistakenly asserts that the application does not address a relevant issue can be dismissed; LBP-04-14, 60 NRC 57 (2004); LBP-04-15, 60 NRC 90 (2004); LBP-04-17, 60 NRC 243 (2004); LBP-04-18, 60 NRC 266 (2004); LBP-04-19, 60 NRC 291 (2004); LBP-04-28, 60 NRC 557 (2004)
- Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 251 (1993), *petition for review and motion for directed certification denied*, CLI-94-2, 39 NRC 91 (1994)
because petitioner did not raise any flaws in the calculations in the environmental report, it may well have been too late to file a contention attacking essentially the same calculations in the final environmental impact statement; CLI-04-22, 60 NRC 136 n.43 (2004)
- Sarnoff v. American Home Products Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986)
where the alleged factual error related to a holding that was merely advisory, not necessary to the result, and could have been deleted without impairing the analytical foundations of the holding, the materiality condition for reconsideration is not met; CLI-04-38, 60 NRC 654 (2004)
- Seater v. Southern California Edison Co.*, ARB No. 96-013, ALJ No. 95-ERA-13, at 4-5 (ARB Sept. 27, 1996)
employees are protected against retaliation even if their perceptions of noncompliance or safety problems are not validated; CLI-04-24, 60 NRC 214 (2004)
- Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-04-2, 59 NRC 5, 8 n.18 (2004)
the Commission does not consider arguments raised for the first time on appeal; CLI-04-36, 60 NRC 640 (2004)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6-8 (1994)
likelihood of success on the merits and irreparable injury are the two most important stay factors, and the moving party has the burden of demonstrating that they weigh in its favor; LBP-04-15, 60 NRC 87 n.15 (2004)

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- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64 (1994)
a petitioner who *supports* a confirmatory order could have standing; CLI-04-26, 60 NRC 408 (2004)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 68 (1994)
once a hearing is requested by the target of the enforcement order, a petitioner who supports the order may be adversely affected by the proceeding because a possible outcome of the proceeding is that the order will not be sustained; LBP-04-16, 60 NRC 116 n.81 (2004)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 69 & n.6, 71 (1994)
intervention by petitioners who support an enforcement order is permitted; LBP-04-16, 60 NRC 116 n.81 (2004)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71-72 (1994)
to establish standing, a petitioner must show an injury in fact that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; CLI-04-26, 60 NRC 405 (2004)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994)
in proceedings involving nonpower reactors or materials licenses, proximity must be coupled with a showing that the facility's activities involve a significant source of radioactivity producing an obvious potential for offsite consequences; LBP-04-24, 60 NRC 486 (2004)
under the Agency's precedents, there are circumstances in which petitioners may be presumed to have standing based on their geographic proximity to the facility; LBP-04-24, 60 NRC 486 (2004)
- Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 216, 222 (1997)
it is well established in Commission enforcement jurisprudence that the document setting the scope of an enforcement adjudication is ordinarily the enforcement order; CLI-04-24, 60 NRC 203 (2004)
- Shell Oil Co. v. EPA*, 950 F.2d 741, 759 (D.C. Cir. 1992)
where a final regulation is a logical outgrowth of the proposed rule originally noticed in the *Federal Register*, the notice provisions of the Administrative Procedure Act are satisfied, and challenges related to the adequacy of the notice must fail; LBP-04-33, 60 NRC 754 n.5 (2004)
- Sierra Club v. Froehle*, 816 F.2d 205, 210 (5th Cir. 1987)
new circumstances that require a supplement to the final environmental impact statement must present a seriously different picture of the environmental impact of the proposed project; CLI-04-39, 60 NRC 659 (2004); LBP-04-23, 60 NRC 448 (2004)
- Simas v. First Citizens' Federal Credit Union*, 170 F.3d 37, 44 (1st Cir. 1999)
a "contributing factor" means any factor that, alone or in connection with other factors, tends to affect in any way the outcome of the decision; CLI-04-24, 60 NRC 197 (2004)
- South Louisiana Environmental Council, Inc. v. Sand*, 629 F.2d 1005, 1011 (5th Cir. 1980)
on review, the Commission asks not whether every assumption contained in the final environmental impact statement was the best or whether it will turn out true, but whether the economic assumptions of the FEIS were so distorted as to impair fair consideration of those environmental effects; CLI-04-22, 60 NRC 145 (2004)
- Southern Railway Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 455 (1979)
in statutory construction, the language "may" is discretionary; LBP-04-31, 60 NRC 705 n.20 (2004)
- St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993)
the ultimate burden of persuasion is on the employee alleging discrimination to show, by a preponderance of the evidence, that the employer's asserted reason is a pretext, and that the real motivation was a prohibited discriminatory animus; CLI-04-24, 60 NRC 190 (2004)
- St. Mary's Medical Center*, CLI-97-14, 46 NRC 287, 290 n.1 (1997)
NRC has long taken the view that its section 50.7 rests in part on the authority of Congress's decision in Energy Reorganization Act §211 to protect nuclear whistleblowers from employer retaliation; CLI-04-24, 60 NRC 194 (2004)
- Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998)
Commission disagrees with Staff's argument for the acceptability of supplementing the bases supporting the Notice of Violation to reflect new facts that surface during discovery because it would leave the scope of an enforcement proceeding uncertain throughout the entire prehearing phase and would undermine the twin goals of fairness and efficiency in adjudicatory decisionmaking; CLI-04-24, 60 NRC 204 (2004)

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- in the interest of providing a fair hearing, avoiding unnecessary delays in NRC's review and hearing process, and producing an informed adjudicatory record, the Commission expects that the Board, NRC Staff, Applicant, and other parties will follow the guidance in this policy statement; CLI-04-30, 60 NRC 432 (2004)
- Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 20 (1998)
the Commission sometimes takes interlocutory review as an exercise of its inherent supervisory authority over agency adjudicatory proceedings; CLI-04-31, 60 NRC 466 (2004)
- Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452 (1981)
to ensure prompt and efficient resolution of contested issues, the Board is to use the techniques specified in the policy statement; CLI-04-30, 60 NRC 433 (2004)
- Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997)
Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves in whistleblower cases; CLI-04-24, 60 NRC 193 (2004)
proponents of a finding of violation must demonstrate to the trier of fact by a preponderance of the evidence that a protected activity was actually a contributing factor in the unfavorable personnel action; CLI-04-24, 60 NRC 197 n.75 (2004)
section 211 of the Energy Reorganization Act is clear and supplies its own free-standing evidentiary framework, which displaces the sprawling body of general employment discrimination law; CLI-04-24, 60 NRC 191 (2004)
use of the adjective "alleged" to modify "illegality" in section 50.7(a)(1)(ii) indicates that an employee need not be correct in his or her legal assessment, but need only have a reasonable belief that the assessment is correct; CLI-04-24, 60 NRC 213 (2004)
- Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-467, 7 NRC 459, 463 (1978)
there is no legal bar to the Commission issuing advisory opinions in appropriate circumstances; CLI-04-32, 60 NRC 473 (2004)
- Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant; Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 189 (2004)
where, in consultation with technical experts, a presiding officer reaches highly fact-specific findings following a review of technical information, the Commission will ordinarily defer to these findings, absent an indication of a clearly erroneous finding; CLI-04-39, 60 NRC 659 (2004)
- Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992)
any contention that fails directly to controvert the application or that mistakenly asserts that the application does not address a relevant issue can be dismissed; LBP-04-14, 60 NRC 57 (2004); LBP-04-15, 60 NRC 90 (2004); LBP-04-17, 60 NRC 243 (2004); LBP-04-18, 60 NRC 266 (2004); LBP-04-19, 60 NRC 291 (2004); LBP-04-28, 60 NRC 557 (2004)
- Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 94 (1983)
the Commission is reluctant to issue an advisory opinion where answering the questions left open would be a mere academic exercise; CLI-04-32, 60 NRC 473 (2004)
- Trimmer v. Department of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999)
in amending section 211 of the Energy Reorganization Act, Congress intended to make it easier for whistleblowers to prevail in their discrimination suits; CLI-04-24, 60 NRC 193 (2004)
- Trimmer v. Department of Labor*, 174 F.3d 1098, 1101 & n.4 (10th Cir. 1999)
section 211 of the Energy Reorganization Act is clear and supplies its own freestanding evidentiary framework, which displaces the sprawling body of general employment discrimination law; CLI-04-24, 60 NRC 191 (2004)
- Trimmer v. Department of Labor*, 174 F.3d 1098, 1104 (10th Cir. 1999)
whistleblower provisions are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment; CLI-04-24, 60 NRC 208 n.128 (2004)
- Tulsa Gamma Ray, Inc.*, LBP-91-40, 34 NRC 297, 321 (1991)
a board may take into account mitigating factors when determining whether to reduce a penalty amount; CLI-04-24, 60 NRC 219 (2004)

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- Union Electric Co.* (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 131 n.14 (1979), *aff'g* LBP-78-31, 8 NRC 366 (1978)
Congress, when enacting the whistleblower protection provisions of the Energy Reorganization Act, inadvertently identified the section as 210, although another statutory provision had already been assigned that same section number; CLI-04-24, 60 NRC 185 (2004)
- Union Electric Co.* (Callaway Plant, Units 1 and 2), LBP-78-31, 8 NRC 366 (1978), *aff'd*, ALAB-527, 9 NRC 126, 131 n.14 (1979)
Staff has the authority to investigate allegations of discrimination against whistleblowers; CLI-04-24, 60 NRC 188 n.26 (2004)
- United States v. Burke*, 700 F.2d 70, 77 n.8 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983)
a subpoena for a reporter's notes and tapes about conversations with a prosecution witness was upheld because the information sought was for impeachment purposes only and was merely cumulative, not highly material and relevant; CLI-04-34, 60 NRC 616 (2004)
a subpoena for a reporter's notes and tapes was upheld because the defendant failed to demonstrate that the materials were not available from another source; CLI-04-34, 60 NRC 616 (2004)
- United States v. Comley*, 890 F.2d 539 (1st Cir. 1989)
reviewing courts have consistently upheld the right of the NRC to issue subpoenas to persons who are not NRC licensees; CLI-04-34, 60 NRC 612 (2004)
- United States v. Construction Products Research, Inc.*, 73 F.3d 464, 470-71 (2d Cir. 1996)
at the subpoena enforcement stage, courts need not determine whether the subpoenaed party is within the agency's jurisdiction or is covered by the statute it administers, but only that the coverage determination should wait until an enforcement proceeding is brought against the subpoenaed party; CLI-04-34, 60 NRC 613 (2004)
- United States v. Construction Products Research, Inc.*, 73 F.3d 464, 471 (2d Cir. 1996)
an NRC investigation is proper if it assists the NRC in exercising its statutory authority; CLI-04-34, 60 NRC 612 (2004)
reviewing courts have consistently upheld the right of the NRC to issue subpoenas to persons who are not NRC licensees; CLI-04-34, 60 NRC 612 (2004)
- United States v. Cutler*, 6 F.3d 67 (2d Cir. 1993)
a subpoena of a reporter by a former licensee employee seeking to vindicate himself about security-related disclosures could be upheld; CLI-04-34, 60 NRC 617 n.6 (2004)
- United States v. Garde*, 673 F. Supp. 604 (D.D.C. 1987), *appeal dismissed as moot*, 848 F.2d 1307 (D.C. Cir. 1988)
reviewing courts have consistently upheld the right of the NRC to issue subpoenas to persons who are not NRC licensees; CLI-04-34, 60 NRC 612 (2004)
- United States v. McGovern*, 87 F.R.D. 582, 584, 590 (M.D. Pa. 1980)
reviewing courts have consistently upheld the right of the NRC to issue subpoenas to persons who are not NRC licensees; CLI-04-34, 60 NRC 612 (2004)
- United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)
a Commission decision that is a final agency action is appealable only to the federal courts; CLI-04-18, 60 NRC 4 (2004)
- United States v. Oncology Services Corp.*, 60 F.3d 1015, 1019 (3d Cir. 1995)
reviewing courts have consistently upheld the right of the NRC to issue subpoenas to persons who are not NRC licensees; CLI-04-34, 60 NRC 612 (2004)
- U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994)
a Commission decision that is a final agency action is appealable only to the federal courts; CLI-04-18, 60 NRC 4 (2004)
- U.S. Department of Labor v. Triplett*, 494 U.S. 715, 719 (1990)
it is unnecessary to evaluate the standing of all participants on one side if one of them is found to have standing; LBP-04-24, 60 NRC 486 n.15 (2004)
- Velazquez-Rivera v. Sea-Land Service, Inc.*, 920 F.2d 1072, 1076-77 (1st Cir. 1990)
federal courts have imposed sanctions on parties who repeatedly disregard court orders or procedural rules; CLI-04-36, 60 NRC 644 n.57 (2004)

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- Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 48 (1989), *vacated in part on other grounds and remanded*, CLI-90-4, 31 NRC 333 (1990)
material provided in support of a contention will be carefully examined by the board to confirm that its does indeed supply an adequate basis for the contention as asserted by the petitioner; LBP-04-14, 60 NRC 56 (2004); LBP-04-17, 60 NRC 242 (2004); LBP-04-18, 60 NRC 265 (2004); LBP-04-19, 60 NRC 290 (2004); LBP-04-28, 60 NRC 556 (2004)
- Vermont Yankee Nuclear Power Corp. and Amergen Vermont, LLC* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000)
an organization seeking to intervene in a representational capacity must demonstrate that the licensing action will affect at least one of its members, must identify that member by name and address, and must show that it is authorized by that member to request a hearing on his or her behalf; LBP-04-28, 60 NRC 553, 554 (2004)
- Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553-54 (1978)
the purpose of the contention rule is to focus litigation on concrete issues and result in a clearer and more focused record for decision; LBP-04-28, 60 NRC 554 (2004)
- Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 378 n.11 (1983)
additional potential costs associated with delaying Commission consideration of intervenors' NEPA argument until after a final Board decision do not amount to a serious irreparable impact warranting immediate Commission review; CLI-04-31, 60 NRC 466 (2004)
- Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 2), ALAB-137, 6 AEC 491, 504 (1973)
where the alleged factual error related to a holding that was merely advisory, not necessary to the result, and could have been deleted without impairing the analytical foundations of the holding, the materiality condition for reconsideration is not met; CLI-04-38, 60 NRC 654 (2004)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 n.10 (1994)
an organization that wishes to intervene may do so by demonstrating either injury to its organizational interests or harm to the interests of its members; LBP-04-16, 60 NRC 105 (2004)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996)
a petitioner must establish that it has suffered or will suffer a distinct and palpable harm constituting injury-in-fact within the zone of interests arguably protected by the governing statutes and that the injury is fairly traceable to the action being challenged and will likely be redressed by a favorable determination; LBP-04-28, 60 NRC 553 (2004)
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- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 9 (1996)
to gain admission of a contention alleging an error in the decommissioning funding estimate, the petitioner must show that there exists no reasonable assurance that the amount in question will be paid by the applicant; LBP-04-14, 60 NRC 56 (2004)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248-49 (1996)
asking intervenors to come forward with support for their request to supplement an EIS is a burden akin to a petitioner's initial obligation to come forward with sufficient basis for a contention; CLI-04-39, 60 NRC 660 (2004)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 251 (1996)
contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking are inadmissible; LBP-04-17, 60 NRC 241 (2004); LBP-04-18, 60 NRC 264 (2004); LBP-04-19, 60 NRC 289 (2004)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 260 (1996)
the Commission does not consider fresh arguments on appeal when there was opportunity to make them earlier; CLI-04-22, 60 NRC 152 (2004)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 260 & n.19 (1996)
the Commission ordinarily will not consider on appeal either new arguments or new evidence supporting the contention, which the Board never had the opportunity to consider; CLI-04-22, 60 NRC 140 (2004)

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- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 261 (1996)
in Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief; CLI-04-25, 60 NRC 225 (2004)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 267 (1996)
a contention that amounts to mere speculation is insufficient to merit further consideration; LBP-04-15, 60 NRC 89 (2004)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 269 (1996)
a final environmental impact statement must be supplemented if there exists significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts; LBP-04-23, 60 NRC 448 (2004)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 206-07 (1998)
the license termination plan stage is petitioners' one and only chance to litigate whether the survey methodology is adequate to demonstrate that the site has been brought to a condition suitable for license termination; LBP-04-27, 60 NRC 541 (2004)
- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 75 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996)
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- Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996), *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996)
any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny; LBP-04-14, 60 NRC 56 (2004); LBP-04-17, 60 NRC 242 (2004); LBP-04-18, 60 NRC 265 (2004); LBP-04-19, 60 NRC 290 (2004); LBP-04-28, 60 NRC 556 (2004)
- Yusov v. Yusuf*, 892 F.2d 784, 787 (9th Cir. 1989)
federal courts have imposed sanctions on parties who repeatedly disregard court orders or procedural rules; CLI-04-36, 60 NRC 644 n.57 (2004)
- Zinn v. University of Missouri*, Case Nos. 93-ERA-34, 93-ERA-36, 1996 WL 171417 (Sec'y Jan. 18, 1996)
an employee is participating in a protected activity when he raises safety-related issues, even if the context in which he does so is the resolution, rather than the raising, of another safety issue; CLI-04-24, 60 NRC 208 (2004)
if an employee, while resolving a previously reported safety issue discovered by another, finds additional previously undiscovered safety problems, the employee's reporting of the new problems would constitute protected activity; CLI-04-24, 60 NRC 209 (2004)

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- 10 C.F.R. Part 2
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- 10 C.F.R. 2.4
if the uranium enrichment facility licensing proceeding is not contested, the Board will determine whether the application and record of the proceeding contain sufficient information and whether the NRC Staff's review of the application has been adequate to support findings to be made by the Director of the Office of Nuclear Materials Safety and Safeguards; CLI-04-30, 60 NRC 428 (2004)
- 10 C.F.R. 2.105(a)
NRC must publish a notice of proposed action in the *Federal Register* in the event that an application for an amendment to an operating license for a facility is filed; LBP-04-33, 60 NRC 752 (2004)
- 10 C.F.R. 2.105(b), (d)
notice of a proposed action must set forth the nature of the proposed action and indicate, to persons whose interests may be affected by the proceeding, the existence of an opportunity to file a request for hearing or a petition for leave to intervene; LBP-04-33, 60 NRC 752 (2004)
- 10 C.F.R. 2.203
the Board has reviewed a proposed settlement agreement and has found that it is in the public interest and therefore approves it and terminates the proceeding; LBP-04-26, 60 NRC 533 (2004)
- 10 C.F.R. 2.205
the Commission's enforcement policy applies just as much to the Board in its review of Staff enforcement actions as it does to the Staff itself; CLI-04-24, 60 NRC 218 n.176 (2004)
- 10 C.F.R. 2.205(a)
basic principles of fairness require that the licensee in an enforcement action know the bases underlying the Staff's finding of violation; CLI-04-24, 60 NRC 202 (2004)
Staff must serve a written notice of violation upon the person charged and specify the dates, facts, and nature of the alleged act or omission with which the person is charged; CLI-04-24, 60 NRC 201 (2004)
- 10 C.F.R. 2.205(d)
the Staff shall consider the answer to a Notice of Violation and only then shall issue an order dismissing the proceeding or imposing, mitigating, or remitting the civil penalty; CLI-04-24, 60 NRC 203 n.98 (2004)
- 10 C.F.R. 2.205(f)
if a hearing is held, an order will be issued after the hearing by the presiding officer or the Commission dismissing the proceeding or imposing, mitigating, or remitting the civil penalty; CLI-04-24, 60 NRC 217 (2004)
licensing boards are authorized in all civil penalty cases to issue an order mitigating the civil penalty; CLI-04-24, 60 NRC 217 (2004)
- 10 C.F.R. 2.205(g)
the Board has reviewed a proposed settlement agreement and has found that it is in the public interest and therefore approves it and terminates the proceeding; LBP-04-26, 60 NRC 533 (2004)
- 10 C.F.R. 2.206
a petitioner who wishes to litigate the need for still more safety measures, perhaps including the closing of the facility, will be remitted to procedures under; LBP-04-16, 60 NRC 112 (2004)
filing a show-cause petition is the appropriate vehicle for the public to make requests to the NRC to modify a license; CLI-04-23, 60 NRC 158 (2004)

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- if a petitioner believes that a confirmatory order does not go far enough to remedy a whistleblower situation, he can file a petition with the NRC under; CLI-04-26, 60 NRC 407 n.35 (2004)
- if petitioner can substantiate its newly arising argument, a more appropriate forum would be a petition under; CLI-04-36, 60 NRC 640 (2004)
- if petitioner has information supporting its claim that licensee's operation has caused human suffering on a vast scale, its remedy would not be a narrowly focused license renewal hearing, but a citizen's petition under; CLI-04-36, 60 NRC 638 (2004)
- if petitioner whose contention has been dismissed for pleading deficiencies can support the concerns it has expressed, it should bring them to the attention of the Commission under; LBP-04-15, 60 NRC 92 (2004)
- petitioner requests immediate action to protect against terrorist attacks; DD-04-03, 60 NRC 344-54 (2004)
- petitioner's claim that licensee's current license should be revoked based on its noncompliance with license conditions raises enforcement-related issues that may be raised in an enforcement action pursuant to; LBP-04-25, 60 NRC 529 (2004)
- request that NRC immediately revoke, suspend, or modify the license for a radioactive waste storage operation, citing risk to the common defense and security, is denied because the limits on types and activity of radioactive material that licensee is authorized to possess are below the levels of concern; DD-04-4, 60 NRC 387-98 (2004)
- the scope of judicial review of agency's show-cause determinations is extremely limited; LBP-04-16, 60 NRC 121 n.2 (2004)
- when motions for reconsideration and amendment of contentions have failed, petitioner may still bring its concerns before the Commission under; LBP-04-22, 60 NRC 384 (2004)
- 10 C.F.R. 2.206(a)
any person may file a request to institute a proceeding to modify, suspend, or revoke a license, or for any other action as may be proper; CLI-04-26, 60 NRC 407 n.35 (2004); LBP-04-28, 60 NRC 569 n.26 (2004)
- 10 C.F.R. Part 2, Subpart C
a hearing on the license application for a uranium enrichment facility shall be conducted by an Atomic Safety and Licensing Board appointed by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel; CLI-04-30, 60 NRC 428 (2004)
- 10 C.F.R. 2.306
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 NRC regulations for responding to filings served by first-class mail or express delivery shall not be applicable; CLI-04-30, 60 NRC 435 (2004)
- 10 C.F.R. 2.309
a petition to intervene in a uranium enrichment facility licensing proceeding shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding; CLI-04-30, 60 NRC 428-29 (2004)
- asking intervenors to come forward with support for their request to supplement an EIS is a burden akin to a petitioner's initial obligation to come forward with sufficient basis for a contention; CLI-04-39, 60 NRC 660 (2004)
- provisions for hearing petitions and associated submissions, including the contentions submitted by petitioners, do not distinguish between governmental and nongovernmental petitioners; LBP-04-14, 60 NRC 57 (2004)
- to intervene in proceeding on a license termination plan, a petitioner must establish its standing and set forth at least one admissible contention; LBP-04-27, 60 NRC 541 (2004)
- 10 C.F.R. 2.309(a)
a requestor who has filed a timely request to intervene as a party in an adjudicatory proceeding must establish it has standing and proffer at least one admissible contention; LBP-04-16, 60 NRC 116 (2004); LBP-04-25, 60 NRC 523, 524 (2004); LBP-04-28, 60 NRC 552 (2004)
- because a petitioner has failed to proffer any admissible contentions, the licensing board need not determine whether it has demonstrated standing to intervene; LBP-04-15, 60 NRC 97 n.79 (2004)
- it is the admissibility of a contention, not its basis, that must be determined; LBP-04-28, 60 NRC 557 (2004)

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- 10 C.F.R. 2.309(a)-(b)
any individual, group, or business or governmental entity that wishes to intervene in a licensing proceeding must file a timely written request to intervene, establish that it has standing to intervene, and offer at least one admissible contention that is litigable in the proceeding; LBP-04-14, 60 NRC 53 (2004)
- 10 C.F.R. 2.309(b)(3)
the 60-day period provided for filing hearing requests, petitions, and contentions is more than ample time for a potential requestor/intervenor to review the application, prepare a filing on standing, and develop proposed contentions and references to materials in support of the contentions; CLI-04-35, 60 NRC 623 (2004)
- 10 C.F.R. 2.309(b)(3)(i)
within 60 days after the date of publication of the notice of opportunity for hearing, any person whose interest may be affected by the proceeding and who wishes to participate as a party must file a written request for a hearing and a petition for leave to intervene; CLI-04-28, 60 NRC 413 (2004)
- 10 C.F.R. 2.309(c)
because of the Licensing Board's closer familiarity with how admission of a contention might affect the proceeding and parties, the Commission remands to the Board petitioner's request to submit late-filed contentions; CLI-04-35, 60 NRC 625 (2004)
if the independent engineering inspection report provides information not previously available that is materially different, then intervenor is entitled to late-file a new contention; LBP-04-28, 60 NRC 578 (2004)
late-filed petitions and contentions are allowed where there is a compelling justification; CLI-04-35, 60 NRC 623 (2004)
petitioners have the opportunity to file new or amended contentions if material new information becomes available via supplements to license amendment applications; LBP-04-33, 60 NRC 752, 754 (2004)
reply filings that constitute untimely attempts to amend the original petitions cannot be considered in determining the admissibility of the contentions; CLI-04-25, 60 NRC 224 (2004); CLI-04-35, 60 NRC 621 (2004); LBP-04-14, 60 NRC 58 (2004)
- 10 C.F.R. 2.309(c)(1)
petitioners may file late contentions only upon a showing that the information upon which the amended or new contention is based was not previously available and is materially different than information previously available, and the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information; CLI-04-36, 60 NRC 636 (2004)
- 10 C.F.R. 2.309(c)(1)(i)
the occurrence of changes to a reclamation plan or discovery of new information shall constitute good cause for a late-filed hearing request, subject to a balancing of the factors set forth in; LBP-04-30, 60 NRC 667 (2004)
- 10 C.F.R. 2.309(c)(1)(i)-(viii)
nontimely filings of petitions to intervene, amended petitions, and supplemental petitions in a uranium enrichment facility licensing proceeding will not be entertained absent a determination by the Commission or the Board that the petition should be granted, based upon a balancing of the factors specified in; CLI-04-30, 60 NRC 430 (2004)
- 10 C.F.R. 2.309(d)
in ruling on a hearing request, a licensing board is to determine whether the petitioner has an interest affected by the proceeding; LBP-04-16, 60 NRC 104-05 (2004)
to obtain a hearing, a petitioner must demonstrate standing and proffer at least one admissible contention; CLI-04-23, 60 NRC 157 (2004)
within 10 days of the Commission's order determining standing, a motion for reconsideration may be submitted; CLI-04-30, 60 NRC 433 (2004)
within 20 days of the Commission's order determining standing, participants may respond to any motion for reconsideration; CLI-04-30, 60 NRC 433 (2004)
- 10 C.F.R. 2.309(d)(1)
a petition to intervene must state the nature of petitioner's right to be made a party, the petitioner's property, financial, or other interest in the proceeding, and the possible effect of any decision or order on the petitioner's interest; LBP-04-28, 60 NRC 552 (2004)

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- state and federally recognized Indian tribes do not need to address standing requirements if the uranium enrichment facility is located within its boundaries; CLI-04-30, 60 NRC 430 (2004)
- 10 C.F.R. 2.309(d)(1)(ii)-(iv)
to establish standing, an intervention petition must provide information on the nature of the petitioner's right under the Atomic Energy Act to be made a party, the petitioner's property, financial, or other interests in the proceeding, and the potential effect any decision may have on the petitioner's interest; LBP-04-14, 60 NRC 53 (2004); LBP-04-25, 60 NRC 523 (2004)
- 10 C.F.R. 2.309(d)(2)
a state that wishes to be a party in a proceeding for a facility located within its boundaries need not address the standing requirements; LBP-04-28, 60 NRC 553 (2004)
a state, county, municipality, federally recognized Indian tribe, or agencies thereof, may submit a petition to the Commission to participate as an interested entity in a uranium enrichment facility licensing proceeding; CLI-04-30, 60 NRC 430 (2004)
- 10 C.F.R. 2.309(d)(2)(i)-(ii)
a state that seeks to intervene in an adjudication concerning a facility located within its borders need simply indicate in its request for a leave to intervene that the proceeding involves a facility located within its boundaries; LBP-04-25, 60 NRC 523 (2004)
- 10 C.F.R. 2.309(f)
a board has not made a merits determination when its holdings are made without any reference to the material supporting the license renewal application, but rather on the basis that the proposed contentions were deficient on their face; CLI-04-36, 60 NRC 642 (2004)
a contention is admissible when its basis cites a regulatory guide not as a legal requirement but as part of the rationale supporting an expert's opinion; LBP-04-28, 60 NRC 559-60 (2004)
although petitioners have established their standing to intervene, their request for hearing must be denied for failure to put forth a litigable contention; LBP-04-19, 60 NRC 298 (2004)
because of the Licensing Board's closer familiarity with how admission of a contention might affect the proceeding and parties, the Commission remands to the Board petitioner's request to submit late-filed contentions; CLI-04-35, 60 NRC 625 (2004)
petitioners have the opportunity to file new or amended contentions if material new information becomes available via supplements to license amendment applications; LBP-04-33, 60 NRC 752, 754 (2004)
petitioners' reply filings are rejected as untimely attempts to amend their original petitions without addressing the late-filing factors; CLI-04-35, 60 NRC 621 (2004)
the hearing request or petition to intervene must provide a specific statement of the issue of law or fact to be raised or controverted and a brief explanation of the basis for the contention and demonstrate that the issue raised in the contention is within the scope of the proceeding and is material to the findings the NRC must make; LBP-04-27, 60 NRC 541-42 (2004)
to be admissible, a contention must provide a specific statement of the legal or factual issue sought to be raised, a brief explanation of its basis, and a concise statement of the alleged facts or expert opinions; LBP-04-14, 60 NRC 54 (2004)
to obtain a hearing, a petitioner must demonstrate standing and proffer at least one admissible contention; CLI-04-23, 60 NRC 157 (2004)
- 10 C.F.R. 2.309(f)(1)
a request for hearing must set forth with particularity the contentions sought to be raised; LBP-04-16, 60 NRC 117 (2004)
an intervention petition is denied on the ground that all proffered contentions were inadmissible; CLI-04-36, 60 NRC 635 (2004)
for a contention to be admissible, it must provide a specific statement of the legal or factual issue sought to be raised, a brief explanation of its basis, a concise statement of the alleged facts or expert opinions, and sufficient information demonstrating that a genuine dispute exists in regard to a material issue of law or fact; LBP-04-15, 60 NRC 88 (2004)
- 10 C.F.R. 2.309(f)(1)(i)
a contention must include references to specific supporting sources and documents and sufficient information to demonstrate that a genuine dispute exists in regard to a material issue of law or fact; LBP-04-14, 60 NRC 54 (2004)

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- for a contention to be admissible, it must provide a specific statement of the legal or factual issue sought to be raised; CLI-04-36, 60 NRC 636 (2004); LBP-04-17, 60 NRC 240 (2004); LBP-04-18, 60 NRC 263-64 (2004); LBP-04-19, 60 NRC 288 (2004); LBP-04-25, 60 NRC 524 (2004); LBP-04-28, 60 NRC 554 (2004)
- 10 C.F.R. 2.309(f)(1)(i)-(vi)
for each contention, a hearing request must conform to six specific pleading requirements; LBP-04-16, 60 NRC 117 (2004)
- 10 C.F.R. 2.309(f)(1)(ii)
a contention must include references to specific supporting sources and documents and sufficient information to demonstrate that a genuine dispute exists in regard to a material issue of law or fact; LBP-04-14, 60 NRC 54 (2004)
to be admissible, a contention must provide a brief explanation of its basis; CLI-04-36, 60 NRC 636 (2004); LBP-04-17, 60 NRC 240 (2004); LBP-04-18, 60 NRC 263-64 (2004); LBP-04-19, 60 NRC 288 (2004); LBP-04-25, 60 NRC 524 (2004); LBP-04-28, 60 NRC 554, 557 (2004)
- 10 C.F.R. 2.309(f)(1)(iii)
petitioner must demonstrate that the issue raised in a contention is within the scope of the proceeding and material to the findings the NRC must make to support the action that is involved in the proceeding; CLI-04-36, 60 NRC 636, 638 (2004); LBP-04-14, 60 NRC 54 (2004); LBP-04-15, 60 NRC 88, 90, 92 (2004); LBP-04-17, 60 NRC 240 (2004); LBP-04-18, 60 NRC 264 (2004); LBP-04-19, 60 NRC 288 (2004); LBP-04-25, 60 NRC 524 (2004); LBP-04-28, 60 NRC 554, 555, 569, 574 (2004)
- 10 C.F.R. 2.309(f)(1)(iv)
alleged shortcomings in the ACRS review are not material to the outcome of the proceeding; LBP-04-28, 60 NRC 559 (2004)
to be admissible, a contention must assert an issue of law or fact that is material to the outcome of a licensing proceeding; CLI-04-36, 60 NRC 636 (2004); LBP-04-14, 60 NRC 56 (2004); LBP-04-15, 60 NRC 89 (2004); LBP-04-17, 60 NRC 242 (2004); LBP-04-18, 60 NRC 266 (2004); LBP-04-19, 60 NRC 290 (2004); LBP-04-25, 60 NRC 524 (2004); LBP-04-28, 60 NRC 554, 556, 571, 574, 576 (2004)
- 10 C.F.R. 2.309(f)(1)(v)
a contention that relates to the effects of aging upon the plant's structures, systems, and components is inadmissible because it fails to satisfy the specificity requirements of; LBP-04-15, 60 NRC 96 (2004)
to be admissible, a contention must provide the alleged facts or expert opinions that support the petitioner's position, together with references to specific sources and documents on which it intends to rely to support its position; CLI-04-36, 60 NRC 636, 637, 639, 640 (2004); LBP-04-14, 60 NRC 54 (2004); LBP-04-15, 60 NRC 89, 91, 92, 96 (2004); LBP-04-17, 60 NRC 240 (2004); LBP-04-18, 60 NRC 263-64 (2004); LBP-04-19, 60 NRC 288 (2004); LBP-04-25, 60 NRC 524 (2004); LBP-04-27, 60 NRC 542 (2004); LBP-04-28, 60 NRC 554, 555 (2004)
- 10 C.F.R. 2.309(f)(1)(vi)
a contention construed as one of omission is inadmissible if it fails to identify each failure and the supporting reasons; LBP-04-15, 60 NRC 96 (2004)
a contention must include references to specific portions of the application that the petitioner disputes, or in the case when the application is alleged to be deficient, the identification of such deficiencies and supporting reasons for this belief; CLI-04-36, 60 NRC 636, 639, 640, 641 (2004); LBP-04-14, 60 NRC 54, 57 (2004); LBP-04-15, 60 NRC 89, 96, 97 (2004); LBP-04-17, 60 NRC 240, 243 (2004); LBP-04-18, 60 NRC 263-64, 266 (2004); LBP-04-19, 60 NRC 288, 291 (2004); LBP-04-25, 60 NRC 524 (2004); LBP-04-27, 60 NRC 542 (2004); LBP-04-28, 60 NRC 554, 557, 561, 569, 571, 574, 576 (2004)
a contention that relates to the effects of aging upon the plant's structures, systems, and components is inadmissible because it fails to satisfy the specificity requirements of; LBP-04-15, 60 NRC 96 (2004)
- 10 C.F.R. 2.309(f)(2)
amended petitions and other late-filed documents that arguably constitute untimely attempts to amend the original petition must address the late-filing factors of; LBP-04-15, 60 NRC 86 (2004)
contentions may be amended upon a showing that the new information was not previously available, is materially different than information previously available, and has been submitted in a timely fashion based on the availability of the subsequent information; LBP-04-22, 60 NRC 383 (2004)

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- if new and materially different information later comes to light, the board may entertain a motion for leave to file a new contention; LBP-04-28, 60 NRC 568 n.24 (2004)
- NRC does not look with favor on amended or new contentions filed after the initial filing; CLI-04-36, 60 NRC 636 (2004)
- reply filings that constitute untimely attempts to amend the original petitions cannot be considered in determining the admissibility of the contentions; CLI-04-25, 60 NRC 224 (2004); LBP-04-14, 60 NRC 58 (2004)
- 10 C.F.R. 2.309(f)(2)(i)-(iii)
- if an independent engineering inspection report provides information not previously available that is materially different, then intervenor is entitled to submit a motion for leave to file a new contention in a timely fashion; LBP-04-28, 60 NRC 578 (2004)
- petitioners may file late contentions only upon a showing that the information upon which the amended or new contention is based was not previously available and is materially different than information previously available, and the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information; CLI-04-36, 60 NRC 636 (2004)
- to amend its contentions or file new ones, petitioner must obtain leave from the Board and show that it satisfies the requirements of; LBP-04-25, 60 NRC 530 n.10 (2004)
- 10 C.F.R. 2.309(f)(3)
- if a petitioner seeks to adopt the contention of another sponsoring petitioner, the petitioner who seeks to adopt the contention must either agree that the sponsoring petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring petitioner a representative who shall have the authority to act for the petitioners with respect to that contention; LBP-04-14, 60 NRC 72 n.17 (2004)
- petitioners may choose to participate on other petitioners' contentions by adopting them; CLI-04-35, 60 NRC 627 (2004); LBP-04-14, 60 NRC 50 (2004)
- the Adjudicatory Process Final Rule provides the option for petitioners, such as a state, to adopt other petitioners' contentions, thus providing the state with an avenue of participation in them; LBP-04-31, 60 NRC 707 n.26 (2004)
- 10 C.F.R. 2.309(g)
- a petitioner requesting a Subpart G hearing pursuant to section 2.310(d) must demonstrate, by reference to the contention and the bases provided and the specific procedures in Subpart G, that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures; LBP-04-31, 60 NRC 693 (2004)
- 10 C.F.R. 2.309(h)(2)
- provisions dealing with the scope of a petitioner's reply to the responses of an applicant and/or the Staff to a hearing request do not distinguish between governmental and nongovernmental petitioners; LBP-04-14, 60 NRC 57 (2004)
- replies should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC Staff answer; LBP-04-14, 60 NRC 58 (2004)
- 10 C.F.R. 2.310
- informal hearing procedures of Subpart L are the most appropriate in this operating license amendment proceeding; LBP-04-31, 60 NRC 690-91 (2004)
- the Adjudicatory Process Final Rule encourages, and in some situations requires, the use of the informal Subpart L procedures rather than the formal Subpart G procedures in proceedings involving the grant, renewal, or amendment of licenses; LBP-04-31, 60 NRC 692-93 (2004)
- 10 C.F.R. 2.310(a)
- in a case involving a licensee-initiated amendment to a license for a nuclear power reactor, the determination of the appropriate hearing procedures hinges on the interpretation and application of; LBP-04-31, 60 NRC 693 (2004)
- statement that the presiding officer "may" use Subpart L procedures, clearly does not mandate the use of Subpart L procedures for a contention that does not meet the criteria of section 2.310(d); LBP-04-31, 60 NRC 704-05 (2004)
- 10 C.F.R. 2.310(d)
- a petitioner is not entitled to a Subpart G hearing based on the fact that there is a high degree of public interest in the proceeding, that it is controversial, or that discovery and cross-examination are allegedly

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- required to ensure public confidence in the proceeding and its decisions; LBP-04-31, 60 NRC 697 (2004)
- complexity of an issue does not automatically trigger a Subpart G hearing under; LBP-04-31, 60 NRC 696 (2004)
- factual disputes alone are insufficient to trigger Subpart G procedures under; LBP-04-31, 60 NRC 698 (2004)
- generalized aspersions on the tactics or motives of the parties, their employees, members, lawyers, or *pro se* representatives do not satisfy the “credibility” or “motive” elements of either criterion of; LBP-04-31, 60 NRC 700 (2004)
- in a case involving a licensee-initiated amendment to a license for a nuclear power reactor, the determination of the appropriate hearing procedures hinges on the interpretation of the circumstances in which Subpart G procedures apply; LBP-04-31, 60 NRC 693 (2004)
- inasmuch as the initial selection of hearing procedures is done before the identity of opposing party witnesses is known, the selection is not immutable and may be changed if, upon subsequent motion, it is shown that the criteria are met; LBP-04-31, 60 NRC 703 (2004)
- petitioners will not be granted a Subpart G proceeding based on an assertion that the licensee will not comply with its duty to disclose documents under section 2.336(a); LBP-04-31, 60 NRC 698 (2004)
- Subpart L procedures are not mandatory for a contention that does not meet the criteria of; LBP-04-31, 60 NRC 705 (2004)
- the Board will not grant a Subpart G proceeding based on the fact that such a proceeding may be more efficient than a Subpart L proceeding because “efficiency” is not a criterion under; LBP-04-31, 60 NRC 697 (2004)
- the fact that a witness may be a paid employee or dedicated member of a party, does not, per se, create any presumption that his or her credibility or motives are in such doubt that a Subpart G proceeding is required pursuant to; LBP-04-31, 60 NRC 700 (2004)
- the first criterion entitling a petitioner to a Subpart G process combines two elements, requiring that a contention necessitate resolution of a dispute of material fact concerning the occurrence of a past activity *and* that the credibility of an eyewitness may reasonably be expected to be an issue in resolving that dispute; LBP-04-31, 60 NRC 694-95 (2004)
- the second criterion entitling a petitioner to a Subpart G process is that issues of motive or intent of the party or eyewitness are material to the resolution of the contested matter; LBP-04-31, 60 NRC 694-95 (2004)
- to demonstrate that a Subpart G proceeding is mandated, a party may challenge the credibility of potential eyewitnesses based on historical information in a similar or related proceeding, so long as it is probative of whether a witness’s credibility reasonably may be expected to be at issue in the current proceeding; LBP-04-31, 60 NRC 701-03 (2004)
- 10 C.F.R. 2.311
- any appeal to the Commission on intervention rulings must be taken within 10 days after the ruling is served; LBP-04-14, 60 NRC 76 (2004); LBP-04-19, 60 NRC 299 (2004)
- interlocutory appeals as of right are only allowed where an intervention petitioner challenges a Board decision denying the petition in its entirety, or argues that the Board should have wholly denied the petition, or claims that the Board’s selection of the appropriate hearing procedure was in clear contravention of Commission rules; CLI-04-31, 60 NRC 468 (2004)
- 10 C.F.R. 2.311(b)
- a ruling denying intervention may be appealed by filing a notice of appeal and accompanying supporting brief within 10 days of service of the decision; LBP-04-15, 60 NRC 97 (2004); LBP-04-16, 60 NRC 119 (2004)
- 10 C.F.R. 2.311(c)
- a party other than the hearing requestor may appeal an order to the Commission on the question as to whether the hearing request should have been wholly denied; LBP-04-27, 60 NRC 547 (2004); LBP-04-28, 60 NRC 579 (2004)
- 10 C.F.R. 2.314(c)(1)
- sanctions may be imposed against any representative of a party who refuses to comply with the Commission’s or the Licensing Board’s directions; CLI-04-36, 60 NRC 644 (2004)

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- 10 C.F.R. 2.315(a)
any person who does not wish, or is not qualified, to become a party to a uranium enrichment facility licensing proceeding may request permission to make a limited appearance; CLI-04-30, 60 NRC 430 (2004)
- 10 C.F.R. 2.315(c)
designated governmental representatives who have not been admitted as a party, but who choose to participate in NRC proceedings as interested states, local governmental bodies, or federally recognized Indian tribes may participate on any admitted contentions; CLI-04-35, 60 NRC 627 (2004)
interested states may introduce evidence, interrogate witnesses where cross-examination is permitted, advise the Commission without the need to take a position on the subject at issue, file proposed findings where findings are permitted, and petition for review with respect to the admitted contentions; CLI-04-35, 60 NRC 626 (2004)
participants may file motions for reconsideration; CLI-04-30, 60 NRC 439 (2004)
state and federally recognized Indian tribes may seek to participate in a uranium enrichment facility licensing proceeding as a nonparty; CLI-04-30, 60 NRC 430 (2004)
the opportunity for state or local governmental entities or affected federally recognized Indian tribes to participate in NRC proceedings is available only to those government representatives that have not been admitted as a party under section 2.309; CLI-04-35, 60 NRC 626 (2004); LBP-04-31, 60 NRC 707 (2004)
- 10 C.F.R. 2.316
licensing boards have authority to further define and/or consolidate contentions when the issues sought to be raised by one or more of the petitioners appear related or when redrafting would clarify the scope of a contention; LBP-04-14, 60 NRC 57 (2004); LBP-04-17, 60 NRC 243 (2004); LBP-04-18, 60 NRC 266 (2004); LBP-04-19, 60 NRC 291 (2004); LBP-04-28, 60 NRC 558 (2004)
- 10 C.F.R. 2.319
a presiding officer possesses the authority to control the prehearing and hearing process by consolidating parties and/or designating a lead party to represent interests held in common by multiple groups, in order to eliminate duplicative or cumulative evidence and arguments; LBP-04-14, 60 NRC 71 (2004)
licensing boards have authority to further define and/or consolidate contentions when the issues sought to be raised by one or more of the petitioners appear related or when redrafting would clarify the scope of a contention; LBP-04-14, 60 NRC 57 (2004); LBP-04-17, 60 NRC 243 (2004); LBP-04-18, 60 NRC 266 (2004); LBP-04-19, 60 NRC 291 (2004); LBP-04-28, 60 NRC 558 (2004)
the pre-application presiding officer has the authority to regulate the conduct of the proceeding and the parties and to dispose of motions, as well as all the other general powers granted by; LBP-04-20, 60 NRC 310 (2004)
the pre-application presiding officer has the authority to strike DOE's certification to the extent that it triggers other actions during the prehearing process, including the obligation on the part of other participants to make their documents electronically available; LBP-04-20, 60 NRC 310 (2004)
- 10 C.F.R. 2.319(g)
a board is instructed to impose what it considers appropriate sanctions against the representative of a party who refuses to comply with the Commission's or the Licensing Board's directions; CLI-04-36, 60 NRC 644 n.57 (2004)
- 10 C.F.R. 2.319(l)
the Board is directed to promptly certify to the Commission all novel legal or policy issues that would benefit from early Commission consideration should such issues arise in a uranium enrichment facility licensing proceeding; CLI-04-30, 60 NRC 431 (2004)
- 10 C.F.R. 2.323(a)
a motion must be made within 10 days of the occurrence or circumstance from which it arises; LBP-04-33, 60 NRC 752 (2004)
- 10 C.F.R. 2.323(c)
intervenor did not ask permission to file a reply, which is not authorized under NRC rules, and thus the Commission does not consider it; CLI-04-28, 60 NRC 414 n.2 (2004)
- 10 C.F.R. 2.323(e)
motions for reconsideration may not be filed except upon leave of the presiding officer, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which

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- could not have reasonably been anticipated, that renders the decision invalid; CLI-04-35, 60 NRC 622 n.12 (2004); CLI-04-36, 60 NRC 636-37, 641 (2004); LBP-04-22, 60 NRC 380, 381, 383 (2004)
- the length of any motion for reconsideration is limited to 10 pages; LBP-04-22, 60 NRC 381 (2004)
- 10 C.F.R. 2.323(f)
- because a board ruling admitting a contention raises a novel legal or policy question regarding the status of depleted uranium hexafluoride waste as low-level waste, the ruling is referred to the Commission; LBP-04-14, 60 NRC 67 (2004)
- because a board ruling includes a determination not to consider information that was first submitted as part of a reply pleading and is purportedly material to the admission of this contention, the board refers its ruling to the Commission; LBP-04-14, 60 NRC 59, 64, 65 (2004)
- the Board is directed to promptly certify to the Commission all novel legal or policy issues that would benefit from early Commission consideration should such issues arise in uranium enrichment facility licensing proceeding; CLI-04-30, 60 NRC 431 (2004)
- 10 C.F.R. 2.329
- licensing boards have authority to further define and/or consolidate contentions when the issues sought to be raised by one or more of the petitioners appear related or when redrafting would clarify the scope of a contention; LBP-04-14, 60 NRC 57 (2004); LBP-04-17, 60 NRC 243 (2004); LBP-04-18, 60 NRC 266 (2004); LBP-04-19, 60 NRC 291 (2004); LBP-04-28, 60 NRC 558 (2004)
- 10 C.F.R. 2.335
- a contention that attacks a Commission rule, or which seeks to litigate a matter that is, or clearly is about to become, the subject of a rulemaking, is inadmissible; LBP-04-17, 60 NRC 241 (2004); LBP-04-18, 60 NRC 264 (2004); LBP-04-19, 60 NRC 289 (2004)
- with limited exception, no rule or regulation of the Commission can be challenged in an adjudicatory proceeding; LBP-04-14, 60 NRC 54 (2004); LBP-04-15, 60 NRC 90 (2004)
- 10 C.F.R. 2.335(a)
- policy choices embodied in a final regulation are not subject to attack in an adjudicatory proceeding; LBP-04-31, 60 NRC 697 (2004)
- with limited exceptions, no rule or regulation of the Commission is subject to attack in any adjudicatory proceeding; LBP-04-28, 60 NRC 557, 564 (2004); LBP-04-31, 60 NRC 696 (2004)
- 10 C.F.R. 2.335(b)
- absent a showing of special circumstances, a matter that impermissibly seeks to challenge a Commission regulatory requirement must be addressed through Commission rulemaking; LBP-04-17, 60 NRC 247 (2004); LBP-04-18, 60 NRC 270 (2004); LBP-04-19, 60 NRC 297 (2004)
- 10 C.F.R. 2.336(a)(2)(i)
- the Board will not presume that a party will not comply with its duty to disclose all documents relevant to the contentions; LBP-04-31, 60 NRC 698 (2004)
- 10 C.F.R. 2.336(a)(3)
- the claim and identification of privileged materials must occur within the time provided for such disclosure of the withheld materials; LBP-04-17, 60 NRC 250 (2004); LBP-04-18, 60 NRC 274 (2004)
- 10 C.F.R. 2.336(b)
- all discovery against the Staff is governed by; CLI-04-30, 60 NRC 431 (2004)
- in creating and providing a hearing file, the Staff can utilize either a hard-copy file or an electronic file; LBP-04-14, 60 NRC 73 n.19 (2004); LBP-04-17, 60 NRC 248 n.8 (2004)
- no later than 30 days after the Board order admitting contentions, Staff shall update the information at the same time as the issuance of the SER or the final environmental impact statement; CLI-04-30, 60 NRC 431 (2004)
- 10 C.F.R. 2.336(b)(5)
- the claim and identification of privileged materials must occur within the time provided for such disclosure of the withheld materials; LBP-04-17, 60 NRC 250 (2004); LBP-04-18, 60 NRC 274 (2004)
- 10 C.F.R. 2.336(e)
- if there is an unexcused failure to make a full disclosure, the Board will not hesitate to impose sanctions, including the use of depositions and interrogatories, against the offending party; LBP-04-31, 60 NRC 698 (2004)
- 10 C.F.R. 2.337(f)
- expert opinions are evidence; LBP-04-31, 60 NRC 711 n.32 (2004)

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- 10 C.F.R. 2.337(j)
scientific fact can be key to the resolution of Part 2 proceedings; LBP-04-31, 60 NRC 711 n.32 (2004)
- 10 C.F.R. 2.338(i)
a licensing board finds the provisions of a settlement agreement to be consistent with the public interest; LBP-04-30, 60 NRC 667 (2004)
- 10 C.F.R. 2.341(d)
a petition for reconsideration may only be granted upon a showing of compelling circumstances, such as a clear and material error in a decision that could not have reasonably been anticipated, that renders the decision invalid; CLI-04-35, 60 NRC 622 n.12 (2004)
- 10 C.F.R. 2.341(f)
the Commission continues to disfavor interlocutory appeals largely due to its general unwillingness to engage in piecemeal interference in ongoing Licensing Board proceedings; CLI-04-31, 60 NRC 465-66 (2004)
- 10 C.F.R. 2.341(f)(1)
the Commission will consider novel issues when the Board refers one of its rulings, or certifies an issue, as warranting immediate Commission attention; CLI-04-31, 60 NRC 467 (2004)
the significance or novelty of issues independently does not justify discretionary interlocutory Commission review; CLI-04-31, 60 NRC 467 (2004)
- 10 C.F.R. 2.341(f)(1), (2)
petitions for interlocutory review are authorized only where the Board decision works immediate and serious irreparable impact or affects the basic structure of the proceeding in a pervasive or unusual manner, or the Board refers a ruling, or certifies a question, that raises significant and novel legal or policy issues; CLI-04-31, 60 NRC 466 (2004)
- 10 C.F.R. 2.341(f)(2)
mere expansion of issues rarely, if ever, has been found to affect the basic structure of a proceeding in a pervasive or unusual manner so as to warrant interlocutory review; CLI-04-31, 60 NRC 467 (2004)
- 10 C.F.R. 2.342(e)
in determining whether to grant or deny a motion for stay, a presiding officer must consider the four factors of; LBP-04-15, 60 NRC 87 n.15 (2004)
- 10 C.F.R. 2.345
petitions for reconsideration of a final Commission or licensing board decision are filed under; CLI-04-35, 60 NRC 622 n.12 (2004)
- 10 C.F.R. 2.345(b)
a petition for reconsideration must demonstrate a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid; CLI-04-38, 60 NRC 653 (2004)
- 10 C.F.R. 2.390
copies of license application, safety analysis report, and environmental report, except for portions thereof subject to withholding from public inspection, are available for public inspection at the Commission's Public Document Room; CLI-04-30, 60 NRC 426, 427 (2004)
- 10 C.F.R. Part 2, Subpart G
Subpart L procedures are compared to Subpart G procedures; LBP-04-31, 60 NRC 693 (2004)
- 10 C.F.R. 2.704
all parties, except the NRC Staff, shall make the mandatory disclosures within 45 days of the issuance of an order admitting a contention; CLI-04-30, 60 NRC 431 (2004); LBP-04-14, 60 NRC 72 (2004)
- 10 C.F.R. 2.704(a)
all lead parties, except Staff, are to make available within 45 days of the issuance of the memorandum and order the name, address, and telephone number of individuals likely to possess discoverable information that is relevant to the admitted contentions and their supporting bases; LBP-04-14, 60 NRC 72 n.18 (2004)
- 10 C.F.R. 2.704(c)
no later than 30 days before the commencement of the hearing at which an issue is to be presented, all parties other than Staff shall make the pretrial disclosures required by; CLI-04-30, 60 NRC 432 (2004)

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- 10 C.F.R. 2.704(e)(1)
a party complying with this rule must supplement its disclosures within a reasonable time after it learns that the information disclosed is incomplete or incorrect in some material respect, if this additional information has not otherwise been made known during discovery or in writing; LBP-04-14, 60 NRC 73 (2004)
- 10 C.F.R. 2.705(b)(4)
when a party claims privilege and withholds information otherwise discoverable under the rules, the party shall expressly make the claim and describe the nature of what is not being disclosed to the extent that, without revealing what is sought to be protected, other parties will be able to determine the applicability of the privilege or protection; LBP-04-14, 60 NRC 74 (2004)
- 10 C.F.R. 2.705(f)
as soon as practicable after issuance of an order admitting parties and issues, parties are to meet to discuss their particular claims and defenses and the possibility of settlement or resolution of any part of the proceeding, to develop a plan for discovery, and to make arrangements for the required disclosures; LBP-04-14, 60 NRC 72-73 (2004)
- 10 C.F.R. 2.705(g)(1)
each section 2.704 disclosure must be signed by at least one attorney of record, certifying that to the best of his or her knowledge, after reasonable inquiry, the information is correct and complete at the time of submission; LBP-04-14, 60 NRC 73 n.18 (2004)
- 10 C.F.R. 2.705(h)(1)
any attempt to compel discovery by filing a motion with the board must be preceded by the moving party either conferring or attempting in good faith to confer with the other party in an effort to resolve the dispute without board intervention; LBP-04-14, 60 NRC 74 (2004)
- 10 C.F.R. 2.709
all discovery against the Staff is governed by; CLI-04-30, 60 NRC 431 (2004)
discovery shall not commence until the issuance of the SER or EIS unless the Board, in its discretion, finds that commencing discovery against the Staff on safety issues before the SER is issued, or on environmental issues before the FEIS is issued, will expedite the hearing without adversely impacting the Staff's ability to complete its evaluation in a timely manner; CLI-04-30, 60 NRC 431 (2004)
- 10 C.F.R. 2.710
although summary disposition motions are included in the schedule, the Board shall not entertain such motions unless they are likely to expedite the proceeding; CLI-04-30, 60 NRC 435 (2004)
- 10 C.F.R. 2.710(a)
a prehearing conference order would establish the deadline for filing of summary disposition motions 20 days after close of discovery; CLI-04-30, 60 NRC 435 (2004)
- 10 C.F.R. 2.710(c)
the contention admissibility threshold is less than is required at the summary disposition stage, where inferences that can be drawn from evidence are construed in favor of the party opposing the summary disposition; LBP-04-28, 60 NRC 555-56 (2004)
- 10 C.F.R. 2.711(b)
interlocutory appeals as of right are allowed where a petitioner for intervention challenges a Board decision "denying" a petition to intervene in its entirety; CLI-04-31, 60 NRC 468 (2004)
- 10 C.F.R. 2.711(c)
interlocutory appeals as of right are allowed where a party argues that, rather than granting a petition to intervene, the Board should have "wholly denied" it; CLI-04-31, 60 NRC 468 (2004)
- 10 C.F.R. 2.711(d)
interlocutory appeals as of right are allowed where a party claims that the Board's selection of the appropriate hearing procedure was in clear contravention of Commission rules; CLI-04-31, 60 NRC 468 (2004)
- 10 C.F.R. 2.714
asking intervenors to come forward with support for their request to supplement an EIS is a burden akin to a petitioner's initial obligation to come forward with sufficient basis for a contention; CLI-04-39, 60 NRC 660 (2004)

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- 10 C.F.R. 2.714(b)
a contention basis is rejected if it fails to establish with specificity any genuine dispute, impermissibly challenges the Commission's regulations or rulemaking-associated generic determinations, lacks adequate factual or expert opinion support, and/or fails to properly challenge the license application; CLI-04-22, 60 NRC 131, 134 (2004)
- 10 C.F.R. 2.714(b)(2)
a party wanting to raise a contention in an adjudicatory hearing must meet strict pleading standards; CLI-04-22, 60 NRC 130 (2004)
- 10 C.F.R. 2.714(b)(2)(iii)
each contention must state sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact; CLI-04-19, 60 NRC 11 n.21 (2004)
- 10 C.F.R. 2.732
applicant bears the burden of persuasion that its application should be granted; LBP-04-21, 60 NRC 369 n.55 (2004)
- 10 C.F.R. 2.740(b)(1)
discovery is generally available in operating license amendment proceedings if information a party seeks is reasonably calculated to lead to the discovery of admissible evidence; CLI-04-29, 60 NRC 420 (2004)
the "indispensability" standard for establishing need to know is more stringent than the general discovery standard of "reasonably calculated to lead to the discovery of admissible evidence"; CLI-04-29, 60 NRC 421 (2004)
the traditional discovery standard of relevance and whether information is reasonably calculated to lead to the discovery of admissible evidence has come to define what is necessary and indispensable to a party in preparing for litigation on any cause or issue; LBP-04-21, 60 NRC 366, 373-74 (2004)
when items are reasonably available from the PDR, it is sufficient response to provide mere reference to the document; LBP-04-21, 60 NRC 376 n.75 (2004)
- 10 C.F.R. 2.740(c)
there is a balancing inherent in many discovery rulings, which takes into account not only relevance and need for information but also such things as embarrassment, oppression, or undue burden or expense, any of which may be grounds for limitation or denial of discovery; LBP-04-21, 60 NRC 374 (2004)
- 10 C.F.R. 2.744(e)
disclosure of safeguards information during litigation is limited to witnesses who are qualified; CLI-04-21, 60 NRC 30 (2004)
- 10 C.F.R. 2.758(b)
a party to an adjudicatory proceeding may petition that the application of a specified regulation be waived or an exception be made for a particular proceeding if special circumstances are such that the application of the rule or regulation would not serve the purposes for which the rule or regulation was adopted; CLI-04-19, 60 NRC 13 n.25 (2004)
- 10 C.F.R. 2.759
NRC encourages activities that might foster the possibility of a settlement between the parties; LBP-04-24, 60 NRC 480 (2004)
- 10 C.F.R. 2.786(b)(1)
a petition for review must be filed within 15 days after service of a decision or action; LBP-04-21, 60 NRC 363 n.23 (2004)
a petition for review that is not filed within 15 days after service of a decision or action must address the timeliness factors of; LBP-04-21, 60 NRC 368 (2004)
the filing of a petition for review is mandatory for a party to exhaust its administrative remedies before seeking judicial review; LBP-04-32, 60 NRC 748 (2004)
- 10 C.F.R. 2.786(b)(4)
a petition for interlocutory review is based on an assertion that the disputed board ruling presents a substantial question regarding a legal conclusion that is contrary to established law and requires a prompt decision by the Commission; CLI-04-21, 60 NRC 26 (2004)
review standards for full or partial initial decisions in a materials license proceeding are governed by; CLI-04-39, 60 NRC 658 n.2 (2004)

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- 10 C.F.R. 2.786(b)(4)(ii)
a board departed from and ruled contrary to established law in considering an employee's protected activities that suffered from defective notice to applicant and incorrectly considered as protected certain of an employee's activities that did not qualify as such; CLI-04-24, 60 NRC 200 (2004)
the Commission ordinarily defers to its licensing boards' fact findings, so long as they are not clearly erroneous; CLI-04-24, 60 NRC 189 (2004)
the Commission will reverse a licensing board's legal rulings if they are a departure from or contrary to established law; CLI-04-24, 60 NRC 190 (2004)
- 10 C.F.R. 2.786(e)
in the case of any material misapprehensions of law or fact in NRC appellate decisions, NRC rules allow for reconsideration petitions; CLI-04-29, 60 NRC 420 n.10 (2004)
- 10 C.F.R. 2.786(g)
although the Commission disfavors interlocutory review, it will take review if an appeal meets one of two criteria in; CLI-04-21, 60 NRC 26 (2004)
Commission review of interlocutory matters in a materials license proceeding is governed by; CLI-04-39, 60 NRC 658 n.2 (2004)
- 10 C.F.R. 2.802
if petitioner believes that revision of any NRC standards is necessitated, it may file a rulemaking petition with the Commission; LBP-04-22, 60 NRC 384 (2004)
- 10 C.F.R. 2.905
petitioner's counsel and expert, who have been granted appropriate NRC clearances, are found to have a need for access to classified guidance documents for preparation of petitioner's case; LBP-04-21, 60 NRC 358, 375 (2004)
- 10 C.F.R. 2.905(b)(1), (f)
requests for access to classified guidance documents must be made to the board; LBP-04-21, 60 NRC 361 (2004)
- 10 C.F.R. 2.905(d)
a board may certify to the Commission for its consideration and determination any questions relating to access to Restricted Data or National Security Information arising in an adjudicatory context; CLI-04-37, 60 NRC 649-50 (2004)
- 10 C.F.R. 2.907
NRC Staff must file a notice of intent if, at the time of publication of Notice of Hearing, it appears that it will be impracticable for the Staff to avoid the introduction of Restricted Data or National Security Information into a proceeding; CLI-04-30, 60 NRC 440 (2004)
- 10 C.F.R. Part 2, Subpart J
adjudicatory procedures governing licensing of a geologic repository for high-level radioactive waste are set out in; CLI-04-32, 60 NRC 470 (2004)
- 10 C.F.R. 2.1001
a "bibliographic header" means the minimum series of descriptive fields that a potential party must submit with a document or other material; LBP-04-20, 60 NRC 311 n.20 (2004)
Class 2 nonsupporting documentary material is information that is relevant to, but does not support, Class 1 information or that party's position; LBP-04-20, 60 NRC 323 (2004)
documentary material embraces any information that is known to, and in the possession of, or developed by the party that is relevant to, but does not support, that information or that party's position; LBP-04-20, 60 NRC 311-12 (2004)
documentary material encompasses all reports and studies, prepared by or on behalf of the party, including all related circulated drafts, relevant to both the license application and the issues set forth in the Topical Guidelines in Regulatory Guide 3.69, regardless of whether they will be relied upon and/or cited by a party; LBP-04-20, 60 NRC 312 (2004)
documentary material includes any information upon which a party intends to rely and/or to cite in support of its position in the proceeding; LBP-04-20, 60 NRC 311 (2004)
the definition of documentary material also includes an indirect reference to the Licensing Support Network because documentary material is defined, in part, as documents relevant to issues set forth in the Topical Guidelines in Regulatory Guide 3.69; LBP-04-20, 60 NRC 312-13 (2004)

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- the language of the definition of the Licensing Support Network indicates that it is *the* system for making documents available; LBP-04-20, 60 NRC 330 (2004)
- the Licensing Support Network is the combined system that makes documentary material available electronically to parties, potential parties, and interested governmental participants to the proceeding for a license to receive and possess high-level radioactive waste at a geologic repository; CLI-04-32, 60 NRC 471 (2004)
- the LSN Administrator is a person within the NRC who is responsible for coordinating access to and the integrity of data available on the Licensing Support Network; CLI-04-32, 60 NRC 471 (2004)
- the LSN Administrator shall not be in any organizational unit that either represents the NRC Staff as a party to the high-level waste repository licensing proceeding or is a part of the management chain reporting to the Director, Office of Nuclear Material Safety and Safeguards; CLI-04-32, 60 NRC 471 n.4 (2004)
- to expedite and to assist the Commission in achieving the 3-year deadline for the Yucca Mountain licensing proceeding, a Web-based system for making documents electronically available to all participants was created; LBP-04-20, 60 NRC 304 (2004)
- 10 C.F.R. 2.1003
- a good faith and reasonably complete document production requires that DOE finish its own privilege review process before certifying; LBP-04-20, 60 NRC 321 (2004)
- a recent addition to this section indicates that the Licensing Support Network is the method for making documents available; LBP-04-20, 60 NRC 329 (2004)
- DOE Certification contrasts sharply with the NRC Certification that documentary material specified in section 2.1003 has been identified and made electronically available; LBP-04-20, 60 NRC 339 (2004)
- DOE has the resources of the Nuclear Waste Fund at its disposal in assembling its documentary material and complying with regulatory requirements; LBP-04-20, 60 NRC 315 (2004)
- DOE's document production did not satisfy its obligation to make, in good faith, all of its documentary material available pursuant to; LBP-04-20, 60 NRC 310, 321 (2004)
- for each party, a responsible official must certify that the documentary material specified in this regulation has been identified and made electronically available; CLI-04-32, 60 NRC 470 (2004)
- parties must make available their documentary material before DOE submits its license application; CLI-04-32, 60 NRC 470 (2004)
- the Commission expects all LSS participants to make a good faith effort to identify the documentary material within the scope of; LBP-04-20, 60 NRC 314 (2004)
- the pre-application presiding officer has jurisdiction to rule on disputes over the electronic availability of documents; LBP-04-20, 60 NRC 310 (2004)
- the State and other potential participants are not required to make their documents available until 90 days after DOE makes all of its documents available on the central Licensing Support Network site, and so certifies; LBP-04-20, 60 NRC 340 (2004)
- 10 C.F.R. 2.1003(a)
- DOE must certify its document production no later than 6 months before submitting its license application, NRC must certify its document production no more than 30 days later, and other potential parties must do so no later than 90 days after DOE; CLI-04-32, 60 NRC 471 (2004)
- for purposes of "availability," documentary material must be indexed by the Licensing Support Network Administrator; LBP-04-20, 60 NRC 336 n.55 (2004)
- State challenges the sufficiency of DOE's production of documentary material and seeks to strike DOE's certification regarding the availability of its documentary material; LBP-04-20, 60 NRC 303 (2004)
- the Commission expects all participants to make a good faith effort to have made available all of the documentary material that may eventually be designated as Class 1 and Class 2 documentary material by the date specified for initial compliance; LBP-04-20, 60 NRC 323 n.43 (2004)
- the phrase "make available" leaves DOE free to make its documents available via whatever method it chooses, so long as they may be indexed by the agency's central Licensing Support Network site; LBP-04-20, 60 NRC 329 (2004)
- 10 C.F.R. 2.1003(a)(1)
- DOE must make all documentary material available; LBP-04-20, 60 NRC 307, 311 (2004)

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- 10 C.F.R. 2.1003(a)(1) and (2)
the full text or image of each document, together with an electronic bibliographic header, must be made available for every document; LBP-04-20, 60 NRC 311 (2004)
- 10 C.F.R. 2.1003(a)(3) and (4)
if it is technically infeasible to make the full text or image electronically available, or if the participant claims that a document is privileged, only a header need be provided; LBP-04-20, 60 NRC 311 (2004)
- 10 C.F.R. 2.1003(a)(4)
a participant need provide only the header, but not the text, of documentary material for which a claim of privilege is asserted, which constitutes confidential financial or commercial information, or which constitutes safeguards information; LBP-04-20, 60 NRC 311 n.21 (2004)
- 10 C.F.R. 2.1003(e)
documents created before a party's initial certification are not covered by the duty to supplement them; LBP-04-20, 60 NRC 327 (2004)
each party shall continue to supplement its documentary material with any additional material created after the time of its initial certification; LBP-04-20, 60 NRC 312, 327 (2004)
- 10 C.F.R. 2.1004
a participant may request that another participant produce a document and that document must be produced within 5 days; LBP-04-20, 60 NRC 328 (2004)
- 10 C.F.R. 2.1005
documentary material excludes reference books, financial and procurement material, copyrighted material, and other similar material; LBP-04-20, 60 NRC 312 (2004)
- 10 C.F.R. 2.1009
DOE's document production did not satisfy its obligation to make, in good faith, all of its documentary material available; LBP-04-20, 60 NRC 310 (2004)
- 10 C.F.R. 2.1009(a)(2)
DOE must establish procedures to implement the requirements in section 2.1003; LBP-04-20, 60 NRC 338 (2004)
no particular wording is prescribed for the certification, each potential party simply being directed to establish procedures to implement the requirements in section 2.1003, and to have a responsible official certify to the pre-application presiding officer that the procedures have been implemented and that to the best of his or her knowledge, the documentary material specified in section 2.1003 has been identified and made electronically available; LBP-04-20, 60 NRC 313 (2004)
- 10 C.F.R. 2.1009(b)
a good-faith and reasonably complete document production requires that DOE finish its own privilege review process before certifying; LBP-04-20, 60 NRC 321 (2004)
a participant must certify that the documentary material specified in section 2.1003 has been identified and made electronically available; LBP-04-20, 60 NRC 312 (2004)
DOE can produce its documents whenever it is ready, but when it does, DOE must simultaneously certify that it has made its documents available; LBP-04-20, 60 NRC 306 (2004)
DOE is required to update its certification at the time DOE submits the license application; LBP-04-20, 60 NRC 327 (2004)
DOE must certify that procedures to implement the requirements in section 2.1003 have been implemented; LBP-04-20, 60 NRC 338 (2004)
DOE's documentary material must be indexed by the LSN Administrator before DOE can make an initial certification under; CLI-04-32, 60 NRC 472 (2004)
DOE's position that documentary material is "available" when DOE places the unindexed material on its own participant server is wholly inconsistent with the purpose of the Licensing Support Network, and DOE's assertions to the contrary are unavailing; LBP-04-20, 60 NRC 334 (2004)
for each party, a responsible official must certify that the documentary material specified in section 2.1003 has been identified and made electronically available; CLI-04-32, 60 NRC 470 (2004)
for purposes of "availability," documentary material must be indexed by the Licensing Support Network Administrator; LBP-04-20, 60 NRC 336 n.55 (2004)
no particular wording is prescribed for the certification, each potential party simply being directed to establish procedures to implement the requirements in section 2.1003, and to have a responsible official certify to the pre-application presiding officer that the procedures have been implemented and that to

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- the best of his or her knowledge, the documentary material specified in section 2.1003 has been identified and made electronically available; LBP-04-20, 60 NRC 313 (2004)
- when no pre-application presiding officer had yet been appointed, DOE appropriately directed its letter certifying the availability of documents for discovery to the Secretary of the Commission; LBP-04-20, 60 NRC 307 n.9 (2004)
- 10 C.F.R. 2.1010
- the pre-application presiding officer has the authority to regulate the conduct of the proceeding and the parties and to dispose of motions, as well as all the other general powers granted by; LBP-04-20, 60 NRC 310 (2004)
- 10 C.F.R. 2.1010(a)(1)
- the pre-application presiding officer is granted his authority solely for the purpose of ruling on disputes over the electronic availability of documents, including disputes relating to claims of privilege and those relating to the implementation of recommendations of the Advisory Review Panel; LBP-04-20, 60 NRC 309 (2004)
- 10 C.F.R. 2.1010(a)(2)
- the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel was designated as the pre-application presiding officer for high-level waste repository proceeding and is authorized to delegate that authority; LBP-04-20, 60 NRC 307 n.9 (2004)
- 10 C.F.R. 2.1010(b)
- the Board has the authority to order DOE to produce missing documents; LBP-04-20, 60 NRC 327 (2004)
- the pre-application presiding officer is granted his authority solely for the purpose of ruling on disputes over the electronic availability of documents, including disputes relating to claims of privilege and those relating to the implementation of recommendations of the Advisory Review Panel; LBP-04-20, 60 NRC 309 (2004)
- 10 C.F.R. 2.1010(e)
- the pre-application presiding officer possesses all the general powers specified in sections 2.319 and 2.321(c) that the pre-application presiding officer requires to carry out its responsibilities; LBP-04-20, 60 NRC 309 (2004)
- 10 C.F.R. 2.1011
- the Licensing Support Network is assumed to be the method for making documentary material available; LBP-04-20, 60 NRC 312 (2004)
- to expedite and to assist the Commission in achieving the 3-year deadline for the Yucca Mountain licensing proceeding, a Web-based system for making documents electronically available to all participants was created; LBP-04-20, 60 NRC 304 (2004)
- 10 C.F.R. 2.1011(b)(2)(i)
- the Licensing Support Network is assumed to be the method for making documentary material available; LBP-04-20, 60 NRC 312 (2004)
- 10 C.F.R. 2.1011(c)(4)
- the importance of the Licensing Support Network is corroborated by the regulation establishing it; LBP-04-20, 60 NRC 330 (2004)
- the Licensing Support Network Administrator is tasked with coordinating the Licensing Support Network, identifying any problems regarding the integrity of the documentary material certified in accordance with section 2.1009(b) by the participants to be in the Licensing Support Network, and providing the pre-application presiding officer with recommendations to resolve disputes regarding the integrity of the documents; LBP-04-20, 60 NRC 308 (2004)
- the Licensing Support Network is assumed to be the method for making documentary material available; LBP-04-20, 60 NRC 312 (2004)
- 10 C.F.R. 2.1011(d)
- no issue lacking a direct relation to the Licensing Support Network is to be entertained by the pre-application presiding officer; LBP-04-20, 60 NRC 309 (2004)
- the pre-application presiding officer shall rule on any claim of document withholding except as otherwise provided by Commission order; LBP-04-20, 60 NRC 309 (2004)

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- 10 C.F.R. 2.1011(e)(2)(i)
the Licensing Support Network is assumed to be the method for making documentary material available; LBP-04-20, 60 NRC 312 (2004)
- 10 C.F.R. 2.1012
to ensure that its 3-year deadline is met, NRC requires that DOE and any other person concerned with Yucca Mountain participate in a document discovery phase lasting at least 6 months and preceding DOE's license application; LBP-04-20, 60 NRC 304 (2004)
- 10 C.F.R. 2.1012(a)
DOE must make its documents available 6 months before the application is docketed; LBP-04-20, 60 NRC 314 n.27 (2004)
the Commission will not docket the application until at least 6 months have elapsed from the time of DOE's certification that it has made all of its documentary materials electronically available; LBP-04-20, 60 NRC 305 (2004)
the Director of NMSS, not the Board, will make the ultimate determination as to the docketing of DOE's license application; LBP-04-20, 60 NRC 310 (2004)
there is, at a minimum, a 6-month window between DOE's next certification and NRC's docketing of a license application; CLI-04-32, 60 NRC 473 (2004)
- 10 C.F.R. 2.1012(b)
based on the date of the Presidential recommendation to use the Yucca Mountain site, DOE should have made its documents available on April 23, 2002; LBP-04-20, 60 NRC 314 n.27 (2004)
- 10 C.F.R. 2.1012(b)(1)
DOE cannot be denied party status for failing to meet the timeliness criterion because the applicant cannot be denied party status; LBP-04-20, 60 NRC 315 (2004)
- 10 C.F.R. Part 2, Subpart L
cross-examination by the parties is permitted, on motion, if the Board deems it necessary for the development of an adequate record; LBP-04-31, 60 NRC 693 (2004)
discovery is prohibited except for certain mandatory disclosures; LBP-04-31, 60 NRC 693 (2004)
parties file all direct and rebuttal testimony in written form; LBP-04-31, 60 NRC 693 (2004)
the Board conducts oral hearings during which it interrogates the witnesses; LBP-04-31, 60 NRC 693 (2004)
- 10 C.F.R. 2.1203
under new adjudicatory rules, most proceedings are less formal than previously, and instead of discovery, the NRC Staff will compile a hearing file; CLI-04-21, 60 NRC 30 n.23 (2004)
- 10 C.F.R. 2.1204(b)
cross-examination is permitted when necessary to ensure development of an adequate record for decision; LBP-04-31, 60 NRC 698 (2004)
- 10 C.F.R. 2.1204(b)(3)
availability of cross-examination is equivalent to the APA § 556(d) provision for such cross-examination as may be required for a full and true disclosure of the facts, for on-the-record adjudicatory hearings; LBP-04-31, 60 NRC 709 (2004)
complexity may be a factor in determining whether cross-examination is needed to ensure the development of an adequate record; LBP-04-31, 60 NRC 696 n.12 (2004)
factual disputes, even where eyewitness credibility is not an issue, may justify cross-examination; LBP-04-31, 60 NRC 698 (2004)
if there are circumstances in any proceeding where the presiding officer believes that cross-examination by the parties is needed to develop an adequate record, the presiding officer may authorize it; LBP-04-31, 60 NRC 709 (2004)
the opportunity for cross-examination under this regulation is consistent with the State's reasonable opportunity to interrogate witnesses under AEA § 274(i); LBP-04-31, 60 NRC 691, 708-11 (2004)
- 10 C.F.R. 2.1205(h)
in proceedings involving nonpower reactors or materials licenses, individuals not having presumptive standing may demonstrate standing based on establishing a viable potential pathway for injury-in-fact and addressing the factors set out in; LBP-04-24, 60 NRC 487 (2004)

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- 10 C.F.R. 2.1205(j)
after admitting intervenors, the presiding officer issued a formal *Federal Register* notice of hearing, since the NRC Staff had elected not to do so, as required under; LBP-04-24, 60 NRC 479 (2004)
- 10 C.F.R. 2.1205(m) (2004)
the supplementation requirement of NEPA and the agency's environmental regulations is not abrogated by the Commission's practice rule authorizing the Staff to issue a license before the adjudication is commenced or completed; LBP-04-23, 60 NRC 450 n.45 (2004)
- 10 C.F.R. 2.1213
although Staff may elect not to participate in a proceeding, the presiding officer may direct the Staff to participate as to both the legal and factual issues; LBP-04-24, 60 NRC 497 n.47 (2004)
- 10 C.F.R. 2.1233(a)
consideration of the merits will, at least initially, be based on the written presentations only; LBP-04-24, 60 NRC 497 (2004)
petitioners who wish to move forward with litigation must file written presentations of their arguments and documentary data, informational material, and other supporting written evidence; LBP-04-24, 60 NRC 489 (2004)
petitioners' written presentations must be done at the time or times and in the sequence the presiding officer establishes by appropriate order; LBP-04-24, 60 NRC 489 (2004)
to create a thorough record for decision, the presiding officer may request that intervenors address specific questions; LBP-04-24, 60 NRC 490 (2004)
- 10 C.F.R. 2.1233(c)
petitioners must describe in detail any deficiency or omission in the license application, give a detailed statement of reasons why any particular sections or portions are deficient or why an omission is material, and describe in detail what relief is sought with respect to each deficiency or omission; LBP-04-24, 60 NRC 489 (2004)
- 10 C.F.R. 2.1235(a)
if, after review of written presentations, the presiding officer finds that more information is needed, he will seek it by invoking the live witness procedures; LBP-04-24, 60 NRC 497 (2004)
- 10 C.F.R. 2.1239
a challenge to the facility design as untried or untested, uncoupled with a claim that the design fails to meet the applicable regulations, might be viewed as an impermissible collateral attack on NRC regulations; LBP-04-24, 60 NRC 508 (2004)
a party may not challenge a Commission regulation in a licensing proceeding; LBP-04-24, 60 NRC 492 (2004)
to the extent that a concern puts forward an overly generalized claim of inadequate regulation, it seems to present a challenge to the Commission's regulations that may not be entertained in NRC proceedings; LBP-04-24, 60 NRC 508 (2004)
- 10 C.F.R. 2.1239(b)
a party may petition that a regulation not be applied in certain instances; LBP-04-24, 60 NRC 492 (2004)
petitioners have failed to present the special circumstances required to justify a certification to the Commission regarding the potential waiver of 10 C.F.R. 30.35; LBP-04-24, 60 NRC 494 (2004)
to avoid a regulation's ordinary impact, a party must demonstrate that special circumstances exist so that application of the regulation to the subject matter of the proceeding would not serve the purposes for which the regulation was adopted; LBP-04-24, 60 NRC 492 (2004)
- 10 C.F.R. 2.1241
a licensing board finds the provisions of a settlement agreement to be consistent with the public interest; LBP-04-30, 60 NRC 667 (2004)
- 10 C.F.R. Part 20
contention alleging that the license termination plan is deficient in that it does not characterize groundwater and subsurface soil contamination on the site to the extent necessary to provide the required assurance that standards will be met is admitted; LBP-04-27, 60 NRC 546 (2004)
- 10 C.F.R. 20.1101(b)
discharge and dosage information are needed prior to and during operations of a uranium processing facility; LBP-04-14, 60 NRC 61 (2004)

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- 10 C.F.R. Part 20, Subpart E
contention alleges that the license termination plan is deficient because Licensee had failed to provide documentation of the source, cause, and plan for remediation of the current high levels of tritium contamination in the groundwater onsite; LBP-04-27, 60 NRC 543 (2004)
contention that addresses Licensee's failure to identify and characterize mixed waste in the groundwater onsite is inadmissible because it raises matters outside of the scope of a license termination plan proceeding; LBP-04-27, 60 NRC 546 (2004)
issues pertaining to the nonradiological groundwater quality are outside of the scope of a license termination plan proceeding; LBP-04-27, 60 NRC 546 (2004)
- 10 C.F.R. 30.7
a petition that addresses risks associated with exposures to radiation is not litigable in a proceeding that concerns violations of the employee protection rule; LBP-04-16, 60 NRC 106 (2004)
licensee is subject to additional planning and training requirements intended to ensure that responsible licensee personnel comply with the agency's employee protection standards; LBP-04-16, 60 NRC 120 (2004)
NRC's role is to procure corrective action for the Licensee's program, and by example, other licensees' programs, not to provide redress for the whistleblower; CLI-04-26, 60 NRC 407 (2004)
- 10 C.F.R. 30.7(a)
licensees are prohibited from discriminating against an employee for engaging in certain types of protected activities; LBP-04-16, 60 NRC 103 n.4 (2004)
- 10 C.F.R. 30.10
a remedy designed to educate the Licensee and prevent future retaliation against whistleblowers is appropriate even in a case of deliberate discrimination; CLI-04-26, 60 NRC 410 (2004)
- 10 C.F.R. 30.11(a)
NRC may exempt a licensee from the requirements of section 30.35 if it determines that an exemption is authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest; LBP-04-25, 60 NRC 519, 525, 527, 528, 529 (2004)
- 10 C.F.R. 30.33
on finding that a materials license application satisfies the applicable standards, a single license will be issued authorizing receipt, possession, use, delivery, and transfer of byproduct, source, and special nuclear material in the uranium enrichment facility as well as construction and operation of the plant; CLI-04-30, 60 NRC 427, 428 (2004)
- 10 C.F.R. 30.35
consideration of concerns over the sufficiency of the decommissioning bond and the absence of a decommissioning plan for the facility are deferred; LBP-04-24, 60 NRC 491 (2004)
contention challenging sufficiency of cost estimates for decommissioning funding plan is admitted; LBP-04-14, 60 NRC 68 (2004)
petitioners have failed to present the special circumstances required to justify a certification to the Commission regarding the potential waiver of; LBP-04-24, 60 NRC 494, 497 (2004)
the food irradiator is embraced within the category of facilities contemplated during the formation of the decommissioning bond regulations; LBP-04-24, 60 NRC 494 (2004)
- 10 C.F.R. 30.35(e)
licensees are required to submit a plan containing a cost estimate for decommissioning; LBP-04-25, 60 NRC 519 (2004)
- 10 C.F.R. 30.35(f)(1)-(2)
licensees must certify that financial assurance for the estimated cost of decommissioning is provided by prepayment of necessary money into a segregated fund or a surety, insurance, or other guarantee method; LBP-04-25, 60 NRC 519 (2004)
- 10 C.F.R. Part 40
Th-232 is source material that has a low specific activity and is very hard to disperse and Ac-227 is very scarce, and thus the possession limits for a radioactive waste storage operation are set accordingly; DD-04-4, 60 NRC 394 (2004)
- 10 C.F.R. 40.32
on finding that a materials license application satisfies the applicable standards, a single license will be issued authorizing receipt, possession, use, delivery, and transfer of byproduct, source, and special

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- nuclear material in the uranium enrichment facility as well as construction and operation of the plant;
CLI-04-30, 60 NRC 427, 428 (2004)
- 10 C.F.R. 40.32(c)
storage of highly dangerous depleted uranium waste over a 30-year period may pose a threat to the
protection of health and property; LBP-04-14, 60 NRC 59 (2004)
- 10 C.F.R. 40.32(d)
applicant's proposed plan for storage of depleted uranium waste is not sufficiently detailed and does not
demonstrate that issuance of a license will not be inimical to the health and safety of the public;
LBP-04-14, 60 NRC 59 (2004)
- 10 C.F.R. 40.36
contention challenging sufficiency of cost estimates for decommissioning funding plan is admitted;
LBP-04-14, 60 NRC 68 (2004)
- 10 C.F.R. Part 40, Appendix A, Criterion 9
a licensee is not required to actually obtain cost estimates from an independent contractor, but the
estimates must take into account the costs associated with hiring an independent contractor to restore a
site; CLI-04-33, 60 NRC 602 (2004)
- actual surety arrangements need not be made until before operations begin; CLI-04-33, 60 NRC 594 n.53
(2004)
- cost estimates must be explained and reasonable, and need only take into account reasonable,
commonsense judgments on costs one would incur in hiring an independent contractor; CLI-04-33, 60
NRC 602 (2004)
- financial assurance plans are not intended to cover every imaginable circumstance; CLI-04-33, 60 NRC
603 (2004)
- licensee is required to update and the NRC is to review the surety for site restoration annually;
CLI-04-33, 60 NRC 594 n.52 (2004)
- 10 C.F.R. 50.5
Staff imposes a civil penalty of \$110,000 for discrimination by managers against an employee for
engagement in protected activities; LBP-04-26, 60 NRC 533, 535 (2004)
- 10 C.F.R. 50.7
discrimination against an employee on account of his whistleblowing activities is a violation of;
LBP-04-26, 60 NRC 533, 535 (2004)
- employers are prohibited from discriminating against employees for engaging in protected activities;
CLI-04-24, 60 NRC 183, 185 (2004)
- were mere involvement to qualify as protected activity, then any employee who had participated in the
resolution of any nuclear issue and who disagreed with a subsequent personnel action could initiate a
claim without having engaged in whistleblowing activity; CLI-04-24, 60 NRC 212 (2004)
- 10 C.F.R. 50.7(a)
protected activities include providing the Congress, the Commission, or the employee's company with
information about alleged violations of the Atomic Energy Act; CLI-04-24, 60 NRC 183 (2004)
- to demonstrate a whistleblower violation, NRC Staff must show a licensee employee engaged in protected
activity and adverse personnel action against the employee because of the protected activity; CLI-04-24,
60 NRC 183 (2004)
- 10 C.F.R. 50.7(a)(1)(i), (ii)
protected activity includes the acts of notifying an employer of an alleged violation and refusing to
engage in any practice made unlawful by the Energy Policy Act of 1992 or the Atomic Energy Act, if
the employee has identified the alleged illegality to the employer; CLI-04-24, 60 NRC 206 (2004)
- 10 C.F.R. 50.7(a)(1)(ii)
any refusal to engage in any practice made unlawful, if the employee has identified the alleged illegality
to the employer, is protected; CLI-04-24, 60 NRC 213 (2004)
- 10 C.F.R. 50.7(a)(1)(iv) and (v)
assisting others who engage in protected activities as well as any participation in protected activities is
covered under; CLI-04-24, 60 NRC 207 (2004)

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- 10 C.F.R. 50.7(a)(1)(v)
exclusively remedial activities do not fall within the bounds of protected activity since such purely remedial activities are hardly the kind that would be taken against the explicit or implicit directives or wishes of the employer; CLI-04-24, 60 NRC 209 (2004)
- 10 C.F.R. 50.7(d)
engaging in protected activities does not immunize employees from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations; CLI-04-24, 60 NRC 183, 192 (2004)
to demonstrate a whistleblower violation, NRC Staff must show a licensee employee engaged in protected activity and adverse personnel action against the employee because of the protected activity; CLI-04-24, 60 NRC 183 (2004)
- 10 C.F.R. 50.40(a)
applicant has shown, by a preponderance of the evidence, that there is reasonable assurance that its proposed use of the four MOX lead test assemblies in the plant will not endanger the health and safety of the public; LBP-04-32, 60 NRC 747 (2004)
there must be reasonable assurance that the activities at issue will not endanger the health and safety of the public; LBP-04-32, 60 NRC 721 (2004)
- 10 C.F.R. 50.46
both a "best estimate" LOCA analysis method and an Appendix K method are permitted; LBP-04-32, 60 NRC 725 (2004)
requirements that light-water reactors must meet with regard to their emergency core cooling systems relate specifically to boiling or pressurized light-water reactors that use low-enriched uranium fuel consisting of uranium oxide pellets within cylindrical zircaloy or ZIRLO cladding; LBP-04-32, 60 NRC 721 (2004)
results of the required LOCA analysis define the LOCA limits, or the allowable core power peaking limits, that are the constraints for meeting the requirements of; LBP-04-32, 60 NRC 724 (2004)
- 10 C.F.R. 50.46(a)(1)
it is generally appropriate to apply these requirements to MOX fuel, as long as Appendix K is not strictly applied to exclude consideration of relocation of the fuel during LOCAs; LBP-04-32, 60 NRC 721-22 (2004)
- 10 C.F.R. 50.46(a)(1)(i)
an emergency core cooling system must be designed so that its calculated cooling performance following postulated loss-of-coolant accidents meets certain criteria; LBP-04-32, 60 NRC 721, 726, 747 (2004)
emergency core cooling system performance and its ability to cool the fuel must be calculated by analyzing a number of postulated LOCAs with various characteristics sufficient to provide assurance that the most severe postulated LOCAs are calculated; LBP-04-32, 60 NRC 723 (2004)
- 10 C.F.R. 50.46(b)(1)
the calculated maximum fuel element cladding temperature, or peak cladding temperature, shall not exceed 2200°F in a reactor using mixed oxide fuel; LBP-04-32, 60 NRC 721, 726, 747 (2004)
- 10 C.F.R. 50.46(b)(2)
the calculated total oxidation of the fuel element cladding shall nowhere exceed 17% of the total cladding thickness before oxidation in a reactor using mixed oxide fuel; LBP-04-32, 60 NRC 721 (2004)
- 10 C.F.R. 50.46(b)(4)
calculated changes in core geometry shall be such that the core remains amenable to cooling in a reactor using mixed oxide fuel; LBP-04-32, 60 NRC 721, 747 (2004)
- 10 C.F.R. 50.52
contention alleges that the license termination plan is deficient because Licensee had failed to provide documentation of the source, cause, and plan for remediation of the current high levels of tritium contamination in the groundwater onsite; LBP-04-27, 60 NRC 543 (2004)
- 10 C.F.R. 50.57(a)(3)
applicant has shown, by a preponderance of the evidence, that there is reasonable assurance that its proposed use of the four MOX lead test assemblies in the plant will not endanger the health and safety of the public; LBP-04-32, 60 NRC 747 (2004)
State alleges that there is insufficient information to adequately bound the uncertainty associated with licensee's demonstration that the ECCS pumps, together with the requested credit for containment

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- overpressure, will provide adequate protection for the public health and safety; LBP-04-28, 60 NRC 562, 563 (2004)
- there must be reasonable assurance that the activities at issue will not endanger the health and safety of the public; LBP-04-32, 60 NRC 721 (2004)
- whether the use of the containment overpressure creates an inappropriate dependency or renders the proposed extended power uprate noncompliant with regulatory requirements is a legitimate issue of fact and law that is in genuine dispute and is material to the proceeding; LBP-04-28, 60 NRC 560 (2004)
- 10 C.F.R. 50.58(b)(6)
- NRC's no significant hazard consideration determination is not subject to review; LBP-04-28, 60 NRC 561 (2004)
- 10 C.F.R. 50.81
- creditor regulations shall apply to the creation of creditor interests in equipment, devices, or important parts thereof, capable of separating the isotopes of uranium or enriching uranium in the isotope U-235; CLI-04-30, 60 NRC 438 (2004)
- 10 C.F.R. 50.82
- contention alleges that the license termination plan is deficient because Licensee had failed to provide documentation of the source, cause, and plan for remediation of the current high levels of tritium contamination in the groundwater onsite; LBP-04-27, 60 NRC 543, 545 (2004)
- 10 C.F.R. 50.82(a)(9)
- all power reactor licensees must submit an application for termination of their licenses for facilities undergoing dismantlement and decommissioning; LBP-04-27, 60 NRC 540 (2004)
- 10 C.F.R. 50.82(a)(9)(ii)
- a license termination plan must include a site characterization, identification of remaining dismantlement activities, plans for site remediation, and detailed plans for the final radiation survey; LBP-04-27, 60 NRC 540, 544, 545 n.4 (2004)
- 10 C.F.R. 50.90
- applicant has shown, by a preponderance of the evidence, that there is reasonable assurance that its proposed use of the four MOX lead test assemblies in the plant will not endanger the health and safety of the public; LBP-04-32, 60 NRC 747 (2004)
- whenever a holder of a license wishes to amend the license, including technical specifications in the license, an application for amendment must be filed, fully describing the changes desired; LBP-04-32, 60 NRC 720-21 (2004)
- 10 C.F.R. 50.91(a)
- Staff determines that a license amendment request involves no significant hazards consideration, based on review of the Licensee's analysis submitted pursuant to; CLI-04-28, 60 NRC 413 (2004)
- 10 C.F.R. 50.92
- applicant has shown, by a preponderance of the evidence, that there is reasonable assurance that its proposed use of the four MOX lead test assemblies in the plant will not endanger the health and safety of the public; LBP-04-32, 60 NRC 747 (2004)
- contention that containment overpressure credit undermines or defeats licensee's demonstration that the proposed extended power uprate will not create a significant hazard is not material to the proceeding; LBP-04-28, 60 NRC 560 (2004)
- contention that uncertainties in using containment overpressure credit mean that the no significant hazard consideration analysis in the application is inadequate raises a procedural issue that is not material to the proceeding; LBP-04-28, 60 NRC 564 (2004)
- 10 C.F.R. 50.92(a)
- determinations on whether to grant a license amendment application are to be guided by the considerations that govern the issuance of initial licenses or construction permits to the extent applicable and appropriate; LBP-04-32, 60 NRC 721 (2004)
- the only purpose of the analysis of the no significant hazard consideration in the application is to assist the Staff in deciding whether an opportunity for a hearing must be provided before or after any amendment that might be granted; LBP-04-28, 60 NRC 561 (2004)
- 10 C.F.R. 50.92(c)
- a notice describing in detail the NRC Staff's reasons for concluding that an amendment request involves no significant hazards consideration is adequate; CLI-04-28, 60 NRC 414 (2004)

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- 10 C.F.R. 50.109
the backfitting rule does not apply where licensee has voluntarily requested the proposed license amendment; LBP-04-28, 60 NRC 564 (2004)
- 10 C.F.R. 50.109(a)(2), (3)
NRC is prohibited from imposing new or amended licensing standards on existing licensees except under limited circumstances; LBP-04-28, 60 NRC 566 (2004)
the incompatibility standard is not a cost-benefit analysis, nor can it be used to impose more stringent requirements merely because they seem like a good idea or are somehow linked or related to the proposed amendment; LBP-04-28, 60 NRC 566 (2004)
- 10 C.F.R. Part 50, Appendix A, GDC 44
licensee is required to have at least two emergency core cooling systems, each with a capability for accomplishing abundant emergency core cooling; LBP-04-28, 60 NRC 560 (2004)
- 10 C.F.R. Part 50, Appendix A, GDC 44, 52
whether the use of the containment overpressure creates an inappropriate dependency or renders the proposed extended power uprate noncompliant with regulatory requirements is a legitimate issue of fact and law that is in genuine dispute and is material to the proceeding; LBP-04-28, 60 NRC 560 (2004)
- 10 C.F.R. Part 50, Appendix K
licensee incorporated unirradiated cladding properties to maximize the predicted strain in its LOCA analysis; LBP-04-32, 60 NRC 728 (2004)
NRC does not require modeling of fuel relocation under; LBP-04-32, 60 NRC 737 (2004)
- 10 C.F.R. Part 50, Appendix K, § I.A.4
a required feature of emergency core cooling system evaluation models includes assuming the heat generation rates from radioactive decay of fission products to be equal to 1.2 times the values for infinite operating time in the ANS Standard; LBP-04-32, 60 NRC 722 n.30, 747 (2004)
- 10 C.F.R. Part 50, Appendix K, § I.A.5
a required feature of emergency core cooling system evaluation models includes calculation of the rate of energy release, hydrogen generation, and cladding oxidation from the metal/water reaction, using the Baker-Just equation; LBP-04-32, 60 NRC 722 n.30, 747 (2004)
- 10 C.F.R. Part 50, Appendix K, § I.B
a required feature of emergency core cooling system evaluation models includes a provision for predicting cladding swelling and rupture in each evaluation model; LBP-04-32, 60 NRC 722 n.30, 747 (2004)
- 10 C.F.R. Part 51
applicant's environmental report and the Staff's associated EIS are to include a statement on the alternatives to the proposed action, including a discussion of the no-action alternative; CLI-04-30, 60 NRC 437 (2004)
contention challenging the environmental report's failure to evaluate the environmental effects of construction and operation of a deconversion facility is sufficient to establish a genuine material dispute adequate to warrant further inquiry; LBP-04-14, 60 NRC 67-68 (2004)
in a hearing on the license application for a uranium enrichment facility the matters of fact and law to be considered are whether the application satisfies the standards set forth in; CLI-04-30, 60 NRC 428 (2004)
- 10 C.F.R. 51.10
an NRC adjudicatory proceeding is not the proper forum for seeking to litigate and resolve controversies about other governmental agencies' permitting authority; LBP-04-18, 60 NRC 271 (2004)
- 10 C.F.R. 51.23(a)
petitioners may not raise issues that have been generically addressed by the Commission through the Waste Confidence Rule; LBP-04-17, 60 NRC 247 (2004); LBP-04-18, 60 NRC 269 (2004); LBP-04-19, 60 NRC 296 (2004)
- 10 C.F.R. 51.23(b)
an FEIS for an ISFSI will address environmental impacts of spent fuel storage only for the term of the license applied for; CLI-04-22, 60 NRC 147, 148 (2004)
- 10 C.F.R. 51.45
petitioners contend that the environmental report in the application does not contain a complete or adequate assessment of the potential environmental impacts of the proposed project on ground and surface water; LBP-04-14, 60 NRC 66 (2004)

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- petitioners contend that the environmental report does not contain a complete or adequate assessment of the potential environmental impacts of accidents involving natural gas transmission facilities; LBP-04-14, 60 NRC 70 (2004)
- 10 C.F.R. 51.45(d)
an applicant seeking a license renewal must list all federal permits, licenses, approvals, and other entitlements that must be obtained in connection with the proposed action, but the applicant need not actually possess such permits at the time of application; LBP-04-15, 60 NRC 93 (2004)
- 10 C.F.R. 51.53(c)(3)(ii)(B)
an applicant is required to either provide a copy of its Clean Water Act § 3.16(b) determination or its Clean Water Act § 316(a) variance or, if it cannot, to address entrainment and impingement; LBP-04-15, 60 NRC 94 (2004)
- 10 C.F.R. 51.92
Staff need not prepare a supplement to an FEIS unless it has first determined that a supplement is warranted; CLI-04-39, 60 NRC 661 (2004)
- 10 C.F.R. 51.92(a)
a final environmental impact statement must be supplemented if there exists significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts; LBP-04-23, 60 NRC 448 (2004)
the supplementation requirement of NEPA and the agency's environmental regulations is not abrogated by the Commission's practice rule authorizing the Staff to issue a license before the adjudication is commenced or completed; LBP-04-23, 60 NRC 450 n.45 (2004)
- 10 C.F.R. 51.97(a)
the Commission is allowed to determine that in a particular situation the final environmental impact statement should address environmental impacts of fuel storage beyond the term of the license sought; CLI-04-22, 60 NRC 148 (2004)
the principle that economic benefits must be weighed against environmental costs does not transform those economic benefits into environmental impacts; CLI-04-22, 60 NRC 146 (2004)
- 10 C.F.R. 52.17(a)(2)
applicant has elected to develop and employ a plant parameters envelope to establish the bounding severe accident consequences that would be associated with the reactor it eventually elects to construct on the site; LBP-04-19, 60 NRC 295 (2004)
consideration of the need for power is not required in an environmental report associated with an early site permit; LBP-04-17, 60 NRC 245 (2004); LBP-04-19, 60 NRC 295 (2004)
- 10 C.F.R. 52.17(b)(1)
an early site permit applicant must address unique physical characteristics of the site in its EP, but the financial capabilities of organizations responsible for operation and maintenance of local infrastructure are not physical characteristics within the meaning of; LBP-04-19, 60 NRC 297 (2004)
- 10 C.F.R. 52.18
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- 10 C.F.R. 61.2
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- 10 C.F.R. Part 70
financial qualifications for enrichment facility license applications is governed by; CLI-04-30, 60 NRC 437 (2004)
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- 10 C.F.R. 70.22(a)(8)
financial criteria can be met by conditioning the enrichment facility license to require funding commitments to be in place prior to construction and operation; CLI-04-30, 60 NRC 437 (2004)
- 10 C.F.R. 70.23
on finding that a materials license application satisfies the applicable standards, a single license will be issued authorizing receipt, possession, use, delivery, and transfer of byproduct, source, and special nuclear material in the uranium enrichment facility as well as construction and operation of the plant; CLI-04-30, 60 NRC 427, 428 (2004)

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- 10 C.F.R. 70.23(a)(5)
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- 10 C.F.R. 70.23a
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- 10 C.F.R. 70.25
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- 10 C.F.R. 70.32(k)
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- 10 C.F.R. 70.40
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- 10 C.F.R. 70.44
creditor regulations may be augmented by license conditions as necessary to allow ownership arrangements (such as sale and leaseback) not covered by section 50.81, provided it can be found that such arrangements are not inimical to the common defense and security of the United States; CLI-04-30, 60 NRC 438 (2004)
creditor regulations shall apply to the creation of creditor interests in special nuclear material; CLI-04-30, 60 NRC 438 (2004)
- 10 C.F.R. 72.52(f)(1)-(2)
under certain circumstances, the Commission may grant a request to delay or postpone initiation of the decommissioning process or approve an alternate schedule for submittal of the final decommissioning plan; CLI-04-22, 60 NRC 149 (2004)
- 10 C.F.R. 72.54(j)
the requirement that decommissioning should be completed within 24 months after the Commission approves the decommissioning plan is waived where appropriate; CLI-04-22, 60 NRC 149 (2004)
- 10 C.F.R. 72.54(j), (k)
decommissioning must be completed within 24 months after the Commission approves a decommissioning plan, unless the Commission determines that another schedule is appropriate under the circumstances; CLI-04-22, 60 NRC 144 n.78 (2004)
- 10 C.F.R. 72.54(k)
the requirement that decommissioning should be completed within 24 months after the Commission approves the decommissioning plan is waived where appropriate; CLI-04-22, 60 NRC 149 (2004)
- 10 C.F.R. 72.54(k)(1)
technical infeasibility is grounds for an extension of decommissioning; CLI-04-22, 60 NRC 144 n.78 (2004)
- 10 C.F.R. 72.106
even if the entire surface of a canister were contaminated and all contamination was released into the atmosphere at once, the estimated dose to an individual located at the boundary of the facility would be well below regulatory limits; CLI-04-22, 60 NRC 135 (2004)
- 10 C.F.R. 73.1
for Category I facilities, the revised design basis threat supercedes the design basis threat specified in; CLI-04-19, 60 NRC 10, 12 (2004)

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- 10 C.F.R. 73.1(a)
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- 10 C.F.R. 73.1(a)(1)
design basis threats for radiological sabotage for Category I nuclear facilities are described; CLI-04-19, 60 NRC 9 n.13 (2004)
guidance documents interpreting this regulation's application to large Category I fuel cycle facilities are so remote from the security issues surrounding the proposed MOX amendment that it is not "indispensable" for intervenor to obtain those documents in discovery; CLI-04-29, 60 NRC 425 (2004)
NRC security regulations, by design, lack specificity in describing the adversary characteristics for a licensee to use to evaluate and implement its physical protection programs; CLI-04-29, 60 NRC 423 n.28 (2004)
the purpose of a classified guidance document relating to the design basis threat for radiological sabotage is to provide clarification and guidance in light of the lack of specificity in this regulation; LBP-04-21, 60 NRC 372 (2004)
- 10 C.F.R. 73.1(a)(2)
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NRC security regulations, by design, lack specificity in describing the adversary characteristics for a licensee to use to evaluate and implement its physical protection programs; CLI-04-29, 60 NRC 423 n.28 (2004)
- 10 C.F.R. 73.2
a formula quantity means strategic special nuclear material in any combination in a quantity of 5,000 grams or more computed by the formula, grams = (grams contained U-235) + 2.5 (grams U-233 + grams plutonium); CLI-04-19, 60 NRC 7 (2004); CLI-04-29, 60 NRC 421 n.15 (2004)
statements to a reporter attributed to a former licensee employee contain safeguards information; CLI-04-34, 60 NRC 609 (2004)
strategic special nuclear material is defined as uranium-235 (contained in uranium enriched to 20% or more in the U-235 isotope), uranium-233, or plutonium; CLI-04-29, 60 NRC 421 n.15 (2004)
- 10 C.F.R. 73.5
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- 10 C.F.R. 73.6(b)
spent fuel is exempted because its special nuclear material is not readily separable from other radioactive material and has a total external radiation dose rate in excess of 100 rems per hour at a distance of 3 feet from any accessible surface without intervening shielding; CLI-04-19, 60 NRC 8 n.11 (2004)
- 10 C.F.R. 73.20, 73.45
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- 10 C.F.R. 73.21
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- 10 C.F.R. 73.21(c)(1)
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- 10 C.F.R. 73.21(c)(2)
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- 10 C.F.R. 73.45, 73.46
although they possess formula quantities of strategic special nuclear material, commercial nuclear reactors are not considered Category I facilities and are exempt from the requirements of; CLI-04-19, 60 NRC 8 n.11, 11 (2004)

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- 10 C.F.R. 73.46
for exemptions from this section, applicant must show the exemptions are authorized by law, will not constitute an undue risk to the common defense and security, and otherwise would be consistent with law and the public interest; LBP-04-21, 60 NRC 369 (2004)
- 10 C.F.R. 73.81
criminal penalties may be imposed for a willful violation of the disclosure provisions of 10 C.F.R. 73.21; CLI-04-34, 60 NRC 610 (2004)
- 10 C.F.R. Part 95
any person who requires possession of classified information in connection with the licensing proceeding may process, store, reproduce, transmit, or handle classified information only in a location for which facility security approval has been obtained from the NRC's Division of Nuclear Security; CLI-04-30, 60 NRC 439 (2004)
- 10 C.F.R. 100.20(c)
an early site permit applicant must address unique physical characteristics of the site in its plan, but the financial capabilities of organizations responsible for operation and maintenance of local infrastructure are not physical characteristics within the meaning of; LBP-04-19, 60 NRC 297 (2004)
- 10 C.F.R. 100.21(f)
requirements that site characteristics be such that adequate security plans and measures can be developed do not apply to an early site permit application; LBP-04-17, 60 NRC 244 (2004); LBP-04-18, 60 NRC 268 (2004); LBP-04-19, 60 NRC 292 (2004)
- 28 C.F.R. 50.10(a)
DOJ guidelines require that, in enforcing subpoenas on the press, the agency strike a proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement; CLI-04-34, 60 NRC 613, 614 (2004)
- 28 C.F.R. 50.10(b)
DOJ guidelines require that, in enforcing subpoenas on the press, all reasonable attempts be made to obtain the information from alternative sources; CLI-04-34, 60 NRC 613, 614 (2004)
- 28 C.F.R. 50.10(c)
DOJ guidelines require that, in enforcing subpoenas on the press, negotiations shall be pursued with the media; CLI-04-34, 60 NRC 613, 614 (2004)
- 28 C.F.R. 50.10(f)(1)-(2)
DOJ guidelines require that, in enforcing subpoenas on the press, the information sought should be essential to the case, whether it is criminal or civil; CLI-04-34, 60 NRC 613 (2004)
- 28 C.F.R. 50.10(f)(2)
a subpoena is enforceable if the information sought is essential to the case; CLI-04-34, 60 NRC 614 (2004)
- 28 C.F.R. 50.10(f)(4)
DOJ guidelines require that, in enforcing subpoenas on the press, the information sought should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information; CLI-04-34, 60 NRC 613, 614 (2004)
- 28 C.F.R. 50.10(n)
DOJ guidelines are not intended to create or recognize any legally enforceable right in any person; CLI-04-34, 60 NRC 613 (2004)
- 40 C.F.R. 1502.9(c)(1)(ii) (2004)
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- 55 U.S.C. 4331(b)(1)
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- Act of Nov. 6, 1978, Pub. L. No. 95-601, § 10, 1978 U.S.C.C.A.N. (92 Stat.) 2947, 2951 (codified at 42 U.S.C. § 5851)
Congress, when enacting the whistleblower protection provisions of the Energy Reorganization Act, inadvertently identified the section as 210, although another statutory provision had already been assigned that same section number; CLI-04-24, 60 NRC 185 (2004)
- Act of Oct. 24, 1992, § 2902, Pub. L. No. 102-486, 1992 U.S.C.C.A.N. (106 Stat.) 3123, 3124 (codified at 42 U.S.C. § 5851)
Congress corrected its error in numbering the whistleblower protection provisions of the Energy Reorganization Act by changing the new section 210 to 211; CLI-04-24, 60 NRC 185 (2004)
- Act of Oct. 24, 1992, § 2902(d), Pub. L. No. 102-486, 1992 U.S.C.C.A.N. (106 Stat.) 3124 (codified at 42 U.S.C. § 5851(b)(3))
a complainant in a whistleblowing proceeding must show that one or more protected activities was a contributing factor in the adverse action; CLI-04-24, 60 NRC 186 (2004)
- Administrative Procedure Act, 5 U.S.C. § 556
there is no explicit right to discovery under; LBP-04-31, 60 NRC 698 n.15 (2004)
- Administrative Procedure Act, 5 U.S.C. § 557(c)
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- Atomic Energy Act, 42 U.S.C. §§ 2000d, 2206
protected activities include providing the Congress, the Commission, or the employee's company with information about alleged violations of the Atomic Energy Act; CLI-04-24, 60 NRC 183 (2004)
- Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*
the Commission has authority to take action against licensees but not to provide a personal remedy for employees who experience discrimination; CLI-04-26, 60 NRC 407 (2004)
- Atomic Energy Act, 11s, 42 U.S.C. § 2014(s)
a "person" is defined as any individual, corporation, partnership, firm, association, trust, estate, public or private institution, legal successor, representative, agent, or agency of the foregoing; CLI-04-34, 60 NRC 612 (2004)
- Atomic Energy Act, 53
a hearing on the license application for a uranium enrichment facility will be held under the authority of; CLI-04-30, 60 NRC 428 (2004)
a uranium enrichment facility is not a production and utilization facility and thus NRC does not have antitrust responsibilities; CLI-04-30, 60 NRC 438 (2004)
- Atomic Energy Act, 42 U.S.C. § 2077
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- Atomic Energy Act, 63
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- Atomic Energy Act, 105
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- Atomic Energy Act, 147a, 42 U.S.C. § 2167
- statements to a reporter attributed to a former licensee employee contains safeguards information; CLI-04-34, 60 NRC 609 (2004)
- Atomic Energy Act, 147b, 42 U.S.C. § 2273
- criminal penalties may be imposed for a willful violation of the disclosure provisions of 10 C.F.R. 73.21; CLI-04-34, 60 NRC 610 (2004)
- Atomic Energy Act, 42 U.S.C. §§ 2201-2297(h)-13
- protected activities include providing the Congress, the Commission, or the employee's company with information about alleged violations of; CLI-04-24, 60 NRC 183 (2004)
- Atomic Energy Act, 161c, 42 U.S.C. § 2201(c)
- an NRC investigation is proper if it assists the NRC in exercising its statutory authority; CLI-04-34, 60 NRC 612 (2004)
- NRC has authority to administer oaths and affirmations and, by subpoena, to require any person to appear and testify or appear and produce documents, or both, at any designated place; CLI-04-34, 60 NRC 612 (2004)
- Atomic Energy Act, 184
- creditor regulations shall apply to the creation of creditor interests in equipment, devices, or important parts thereof, capable of separating the isotopes of uranium or enriching uranium in the isotope U-235; CLI-04-30, 60 NRC 438 (2004)
- Atomic Energy Act, 189
- a hearing on the license application for a uranium enrichment facility will be held under the authority of; CLI-04-30, 60 NRC 428 (2004)
- Atomic Energy Act, 189a, 42 U.S.C. § 2239(a)
- a hearing is required for any person affected by a proceeding; LBP-04-16, 60 NRC 115 n.80 (2004)
- authority to define the scope of a proceeding resides with the Commission; LBP-04-16, 60 NRC 112 (2004)
- judicial precepts of standing have long been the hallmark of NRC adjudications; LBP-04-16, 60 NRC 120 (2004)
- NRC rejects its prior interpretation that petitioners are entitled to conduct discovery and cross-examination in an adjudicatory proceeding; LBP-04-31, 60 NRC 696-97 (2004)
- the only purpose of the analysis of the no significant hazard consideration in the application is to assist the Staff in deciding whether an opportunity for a hearing must be provided before or after any amendment that might be granted; LBP-04-28, 60 NRC 561 (2004)
- Atomic Energy Act, 191
- a hearing on the license application for a uranium enrichment facility will be held under the authority of; CLI-04-30, 60 NRC 428 (2004)
- Atomic Energy Act, 193
- a hearing on the license application for a uranium enrichment facility will be conducted according to the rules of procedure in 10 C.F.R. Part 2, Subparts A, C, G, and to the extent that classified information becomes involved, Subpart I; CLI-04-30, 60 NRC 428 (2004)
- Atomic Energy Act, 193(c)
- prior to commencement of operations of the uranium enrichment facility, NRC will verify through inspection that the facility has been constructed in accordance with the requirements of the license for such construction and operation; CLI-04-30, 60 NRC 427 (2004)
- Atomic Energy Act, 193(f)
- requirements addressing foreign ownership, control, and domination of enrichment facilities are incorporated in 10 C.F.R. 70.40; CLI-04-30, 60 NRC 438 (2004)
- Atomic Energy Act, 223, 42 U.S.C. § 2273
- criminal penalties may be imposed for a willful violation of the disclosure provisions of 10 C.F.R. 73.21; CLI-04-34, 60 NRC 610 (2004)

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- Atomic Energy Act, 234b, 42 U.S.C. § 2282(b)
basic principles of fairness require that the licensee in an enforcement action know the bases underlying the Staff's finding of violation; CLI-04-24, 60 NRC 202 (2004)
Staff's argument that licensee had an opportunity at hearing to rebut the Staff's new "protected activity" claims fails to carry the day because Staff deprived licensee of an opportunity to make its case to the NRC enforcement staff prior to hearing; CLI-04-24, 60 NRC 206 n.109 (2004)
- Atomic Energy Act, 274c(1)
the Commission is to retain authority and responsibility for the regulation of uranium enrichment facilities; CLI-04-30, 60 NRC 436 (2004)
- Atomic Energy Act, 274(l), 42 U.S.C. § 2021(l)
a license amendment application for a 20% increase in maximum power clearly falls within the scope of; LBP-04-31, 60 NRC 706 n.22 (2004)
the opportunity for cross-examination under 10 C.F.R. 2.1204(b)(3) is consistent with the State's reasonable opportunity to interrogate witnesses under; LBP-04-31, 60 NRC 690, 708-11 (2004)
- Civil Rights Act, Title VII, 42 U.S.C. §§ 2000(e) *et seq.*
Staff could supplement its Notice of Violation or its enforcement order, just as complainants regularly supplement their discrimination claims under; CLI-04-24, 60 NRC 205 (2004)
- Corporate and Criminal Fraud Accountability Act of 2002, 18 U.S.C. § 1514A
a complainant in a whistleblowing proceeding must show that one or more protected activities was "a contributing factor" in the adverse action; CLI-04-24, 60 NRC 196 (2004)
- Energy Policy Act of 1992, 2902
the current version of 10 C.F.R. 50.7 was promulgated in 1993 to reflect the changes in the whistleblower protection provisions brought about by; CLI-04-24, 60 NRC 185 (2004)
- Energy Reorganization Act, 42 U.S.C. § 5801-5879
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- Energy Reorganization Act, 211, 42 U.S.C. § 5851
licensees are prohibited from discriminating against employees for engaging in protected activities; CLI-04-24, 60 NRC 185 (2004)
the term "demonstrated" is interpreted to imply a preponderance-of-the-evidence standard; CLI-04-24, 60 NRC 187 n.24 (2004)
- Energy Reorganization Act, 42 U.S.C. § 5851(a)(1)(A), (B)
protected activity includes the acts of notifying an employer of an alleged violation and refusing to engage in any practice made unlawful by this act or the Atomic Energy Act, if the employee has identified the alleged illegality to the employer; CLI-04-24, 60 NRC 206 (2004)
- Energy Reorganization Act, 211(b)(3), 42 U.S.C. § 5851(b)(3)
a complainant in a whistleblowing proceeding must show that one or more protected activities was a contributing factor in the adverse action; CLI-04-24, 60 NRC 186 (2004)
- Energy Reorganization Act, 42 U.S.C. § 5851(b)(3)(C)
proponents of a finding of violation must demonstrate to the trier of fact by a preponderance of the evidence that a protected activity was actually a contributing factor in the unfavorable personnel action; CLI-04-24, 60 NRC 197 n.75 (2004)
- Federal Water Pollution Control Act, 511(c)(2), 33 U.S.C. § 1371(c)(2)
NRC has been barred by statute from making substantive determinations regarding compliance with the Clean Water Act; LBP-04-15, 60 NRC 93 n.55 (2004)
- Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. § 1831j(a)(1)
a complainant in a whistleblowing proceeding must show that one or more protected activities was "a contributing factor" in the adverse action; CLI-04-24, 60 NRC 196 (2004)
- National Environmental Policy Act, 101(b)(1)
to introduce a new industrial facility with significant water needs in an area with a projected water shortage runs counter to the federal responsibility to act as a trustee of the environment for succeeding generations; LBP-04-14, 60 NRC 67 (2004)
- National Environmental Policy Act, 42 U.S.C. § 4332(2)(C) (2000)
federal agencies must prepare an environmental impact statement as part of all major federal actions significantly affecting the quality of the human environment; LBP-04-23, 60 NRC 447 (2004)

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- Nuclear Waste Policy Act, 42 U.S.C. §§ 10101-10270
DOE is charged with responsibility for constructing and operating a geologic repository for high-level radioactive waste; CLI-04-32, 60 NRC 470 (2004)
- Nuclear Waste Policy Act, 42 U.S.C. § 10131(b)
purpose of the act is to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level waste; LBP-04-20, 60 NRC 303 (2004)
- Nuclear Waste Policy Act, 42 U.S.C. §§ 10132-10134
DOE is charged with the responsibility of constructing and operating high-level waste repositories, and preparing and submitting any license applications for them; LBP-04-20, 60 NRC 303 (2004)
- Nuclear Waste Policy Act, 114(b), 42 U.S.C. § 10134(b)
DOE is required to submit its license application to the Commission 90 days after the date on which the President's recommendation to use the Yucca Mountain site is effective; LBP-04-20, 60 NRC 314 (2004)
- Nuclear Waste Policy Act, 42 U.S.C. § 10134(d)
NRC is responsible for deciding whether licenses should be issued and of regulating high-level waste repositories; LBP-04-20, 60 NRC 303 (2004)
NRC must issue a final decision on licensing of the high-level waste repository not later than 3 years after DOE submits the license application; LBP-04-20, 60 NRC 303 (2004)
- Nuclear Waste Policy Act, 42 U.S.C. §§ 10141(b)
NRC is responsible for deciding whether licenses should be issued and of regulating high-level waste repositories; LBP-04-20, 60 NRC 303 (2004)
- Nuclear Waste Policy Amendments Act, 42 U.S.C. § 10133(a)
Yucca Mountain, Nevada, is the sole focus of the nation's high-level waste geologic repository program and the only site that DOE can lawfully consider; LBP-04-20, 60 NRC 304 (2004)
- Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60,129
a complainant in a whistleblowing proceeding must show that one or more protected activities was "a contributing factor" in the adverse action; CLI-04-24, 60 NRC 196 (2004)
- Pub. L. No. 107-200, 116 Stat. 735 (2002) (codified at 42 U.S.C. § 10135 note)
the Presidential recommendation to use the Yucca Mountain site was effective on July 23, 2002, after Congress passed a joint resolution overriding the State's veto and approving the development of a repository at Yucca Mountain; LBP-04-20, 60 NRC 314 n.27 (2004)
- USEC Privatization Act, 3113
applicant's plan to transfer to DOE for disposal by DOE of applicant's depleted tails constitutes a plausible strategy for dispositioning the applicant's depleted tails; CLI-04-25, 60 NRC 226 (2004); CLI-04-30, 60 NRC 437 (2004)
- Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42,121
a complainant in a whistleblowing proceeding must show that one or more protected activities was "a contributing factor" in the adverse action; CLI-04-24, 60 NRC 196 (2004)
- Whistleblower Protection Act, 5 U.S.C. § 1221(e)
a complainant in a whistleblowing proceeding must show that one or more protected activities was "a contributing factor" in the adverse action; CLI-04-24, 60 NRC 196 (2004)

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OTHERS**

- 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S.20)
a “contributing factor” means any factor that, alone or in connection with other factors, tends to affect in any way the outcome of the decision; CLI-04-24, 60 NRC 196-97 (2004)
- William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. Pa. J. Lab. & Emp. L. 199 (2003)
indirect or circumstantial evidence also suffices to trigger the “dual motive” approach in whistleblower discrimination cases; CLI-04-24, 60 NRC 191 n.44 (2004)
- Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Era of Employment Dissent*, 51 Admin. L. Rev. 531, 554 (1999)
“a contributing factor” means any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision; CLI-04-24, 60 NRC 197 (2004)
in using a “contributing factor” test in whistleblower protection laws, Congress quite clearly made it easier for the plaintiff to make its case under the statute and more difficult for the defendant to avoid liability; CLI-04-24, 60 NRC 196 (2004)
- Fed. R. Civ. P. 26(b)(1)
the traditional standard of whether information is reasonably calculated to lead to the discovery of admissible evidence has come to define what is necessary and indispensable to a party in preparing for litigation on any cause or issue; LBP-04-21, 60 NRC 366 (2004)
- Fed. R. Evid. 702
a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue; CLI-04-21, 60 NRC 27-28 (2004); LBP-04-13, 60 NRC 36 (2004)
- H.R. Rep. No. 97-177, at 151 (1981)
NRC strictly limits the contentions that may be raised in licensing adjudications so that individual licensing adjudications are limited to deciding genuine, substantive safety and environmental issues placed in contention by qualified intervenors; CLI-04-22, 60 NRC 129 (2004)
- H.R. Rep. No. 102-474, pt. VIII, at 79 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 2282, 2297
in amending section 211, Congress intended to make it easier for whistleblowers to prevail in their discrimination suits; CLI-04-24, 60 NRC 193 (2004)
- H.R. Rep. No. 108-594, at 3 (2004)
DOE has already spent 7 billion dollars on characterization and other related activities at Yucca Mountain and estimates that a total of \$50 billion will be spent during the lifetime of the project; LBP-04-20, 60 NRC 304 (2004)
- 2A Norman J. Singer, *Sutherland Statutory Construction* §46.05 (6th ed. 2000)
each part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole; LBP-04-20, 60 NRC 329 n.49, 335 (2004)
- Whistleblower Issues in the Nuclear Industry: Hearing Before the Subcomm. on Clean Air and Nuclear Regulation of the Senate Comm. on Environment and Public Works*, 103d Cong. 1-2 (1993) (statement submitted by the United States Nuclear Regulatory Commission)
in amending section 211, Congress intended to make it easier for whistleblowers to prevail in their discrimination suits; CLI-04-24, 60 NRC 193 (2004)

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ABUSE OF DISCRETION

Commission's standard for review of a board evidentiary ruling; CLI-04-21, 60 NRC 21 (2004)

ACCIDENTS, LOSS-OF-COOLANT

differences between MOX and LEU fuels are discussed with regard to tightness of fuel-clad bonding prior to ballooning and its impact on fuel relocation behavior during; LBP-04-32, 60 NRC 713 (2004)

if an application requests that containment overpressure serve as a credit to assist in demonstrating that a facility will have adequate net positive suction head to deal with an accident, the appropriateness of the credit is within the scope of the proceeding; LBP-04-28, 60 NRC 548 (2004)

ACCIDENTS, SEVERE

applicant has elected to develop and employ a plant parameters envelope to establish the bounding consequences that would be associated with; LBP-04-17, 60 NRC 229 (2004)

petitioners contend that assessment, in the environmental report, of the potential environmental impacts of accidents involving natural gas transmission facilities is inadequate; LBP-04-14, 60 NRC 40 (2004)

ACTINIUM

Ac-227 is very scarce and thus the possession limits for a radioactive waste storage operation are set accordingly; DD-04-4, 60 NRC 387 (2004)

ADVISORY COMMITTEE ON REACTOR SAFEGUARDS

challenges to the quality or quantity of an ACRS review of a regulatory guide that it approved is not material and not a proper subject for a licensing proceeding; LBP-04-28, 60 NRC 548 (2004)

ADVISORY OPINIONS

although there is no legal bar to issuance in appropriate circumstances, the Commission is reluctant to do so where answering the questions left open would be a mere academic exercise; CLI-04-32, 60 NRC 469 (2004)

the Commission's alleged factual error, even if it were true, is not a ground for reconsideration where the alleged error was not material to the Commission's decision; CLI-04-38, 60 NRC 652 (2004)

ALTERNATIVES

See Consideration of Alternatives

AMENDMENT OF CONTENTIONS

a showing that the new information was not previously available, is materially different from information previously available, and has been submitted in a timely fashion based on the availability of the subsequent information is required for; LBP-04-22, 60 NRC 379 (2004)

NRC does not look with favor on amended or new contentions filed after the initial filing; CLI-04-36, 60 NRC 631 (2004)

AMENDMENTS

See License Amendments

ANTITRUST REVIEW

a uranium enrichment facility is not a production and utilization facility and thus NRC does not have responsibilities for; CLI-04-30, 60 NRC 426 (2004)

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APPEALS

Commission decision that is a final agency action is appealable only to the federal courts; CLI-04-18, 60 NRC 1 (2004)

of orders issued by pre-license application presiding officer must be accompanied by a supporting brief and filed with the Commission no later than 10 days after service of the order; CLI-04-20, 60 NRC 15 (2004)

See also Abeyance of Appeals; Appellate Review; Briefs, Appellate

APPEALS, INTERLOCUTORY

petitioner must show either irreparable harm or a pervasive or unusual effect on the basic structure of the proceeding; CLI-04-21, 60 NRC 21 (2004)

review is sometimes taken as an exercise of the Commission's inherent supervisory authority over agency adjudicatory proceedings; CLI-04-21, 60 NRC 21 (2004)

APPELLATE REVIEW

although there is no legal bar to the Commission issuing advisory opinions in appropriate circumstances, it is reluctant to do so where answering the questions left open would be a mere academic exercise; CLI-04-32, 60 NRC 469 (2004)

appellant bears the responsibility of clearly identifying the asserted errors in the licensing board decision; CLI-04-23, 60 NRC 154 (2004)

arguments not raised before the board or not clearly articulated in petitions for review are deemed waived; CLI-04-33, 60 NRC 581 (2004)

board rulings on admissibility of contentions are affirmed if the appellant points to no error of law or abuse of discretion; CLI-04-36, 60 NRC 631 (2004)

it is not sensible or productive to analyze legal issue that the appellant raises and to issue a Commission decision on a controversy that may not arise at all; CLI-04-32, 60 NRC 469 (2004)

showing that the record evidence in a case may be understood to support a view sharply different from that of the board does not, in and of itself, establish the board's view as clearly erroneous; CLI-04-24, 60 NRC 160 (2004)

the Commission ordinarily defers to a licensing board's fact findings, as long as they are not clearly erroneous; CLI-04-24, 60 NRC 160 (2004)

the Commission ordinarily will not consider on appeal either new arguments or new evidence supporting a contention, which the licensing board never had the opportunity to consider; CLI-04-22, 60 NRC 125 (2004); CLI-04-36, 60 NRC 631 (2004)

the Commission will affirm a board's ruling on admissibility of contentions where the appellant fails on appeal to adequately address the board's grounds for refusing to admit the contentions, and/or fails to provide specific support for its contentions, and/or presents contentions that fall beyond the scope of the proceeding; CLI-04-36, 60 NRC 631 (2004)

the Commission's alleged factual error, even if it were true, is not a ground for reconsideration, where the alleged error was not material to the Commission's decision; CLI-04-38, 60 NRC 652 (2004)

the Commission's standard of review for a licensing board's conclusions of law is *de novo*, and it will reverse the board's legal rulings if they are a departure from or contrary to established law; CLI-04-24, 60 NRC 160 (2004)

where, in consultation with technical experts, a Presiding Officer reaches highly fact-specific findings following a review of technical information, the Commission will ordinarily defer to these findings, absent an indication of a clearly erroneous finding; CLI-04-39, 60 NRC 657 (2004)

ATOMIC ENERGY ACT

employers are prohibited from taking adverse action against employees for providing safety-related allegations to employers, Congress, or the Commission; CLI-04-24, 60 NRC 160 (2004)

"protected activity" in section 161 includes, but is not limited to, protected activities related to safety issues; CLI-04-24, 60 NRC 160 (2004)

BACKFITTING

a contention alleging that a proposed license amendment is technically incompatible with a specified element of licensee's current design or licensing basis can be admissible and does not violate section 50.109; LBP-04-28, 60 NRC 548 (2004)

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BRIEFS, APPELLATE

asking intervenors to come forward with support for their request to supplement an EIS is a burden akin to a petitioner's initial obligation to come forward with sufficient basis for a contention; CLI-04-39, 60 NRC 657 (2004)

parties are expected to identify their strongest arguments clearly and concisely in; CLI-04-33, 60 NRC 581 (2004)

BURDEN OF PROOF

a complainant in a DOL whistleblowing proceeding must show that one or more protected activities was a contributing factor in the adverse action; CLI-04-24, 60 NRC 160 (2004)

appellant bears the responsibility of clearly identifying the asserted errors in the decision on appeal; CLI-04-23, 60 NRC 154 (2004)

the party who offers a witness has the burden of demonstrating that the witness is qualified to serve as an expert; CLI-04-21, 60 NRC 21 (2004)

whistleblowers will prevail if they demonstrate by a preponderance of the evidence that a protected activity was a contributing factor to an adverse personnel action unless the employer comes back with clear and convincing evidence that it would have taken the same unfavorable personnel action notwithstanding the protected whistleblowing activity; CLI-04-24, 60 NRC 160 (2004)

CERTIFICATION

each potential party must establish procedures to implement the requirements in 10 C.F.R. 2.1003, and to have a responsible official certify to the pre-license application presiding officer that the procedures have been implemented and the documentary material specified in section 2.1003 has been identified and made electronically available; LBP-04-20, 60 NRC 300 (2004)

to establish a "special circumstance" for a rule waiver, a petitioner must be able to point to unusual facts that make the situation at hand peculiar enough to take it out of the regulation's contemplation; LBP-04-24, 60 NRC 475 (2004)

See also Directed Certification

CERTIFIED QUESTIONS

a board may certify to the Commission for its consideration and determination any questions relating to access to restricted data or national security information arising in an adjudicatory context; CLI-04-37, 60 NRC 646 (2004)

to resolve such questions, the Commission sometimes must consider matters that arguably touch on the merits; CLI-04-37, 60 NRC 646 (2004)

CIVIL PENALTIES

a civil penalty of \$110,000 for discrimination against an employee for engagement in protected activities is reduced to \$44,000; LBP-04-26, 60 NRC 532 (2004)

a complainant in a DOL whistleblowing proceeding must show that one or more protected activities was a contributing factor in the adverse action; CLI-04-24, 60 NRC 160 (2004)

mitigation determinations are inherently fact-based, and the licensing board is responsible in the first instance for factfinding; CLI-04-24, 60 NRC 160 (2004)

Staff shall consider the answer to a Notice of Violation and only then shall issue an order dismissing the proceeding or imposing, mitigating, or remitting the penalty; CLI-04-24, 60 NRC 160 (2004)

the litmus test for board mitigation is not abuse of discretion; CLI-04-24, 60 NRC 160 (2004)

the penalty assessed by Staff constitutes the upper bound of the penalty that may be imposed after a hearing; CLI-04-24, 60 NRC 160 (2004)

whistleblowers will prevail if they demonstrate by a preponderance of the evidence that a protected activity was a contributing factor to an adverse personnel action unless the employer comes back with clear and convincing evidence that it would have taken the same unfavorable personnel action notwithstanding the protected whistleblowing activity; CLI-04-24, 60 NRC 160 (2004)

CIVIL PENALTY PROCEEDINGS

these adjudications are *de novo* proceedings, not limited proceedings for review of NRC Staff decisions; CLI-04-24, 60 NRC 160 (2004)

withdrawal of licensee's request is basis for termination of; LBP-04-29, 60 NRC 663 (2004)

CLASSIFIED INFORMATION

access to sensitive guidance documents must be as narrow as possible, with redactions to particular documents appropriate in some cases; LBP-04-21, 60 NRC 357 (2004)

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- any person who requires possession of such information in connection with the licensing proceeding may process, store, reproduce, transmit, or handle classified information only in a location for which facility security approval has been obtained from the NRC's Division of Nuclear Security; CLI-04-30, 60 NRC 426 (2004)
- distribution of sensitive information must be limited to those having an actual and specific, rather than a perceived, need to know; LBP-04-21, 60 NRC 357 (2004)
- in ruling on need-to-know requests, boards must keep in mind the delicate balance between fulfilling the Commission's mission to protect the public and providing the public enough information to help the Commission discharge that mission; LBP-04-21, 60 NRC 357 (2004)
- NRC Staff must file a notice of intent if, at the time of publication of Notice of Hearing, it appears that it will be impracticable for the Staff to avoid the introduction of Restricted Data or National Security Information into a proceeding; CLI-04-30, 60 NRC 426 (2004)
- requests for access to classified guidance documents must be made to the board; LBP-04-21, 60 NRC 357 (2004)
- See also Confidential National Security Information
- COMMON DEFENSE AND SECURITY**
- limits on types and activity of radioactive material that radioactive waste storage licensee is authorized to possess are below the levels of concern about; DD-04-4, 60 NRC 387 (2004)
- CONCLUSIONS OF LAW**
- the Commission review is *de novo*, with legal rulings being reversed only if they are a departure from or contrary to established law; CLI-04-24, 60 NRC 160 (2004)
- CONFIDENTIAL NATIONAL SECURITY INFORMATION**
- a board may certify to the Commission any questions relating to access to restricted data or national security information arising in an adjudicatory context; CLI-04-37, 60 NRC 646 (2004)
- CONFIRMATORY ORDER**
- concerns relative to the question of whether the facts set forth in an order are true and whether the remedy chosen is supported by those facts would fall within the scope of an enforcement proceeding; LBP-04-16, 60 NRC 99 (2004)
- injury alleged as a result of failure to grant more extensive relief is not cognizable in a proceeding on; CLI-04-23, 60 NRC 154 (2004)
- petitioner may challenge the Staff's assessment and analysis of the facts underlying the issuance of; LBP-04-16, 60 NRC 99 (2004)
- the critical inquiry in an enforcement proceeding is whether the order improves the licensee's health and safety conditions; CLI-04-26, 60 NRC 399 (2004)
- the scope of an enforcement proceeding is defined by the Commission in; LBP-04-16, 60 NRC 99 (2004)
- CONSIDERATION OF ALTERNATIVES**
- allegation that environmental report fails to consider no-action alternative is litigable in early site permit proceeding; LBP-04-18, 60 NRC 253 (2004)
- under NEPA, an agency must take into account the needs and goals of the parties involved in the application; CLI-04-22, 60 NRC 125 (2004)
- CONSOLIDATION OF PARTIES**
- a licensing board may consolidate parties and/or designate a lead party to represent interests held in common by multiple groups in order to eliminate duplicative or cumulative evidence and arguments; LBP-04-14, 60 NRC 40 (2004)
- the lead party has primary responsibility for the litigation of a contention; LBP-04-14, 60 NRC 40 (2004)
- the lead party is responsible for consulting with the other parties involved; LBP-04-14, 60 NRC 40 (2004)
- CONSTRUCTION OF MEANING**
- although petitioner bears the burden of demonstrating standing, licensing boards must construe the petition in favor of the petitioner; LBP-04-16, 60 NRC 99 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)
- the language and structure of regulations is the starting point in; LBP-04-20, 60 NRC 300 (2004)
- when the meaning of a regulation is clear and obvious, the regulatory language is conclusive and a board is not free to go outside the express terms of an unambiguous regulation to extrinsic aids such as regulatory history; LBP-04-31, 60 NRC 686 (2004)

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CONSTRUCTION OF TERMS

it is a fundamental rule of regulatory construction that “may,” when contrasted with “must” or “will,” is permissive; LBP-04-31, 60 NRC 686 (2004)

See also Regulations, Interpretation; Statutory Construction

CONTAINMENT SYSTEMS

if an application requests that containment overpressure serve as a credit to assist in demonstrating that a facility will have adequate net positive suction head to deal with a loss of coolant accident, the appropriateness of the credit is within the scope of the proceeding; LBP-04-28, 60 NRC 548 (2004)

CONTENTIONS

a Commission memorandum does not impose binding requirements on a licensee; LBP-04-25, 60 NRC 516 (2004)

a licensee may be exempted from the decommissioning funding requirements if the exemption is authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest; LBP-04-25, 60 NRC 516 (2004)

a licensing board may consolidate parties and/or designate a lead party to represent interests held in common by multiple groups, in order to eliminate duplicative or cumulative evidence and arguments; LBP-04-14, 60 NRC 40 (2004)

intervenors have an obligation to review the record closely and to raise their arguments promptly; CLI-04-33, 60 NRC 581 (2004)

petitioners must examine the publicly available material and set forth their claims and the support for their claims at the outset; CLI-04-25, 60 NRC 223 (2004)

the fact that NRC safety regulations do not require a measure does not necessarily mean there will be no environmental consequences that must be discussed in an environmental impact statement; CLI-04-22, 60 NRC 125 (2004)

when an admissible contention is adopted by another party or several admissible contentions are consolidated because of their similar subject matter, the prudent approach is to designate lead parties for the litigation of each contention; LBP-04-14, 60 NRC 40 (2004)

where a party who previously advanced contentions thereafter expressly declines to contest the position of the NRC Staff that certain contentions are inadmissible, those contentions are deemed abandoned; LBP-04-25, 60 NRC 516 (2004)

See also Amendment of Contentions

CONTENTIONS, ADMISSIBILITY

a contention alleging that a proposed license amendment is technically incompatible with a specified element of licensee’s current design or licensing basis can be admissible and does not violate section 50.109; LBP-04-28, 60 NRC 548 (2004)

a contention challenging whether an emergency response plan’s provisions provide the requisite reasonable assurance based on the adequacy of implementing procedures for those provisions fails to present a material issue; LBP-04-17, 60 NRC 229 (2004)

a hearing petitioner may not seek enhanced enforcement actions by raising factual or remedial questions; CLI-04-38, 60 NRC 652 (2004)

a licensing board appropriately looks to the Commission’s hearing notice to ascertain its subject matter jurisdiction; LBP-04-15, 60 NRC 81 (2004)

a licensing board may not waive or suspend the requirements governing contention formulation and the late-filed submission of contention amendments or revisions for interested governmental entities; LBP-04-14, 60 NRC 40 (2004)

a request for hearing must set forth with particularity the contentions sought to be raised; LBP-04-16, 60 NRC 99 (2004)

a specific statement of the legal or factual issue sought to be raised, a brief explanation of its basis, a concise statement of the alleged facts or expert opinions, with supporting references, and sufficient information demonstrating that a genuine dispute exists in regard to a material issue of law or fact are required; CLI-04-36, 60 NRC 631 (2004); LBP-04-14, 60 NRC 40 (2004); LBP-04-15, 60 NRC 81 (2004); LBP-04-16, 60 NRC 99 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

adverse thermal impact on striped bass population is litigable in early site permit proceeding; LBP-04-18, 60 NRC 253 (2004)

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allegation that a seismic and structural analysis is necessary to determine whether the existing cooling towers are adequate to handle the increased loads of extended power uprate is within the scope of the proceeding; LBP-04-28, 60 NRC 548 (2004)

allegation that environmental report fails to consider no-action alternative is litigable in early site permit proceeding; LBP-04-18, 60 NRC 253 (2004)

allegation that the documentation of licensee's current licensing basis is noncompliant is not material or within the scope of an operating license amendment proceeding unless petitioner shows that the alleged deficiencies have a plausible nexus to the grant or denial of the uprate application; LBP-04-28, 60 NRC 548 (2004)

allegations of an error in a decommissioning funding estimate must include a showing that there exists no reasonable assurance that the amount in question will be paid by the applicant; LBP-04-14, 60 NRC 40 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

although licensing boards generally are to litigate contentions rather than bases, the reach of a contention necessarily hinges upon its terms coupled with its stated bases; LBP-04-14, 60 NRC 40 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

amendment of a contention requires a showing that the new information was not previously available, is materially different from information previously available, and has been submitted in a timely fashion based on the availability of the subsequent information; LBP-04-22, 60 NRC 379 (2004)

any supporting material provided by a petitioner, including portions of material that are not relied upon, is subject to licensing board scrutiny; LBP-04-14, 60 NRC 40 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

attack on applicable statutory requirements or challenge to the basic structure of the Commission's regulatory process must be rejected; LBP-04-14, 60 NRC 40 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

because petitioner did not raise any flaws in the calculations in the environmental report, it may well have been too late to file a contention attacking essentially the same calculations in the final environmental impact statement; CLI-04-22, 60 NRC 125 (2004)

challenges must focus on either specific portions of the license application in question or alleged omissions from it; LBP-04-14, 60 NRC 40 (2004); LBP-04-15, 60 NRC 81 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

challenges to the quality or quantity of the review by the Advisory Committee on Reactor Safeguards of a regulatory guide that it approved is not material and not a proper subject for a licensing proceeding; LBP-04-28, 60 NRC 548 (2004)

contention that addresses licensee's failure to identify and characterize mixed waste in the groundwater onsite is inadmissible because it raises matters outside of the scope of a license termination plan proceeding; LBP-04-27, 60 NRC 539 (2004)

contested issues must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board; LBP-04-14, 60 NRC 40 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

emergency planning deficiencies are outside the scope of an early site permit proceeding; LBP-04-19, 60 NRC 277 (2004)

emergency planning issues fall outside the scope of license renewal proceedings; CLI-04-36, 60 NRC 631 (2004)

environmental justice contention fails to identify any significant and disproportional environmental impact on the minority or low-income population arising from the proposed siting of additional reactors on the site at issue so as to raise a genuine dispute on a material issue of fact or law; LBP-04-19, 60 NRC 277 (2004)

everyday operational issues are not litigable in license renewal proceedings; CLI-04-36, 60 NRC 631 (2004)

failure to comply with any of the pleading requirements is grounds for dismissal of a contention; LBP-04-14, 60 NRC 40 (2004); LBP-04-15, 60 NRC 81 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

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failure to directly controvert the license application or a mistaken assertion that the application does not address a relevant issue is cause for contention dismissal; LBP-04-14, 60 NRC 40 (2004); LBP-04-15, 60 NRC 81 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

failure to evaluate site suitability for below-grade placement of reactor containment is not an admissible issue in an early site permit proceeding; LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2004)

failure to provide adequate safety assessment of reactor interaction is not an admissible issue in an early site permit proceeding; LBP-04-18, 60 NRC 253 (2004)

if an application requests that containment overpressure serve as a credit to assist in demonstrating that a facility will have adequate net positive suction head to deal with a loss of coolant accident, the appropriateness of the credit is within the scope of the proceeding; LBP-04-28, 60 NRC 548 (2004)

if petitioner has information supporting its claim that licensee's operation has caused human suffering on a vast scale, its remedy would not be a narrowly focused license renewal hearing, but a citizen's petition under section 2.206; CLI-04-36, 60 NRC 631 (2004)

if Staff's environmental impact statement addresses the concerns alleged in a contention, the original contention becomes moot and the intervenor must raise a new contention if it claims the EIS discussion is still inaccurate or incomplete; CLI-04-22, 60 NRC 125 (2004)

in license renewal proceedings, the scope of litigable issues 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 analysis; LBP-04-15, 60 NRC 81 (2004)

intervenor is precluded from making general allegations, with the hope of generating through discovery sufficient facts to show that there is a genuine dispute; CLI-04-22, 60 NRC 125 (2004)

neither mere speculation nor bare assertions alleging that a matter should be considered will suffice to allow the admission of a proffered contention; LBP-04-14, 60 NRC 40 (2004); LBP-04-15, 60 NRC 81 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

new arguments may not be raised for the first time in a reply brief; CLI-04-25, 60 NRC 223 (2004)

NRC license renewal inquiry is narrow, focusing on the potential impacts of an additional 20 years of nuclear power plant operation, not on everyday operational issues; CLI-04-36, 60 NRC 631 (2004)

NRC strictly limits the contentions that may be raised in licensing adjudications so that individual adjudications are limited to deciding genuine, substantive safety and environmental issues placed in contention by qualified intervenors; CLI-04-22, 60 NRC 125 (2004)

petitioner is not expected to prove its contention at the pleading stage, but is required to show that a genuine dispute exists, warranting a hearing; CLI-04-22, 60 NRC 125 (2004)

petitioner may challenge the Staff's assessment and analysis of the facts underlying the issuance of a confirmatory order; LBP-04-16, 60 NRC 99 (2004)

petitioner may not request additional measures beyond those set out in a confirmatory order or litigate matters that go beyond the scope of the proceeding as defined by the Commission in the confirmatory order; LBP-04-16, 60 NRC 99 (2004)

petitioner may not seek to impose stricter requirements than those set forth by the regulations; LBP-04-14, 60 NRC 40 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

petitioner may not simply incorporate massive documents by reference as the basis for or as a statement of his contentions; LBP-04-15, 60 NRC 81 (2004)

petitioner must demonstrate that the issue raised is within the scope of the proceeding and material to the findings the NRC must make to support the action that is involved in the proceeding; CLI-04-36, 60 NRC 631 (2004); LBP-04-14, 60 NRC 40 (2004); LBP-04-15, 60 NRC 81 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003); LBP-04-27, 60 NRC 539 (2004)

petitioner must present factual information and expert opinions necessary to support its contention adequately; LBP-04-14, 60 NRC 40 (2004); LBP-04-15, 60 NRC 81 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

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petitioner must provide a concise statement of the alleged facts or expert opinions supporting its position, together with references to the specific sources and documents upon which it intends to rely as furnishing that support; CLI-04-36, 60 NRC 631 (2004); LBP-04-27, 60 NRC 539 (2004)

petitioner must provide references to specific portions of the application that are disputed and the reasons supporting the dispute or identify each instance where the application purportedly fails to contain information on a relevant matter as required by law and the reasons supporting the allegation; LBP-04-16, 60 NRC 99 (2004)

petitioner must provide sufficient information to show the existence of a genuine dispute with the applicant/licensee on a material issue of law or fact; LBP-04-27, 60 NRC 539 (2004)

petitioners must examine the publicly available material and set forth their claims and the support for their claims at the outset; LBP-04-22, 60 NRC 379 (2004)

providing any material or document as a basis for a contention without setting forth an explanation of its significance is inadequate support for; LBP-04-14, 60 NRC 40 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

regulatory guides are not mandatory requirements and therefore disputes about whether the application demonstrates that it meets the regulatory guide preconditions of necessity or impracticability are not material to a 20% extended power uprate proceeding; LBP-04-28, 60 NRC 548 (2004)

requirement that an applicant submit a no significant hazard consideration analysis concerns a procedural matter and thus is not material to the merits of the licensing proceeding; LBP-04-28, 60 NRC 548 (2004)

requirements are the same for governmental and nongovernmental petitioners; LBP-04-14, 60 NRC 40 (2004)

requiring that contentions be concrete and specific to the license application helps ensure that individual license applicants are not put into the position of defending the policies and decisions of the Commission itself; CLI-04-22, 60 NRC 125 (2004)

security issues are beyond the scope of a license renewal proceeding; CLI-04-36, 60 NRC 631 (2004)

simply pointing out that the applicant does not control quality assurance measures at another licensee's facility does not raise a genuine material dispute; CLI-04-22, 60 NRC 125 (2004)

terrorism-related issues are beyond the scope of a license renewal proceeding; CLI-04-36, 60 NRC 631 (2004); LBP-04-15, 60 NRC 81 (2004)

the adjudicatory process is not the proper venue for setting forth views regarding the direction regulatory policy should take; LBP-04-14, 60 NRC 40 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

the Commission affirms board rulings if the appellant points to no error of law or abuse of discretion; CLI-04-36, 60 NRC 631 (2004)

the Commission affirms board rulings where the appellant fails to adequately address the board's grounds for refusing to admit the contentions, and/or fails to provide specific support for its contentions, and/or presents contentions that fall beyond the scope of the proceeding; CLI-04-36, 60 NRC 631 (2004)

the hearing request or petition to intervene must provide a specific statement of the issue of law or fact to be raised or controverted and a brief explanation of the basis for the contention; LBP-04-27, 60 NRC 539 (2004)

the pendency of an NRC-commissioned independent engineering inspection of a plant does not entitle the public or petitioners to a delay in the deadline established in the NRC notice for the filing of contentions and requests for hearing; LBP-04-28, 60 NRC 548 (2004)

the subject matter of a contention must impact the grant or denial of a pending license application; LBP-04-14, 60 NRC 40 (2004); LBP-04-15, 60 NRC 81 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

to attack the factual determinations underpinning a regulation in a NEPA context, a petitioner must present specific, fact-based claims to the contrary, not mere allegations; CLI-04-22, 60 NRC 125 (2004)

to show a genuine material dispute, a contention would have to postulate a plausible scenario wherein quality assurance measures fail and a mechanism giving rise to environmental consequences needing discussion in the environmental report; CLI-04-22, 60 NRC 125 (2004)

when a party challenges the sufficiency of the decommissioning bond and the absence of a decommissioning plan for a facility, instances where similar facilities were extremely costly to

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- decommission may provide grounds for waiving the regulation setting the bond amount; LBP-04-24, 60 NRC 475 (2004)
- when the requisite support for a contention is lacking, the licensing board may not make assumptions of fact that favor petitioner or supply information that is missing; LBP-04-14, 60 NRC 40 (2004); LBP-04-15, 60 NRC 81 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)
- with limited exception, no rule or regulation of the Commission can be challenged in an adjudicatory proceeding; CLI-04-19, 60 NRC 5 (2004); CLI-04-22, 60 NRC 125 (2004); LBP-04-14, 60 NRC 40 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003); LBP-04-24, 60 NRC 475 (2004)
- CONTENTIONS, LATE-FILED**
- petitioners must show that the information upon which the amended or new contention is based was not previously available and is materially different than information previously available, and the amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information; CLI-04-36, 60 NRC 631 (2004)
- providing, for the first time, the necessary threshold support for contentions in reply briefs is not allowed; CLI-04-35, 60 NRC 619 (2004)
- COST-BENEFIT ANALYSES**
- determination of economic benefits and costs that are tangential to environmental consequences are within a wide area of agency discretion; CLI-04-22, 60 NRC 125 (2004)
- on review, the Commission asks not whether every assumption contained in the final environmental impact statement was the best or whether it will turn out true, but whether the economic assumptions of the FEIS were so distorted as to impair fair consideration of those environmental effects; CLI-04-22, 60 NRC 125 (2004)
- overstated benefits could persuade an agency to approve a project despite significant adverse environmental impacts, while the EIS would also misinform the public; CLI-04-22, 60 NRC 125 (2004)
- COSTS**
- the more pore volumes of water that must be pumped or processed to restore groundwater quality, the more it will cost to achieve groundwater restoration; CLI-04-33, 60 NRC 581 (2004)
- See also Decommissioning Costs
- COUNSEL**
- consistent disregard for NRC procedural rules can result in reprimand, censure, or suspension of; CLI-04-36, 60 NRC 631 (2004)
- CREDIBILITY**
- because a witness is a paid employee or dedicated member of a party does not create doubt about motives such that a Subpart G proceeding is required; LBP-04-31, 60 NRC 686 (2004)
- Commission deference to a licensing board's fact findings is particularly great where the board bases its findings in significant part on; CLI-04-24, 60 NRC 160 (2004)
- to obtain a Subpart G hearing, a party may challenge the credibility of potential eyewitnesses based on historical information in a similar or related proceeding, as long as it is probative of whether that credibility reasonably may be expected to be at issue in the current proceeding; LBP-04-31, 60 NRC 686 (2004)
- CREDITOR REQUIREMENTS**
- creditor regulations may be augmented by license conditions as necessary to allow ownership arrangements (such as sale and leaseback) not covered by section 50.81, provided it can be found that such arrangements are not inimical to the common defense and security of the United States; CLI-04-30, 60 NRC 426 (2004)
- in uranium enrichment facility licensing, creditor regulations shall apply to the creation of creditor interests in equipment, devices, or important parts thereof, capable of separating the isotopes of uranium or enriching uranium in the isotope U-235; CLI-04-30, 60 NRC 426 (2004)
- CROSS-EXAMINATION**
- appropriate circumstances in Subpart L proceedings are not limited to situations described in 10 C.F.R. 2.310(d); LBP-04-31, 60 NRC 686 (2004)
- opportunity for cross-examination under Subpart L is equivalent to the opportunity for cross-examination under Administrative Procedure Act §556(b); LBP-04-31, 60 NRC 686 (2004)

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DEADLINES

- if exigent circumstances warrant an extension of the petition deadline, NRC rules allow petitioners to file a motion requesting an extension; CLI-04-35, 60 NRC 619 (2004)
- 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 NRC regulations for responding to filings served by first-class mail or express delivery shall not be applicable; CLI-04-30, 60 NRC 426 (2004)
- the pendency of an NRC-commissioned independent engineering inspection of a plant does not entitle the public or petitioners to a delay in the deadline established in the NRC notice for the filing of contentions and requests for hearing; LBP-04-28, 60 NRC 548 (2004)

DECOMMISSIONING

- activities must be completed within 24 months after the Commission approves a decommissioning plan, unless the Commission determines that another schedule is appropriate under the circumstances; CLI-04-22, 60 NRC 125 (2004)
- technical infeasibility is grounds for an extension of; CLI-04-22, 60 NRC 125 (2004)
- under certain circumstances, the Commission may grant a request to delay or postpone initiation of the decommissioning process or approve an alternate schedule for submittal of the final decommissioning plan; CLI-04-22, 60 NRC 125 (2004)

DECOMMISSIONING COSTS

- an applicant that has had its own experiences in the uranium recovery field may draw upon its own prior experience as a basis in estimating restoration costs; CLI-04-33, 60 NRC 581 (2004)
- petitioners challenge sufficiency of presentations in license application; LBP-04-14, 60 NRC 40 (2004)

DECOMMISSIONING FUNDING

- a licensee may be exempted from requirements if the exemption is authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest; LBP-04-25, 60 NRC 516 (2004)
- in making an exemption determination, the threshold inquiry is whether, as a matter of financial fact, the licensee can comply with section 30.35; LBP-04-25, 60 NRC 516 (2004)
- to gain admission of a contention alleging an error in the estimate, the petitioner must also show that there exists no reasonable assurance that the amount in question will be paid by the applicant; LBP-04-14, 60 NRC 40 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)
- when a party challenges the sufficiency of the decommissioning bond and the absence of a decommissioning plan for a facility, instances where similar facilities were extremely costly to decommission may provide grounds for waiving the regulation setting the bond amount; LBP-04-24, 60 NRC 475 (2004)

DEFINITIONS

- a pre-license application presiding officer is one or more members of the Commission, or an Atomic Safety and Licensing Board, or a named officer who has been delegated final authority in the pre-license application phase with jurisdiction specified at the time of designation; CLI-04-20, 60 NRC 15 (2004)

DELAY

- the pendency of an NRC-commissioned independent engineering inspection of a plant does not entitle the public or petitioners to a delay in the deadline established in the NRC notice for the filing of contentions and requests for hearing; LBP-04-28, 60 NRC 548 (2004)

DEPARTMENT OF ENERGY

- the agency is required to update its certification of document production at the time it submits its license application for the high-level waste repository; LBP-04-20, 60 NRC 300 (2004)

DEPARTMENT OF JUSTICE

- guidelines do not vest any rights in a person challenging a subpoena; CLI-04-34, 60 NRC 607 (2004)
- guidelines on subpoenas are not binding on the NRC but they may provide some internal guidance to DOJ in deciding whether to seek enforcement of the subpoena in federal court, should that eventually arise; CLI-04-34, 60 NRC 607 (2004)

DEPLETED URANIUM

- contention alleging that a sound, reliable, or plausible strategy for disposal of large amounts of waste is lacking is admitted; LBP-04-14, 60 NRC 40 (2004)

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unless applicant demonstrates a use for the uranium in the depleted tails as a potential resource, the depleted tails may be considered waste; CLI-04-25, 60 NRC 223 (2004)

DIRECTED CERTIFICATION

the board is directed to promptly certify to the Commission all novel legal or policy issues that would benefit from early Commission consideration; CLI-04-30, 60 NRC 426 (2004)

See also Certification; Certified Questions

DISCLOSURE

a board will not presume that a party will not comply with its duty regarding; LBP-04-31, 60 NRC 686 (2004)

petitioners will not be granted a Subpart G proceeding based on an assertion that the licensee will not comply with its duty to disclose documents; LBP-04-31, 60 NRC 686 (2004)

safeguards information during litigation is limited to witnesses who are qualified; CLI-04-21, 60 NRC 21 (2004)

sanctions, including the use of depositions and interrogatories, will be imposed against the offending party for failure to comply with; LBP-04-31, 60 NRC 686 (2004)

DISCOVERY

a licensing board will oversee the discovery process through status reports and/or conferences, and each party is expected to comply with the process to the maximum extent possible; LBP-04-14, 60 NRC 40 (2004)

a party has a duty to supplement its disclosures within a reasonable time after it learns that the information disclosed is incomplete or incorrect in some material respect; LBP-04-14, 60 NRC 40 (2004)

a plan must be submitted to the presiding officer within 10 days of the meeting on discovery and must indicate the views of the parties and their proposals; LBP-04-14, 60 NRC 40 (2004)

access to sensitive documents must be as narrow as possible, with redactions to particular documents appropriate in some cases; LBP-04-21, 60 NRC 357 (2004)

all lead parties are to make available within 45 days of the issuance of a memorandum and order admitting parties and issues the name, address, and phone number of individuals likely to possess relevant discoverable information; LBP-04-14, 60 NRC 40 (2004)

all parties, except the NRC Staff, shall make the mandatory disclosures within 45 days of the issuance of an order admitting a contention; CLI-04-30, 60 NRC 426 (2004)

any attempt to compel discovery by filing a motion with the board must be preceded by the moving party either conferring or attempting in good faith to confer with the other party in an effort to resolve the dispute without licensing board intervention; LBP-04-14, 60 NRC 40 (2004)

application of the need-to-know doctrine starts with the traditional discovery rules and then narrows their breadth to take account of the sensitive nature of security information; CLI-04-29, 60 NRC 417 (2004)

as soon as practicable after issuance of a memorandum and order admitting parties and issues, but no more than 30 days after that issuance, parties are to meet to develop a plan for discovery and make arrangements for the required disclosures; LBP-04-14, 60 NRC 40 (2004)

copies of, or descriptions by category and locations of, all documents, data compilations, and tangible things in the possession, custody, or control of the lead party that are relevant to the admitted contentions and their supporting bases are to be made available within 45 days; LBP-04-14, 60 NRC 40 (2004)

defining the need-to-know "indispensability" standard by reference to the discovery standard, with appropriate balancing of the public safety and other factors unique to the case, is the proper course to follow for disclosure of security information; CLI-04-29, 60 NRC 417 (2004)

disclosure must be signed by at least one attorney of record, certifying that to the best of his or her knowledge, after reasonable inquiry, the information is correct and complete at the time of submission; LBP-04-14, 60 NRC 40 (2004)

distribution of sensitive information must be limited to those having an actual and specific, rather than a perceived, need to know; LBP-04-21, 60 NRC 357 (2004)

failure to comply with the discovery process may result in appropriate licensing board sanctions; LBP-04-14, 60 NRC 40 (2004)

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- for material that is publicly available from a different source, it will suffice to provide the location, title, and page reference to the relevant document, data compilation, or tangible thing; LBP-04-14, 60 NRC 40 (2004)
- in ruling on need-to-know requests, boards must keep in mind the delicate balance between fulfilling the Commission's mission to protect the public and providing the public enough information to help the Commission discharge that mission; LBP-04-21, 60 NRC 357 (2004)
- parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the proceeding; CLI-04-29, 60 NRC 417 (2004)
- the claim and identification of privileged materials must occur within the time provided for such disclosure of the withheld materials; LBP-04-17, 60 NRC 229 (2004)
- the Commission is disinclined to second-guess a board's findings on a discovery dispute because the board is more familiar with the nature of the admitted contention; CLI-04-29, 60 NRC 417 (2004)
- the Commission reviews a board's findings on a discovery dispute because the Commission participated in the formulation of the guidance documents requested by the Intervenor during discovery and is therefore in a position to understand both their history and their scope, as well as the reasons for selecting particular design basis threats; CLI-04-29, 60 NRC 417 (2004)
- the traditional standard of relevance and whether information is reasonably calculated to lead to the discovery of admissible evidence has come to define what is necessary and indispensable to a party in preparing for litigation on any cause or issue; LBP-04-21, 60 NRC 357 (2004)
- to ensure that its 3-year deadline is met, NRC requires that DOE and any other person concerned with Yucca Mountain participate in a document discovery phase lasting at least 6 months and preceding DOE's license application; LBP-04-20, 60 NRC 300 (2004)
- when a party withholds information otherwise discoverable under the rules, the party shall expressly make the privilege claim and describe the nature of what is not being disclosed to the extent that, without revealing what is sought to be protected, other parties will be able to determine the applicability of the privilege or protection; LBP-04-14, 60 NRC 40 (2004)
- when items are reasonably available from the PDR, it is sufficient response to provide mere reference to the document; LBP-04-21, 60 NRC 357 (2004)
- DOCUMENT PRODUCTION**
- a good-faith effort involves the amount of time the participant has had to comply with the regulations, the participant's control over the timing of the initial document production, the purpose and importance of the participant's obligation to produce all documents, and the participant's status and financial ability; LBP-04-20, 60 NRC 300 (2004)
- because the regulations at issue do not answer the question as to how documents are to be made available, a board must examine the agency's entire regulatory scheme; LBP-04-20, 60 NRC 300 (2004)
- DOE is required to update its certification of document production at the time it submits its license application for the high-level waste repository; LBP-04-20, 60 NRC 300 (2004)
- DOE's certification regarding the availability of its documentary material for high-level waste repository is stricken; LBP-04-20, 60 NRC 300 (2004)
- each party shall continue to supplement its documentary material with any additional material created after the time of its initial certification; LBP-04-20, 60 NRC 300 (2004)
- interpretation of what it means to be "electronically available" and "in the LSN"; LBP-04-20, 60 NRC 300 (2004)
- participants in a high-level waste repository licensing proceeding are required to make their documentary material electronically available in or via the Licensing Support Network; LBP-04-20, 60 NRC 300 (2004)
- to expedite and to assist the Commission in achieving the 3-year deadline for the Yucca Mountain licensing proceeding, a Web-based system for making documents electronically available to all participants was created; LBP-04-20, 60 NRC 300 (2004)
- DUE PROCESS**
- a notice of proposed action published in the *Federal Register* must be reasonably calculated to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections; LBP-04-33, 60 NRC 749 (2004)
- Staff shall consider the answer to a Notice of Violation and only then shall issue an order dismissing the proceeding or imposing, mitigating, or remitting the civil penalty; CLI-04-24, 60 NRC 160 (2004)

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- where a notice of opportunity to request a hearing mentions supplements to an application that were clarifications and additional material submitted in response to requests for additional information and were generally available on the agency's Web site, the original notice was reasonably calculated to apprise interested parties of the scope and pendency of the proceeding; LBP-04-33, 60 NRC 749 (2004)
- EARLY SITE PERMIT APPLICATION**
- applicant has elected to develop and employ a plant parameters envelope to establish the bounding severe accident consequences that would be associated with the reactor it eventually elects to construct on the site; LBP-04-17, 60 NRC 229 (2004)
- applicant must address unique physical characteristics of the site in its application, but the financial capabilities of organizations responsible for operation and maintenance of local infrastructure are not physical characteristics within the meaning of 10 C.F.R. 52.17(b)(1); LBP-04-17, 60 NRC 229 (2004)
- consideration of the need for power is not required in an environmental report associated with; LBP-04-17, 60 NRC 229 (2004)
- requirements that site characteristics be such that adequate security plans and measures can be developed do not apply to; LBP-04-17, 60 NRC 229 (2004)
- EARLY SITE PERMIT PROCEEDING**
- a contention challenging whether an emergency response plan's provisions provide the requisite reasonable assurance based on the adequacy of implementing procedures for those provisions fails to present a material issue; LBP-04-17, 60 NRC 229 (2004)
- adverse thermal impact on striped bass population is litigable in; LBP-04-18, 60 NRC 253 (2004)
- allegation that environmental report fails to consider no-action alternative is litigable in; LBP-04-18, 60 NRC 253 (2004)
- emergency planning deficiencies are outside the scope of; LBP-04-19, 60 NRC 277 (2004)
- failure to evaluate site suitability for below-grade placement of reactor containment is not an admissible issue in; LBP-04-18, 60 NRC 253 (2004)
- failure to provide adequate safety assessment of reactor interaction is not an admissible issue in; LBP-04-18, 60 NRC 253 (2004)
- ECONOMIC EFFECTS**
- the principle that economic benefits must be weighed against environmental costs does not transform those economic benefits into environmental impacts; CLI-04-22, 60 NRC 125 (2004)
- ECONOMIC INJURY**
- additional potential costs associated with delaying Commission consideration of Intervenor's NEPA argument until after a final board decision do not amount to irreparable impact warranting immediate Commission review; CLI-04-31, 60 NRC 461 (2004)
- EMERGENCY CORE COOLING SYSTEM**
- if an application requests that containment overpressure serve as a credit to assist in demonstrating that a facility will have adequate net positive suction head to deal with a loss of coolant accident, the appropriateness of the credit is within the scope of the proceeding; LBP-04-28, 60 NRC 548 (2004)
- loss-of-coolant accidents are analyzed for pressurized water reactor using mixed oxide fuel in lead test assemblies; LBP-04-32, 60 NRC 713 (2004)
- EMERGENCY PLANNING**
- a license renewal proceeding is not the appropriate forum for considering; CLI-04-36, 60 NRC 631 (2004); LBP-04-15, 60 NRC 81 (2004)
- EMERGENCY PREPAREDNESS**
- although the Federal Emergency Management Agency is responsible for assessing the adequacy of offsite (state and local) radiological emergency planning and preparedness activities, NRC makes the overall determination as to the state of; DD-04-3, 60 NRC 343 (2004)
- EMERGENCY RESPONSE**
- petitioner's request for a review of evacuation and emergency planning has in effect been granted in part by NRC actions following the events of September 11, 2001; DD-04-3, 60 NRC 343 (2004)
- EMPLOYEE PROTECTION**
- a complainant in a DOL whistleblowing proceeding must show that one or more protected activities was a contributing factor in the adverse action; CLI-04-24, 60 NRC 160 (2004)
- although Energy Reorganization Act § 211 does not specify a preponderance-of-the-evidence standard, the courts have found that the term "demonstrated" implies that standard; CLI-04-24, 60 NRC 160 (2004)

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employers are prohibited from taking adverse action against employees for providing safety-related allegations to employers, Congress, or the Commission; CLI-04-24, 60 NRC 160 (2004)
protected activity includes, but is not limited to, protected activities related to safety issues; CLI-04-24, 60 NRC 160 (2004)

the evidentiary touchstone in a nuclear whistleblowing case is the special evidentiary framework that Congress established in section 211 of the Energy Reorganization Act; CLI-04-24, 60 NRC 160 (2004)
whistleblowers will prevail if they demonstrate by a preponderance of the evidence that a protected activity was a contributing factor to an adverse personnel action unless the employer comes back with clear and convincing evidence that it would have taken the same unfavorable personnel action notwithstanding the protected whistleblowing activity; CLI-04-24, 60 NRC 160 (2004)

ENERGY REORGANIZATION ACT

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although section 211 does not specify a preponderance-of-the-evidence standard, the courts have found that the term “demonstrated” implies that standard; CLI-04-24, 60 NRC 160 (2004)

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ENFORCEMENT ACTIONS

a hearing petitioner may not seek enhanced actions by raising factual or remedial questions; CLI-04-38, 60 NRC 652 (2004)

a petitioner is not adversely affected by a confirmatory order that improves the safety situation over what it was in the absence of the order; CLI-04-26, 60 NRC 399 (2004)

basic principles of fairness require that the licensee know the bases underlying the Staff’s finding of violation; CLI-04-24, 60 NRC 160 (2004)

injury alleged as a result of failure to grant more extensive relief is not cognizable in a proceeding on a confirmatory order; CLI-04-23, 60 NRC 154 (2004)

licensee must have notice of, and opportunity to comment on, the fundamental bases for; CLI-04-24, 60 NRC 160 (2004)

petitioners may not obtain licensing board hearings to challenge NRC Staff enforcement orders as too weak or otherwise insufficient; CLI-04-26, 60 NRC 399 (2004)

the critical inquiry in a proceeding on a confirmatory order is whether the order improves the licensee’s health and safety conditions; CLI-04-26, 60 NRC 399 (2004)

to obtain a hearing, a petitioner must demonstrate standing and proffer at least one admissible contention; CLI-04-23, 60 NRC 154 (2004)

where the licensee has already agreed to an enforcement order by the time a notice of hearing is published, a challenge to the facts, as stated in the order, by a nonlicensee is not cognizable; CLI-04-26, 60 NRC 399 (2004)

ENFORCEMENT ORDERS

Commission orders determine requirements only for those licensees and facilities to whom the orders are issued; CLI-04-19, 60 NRC 5 (2004)

for intervention, the threshold question, intertwined with both standing and contention admissibility issues, is whether the confirmatory order should be sustained; CLI-04-23, 60 NRC 154 (2004)

imposition of security upgrades at two existing Category I facilities does not change the prospective applicability of NRC regulations or create a universal design-basis threat applicable to any other facility; CLI-04-19, 60 NRC 5 (2004)

the threshold question is whether the hearing request is within the scope of the proceeding as outlined in; CLI-04-26, 60 NRC 399 (2004)

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ENFORCEMENT POLICY

substantive parameters for civil penalties and other enforcement actions are not established by policy statements; CLI-04-24, 60 NRC 160 (2004)

ENFORCEMENT PROCEEDINGS

a licensing board must consider as part of its standing inquiry whether the petitioner's concerns are beyond the scope of this proceeding; LBP-04-16, 60 NRC 99 (2004)

Commission refusal in a whistleblower proceeding to look into the merits of an employee's safety concerns is analogous to its approach toward management personnel decisions in whistleblower cases; CLI-04-24, 60 NRC 160 (2004)

concerns relative to the question of whether the facts set forth in an order are true and whether the remedy chosen is supported by those facts would fall within the scope of; LBP-04-16, 60 NRC 99 (2004)

petitioner may challenge the Staff's assessment and analysis of the facts underlying the issuance of the confirmatory order; LBP-04-16, 60 NRC 99 (2004)

petitioner may not request additional measures beyond those set out in a confirmatory order or litigate matters that go beyond the scope of the proceeding as defined by the Commission in the confirmatory order; LBP-04-16, 60 NRC 99 (2004)

the document setting the scope of an adjudication is ordinarily the enforcement order; CLI-04-24, 60 NRC 160 (2004)

the only issue is whether the confirmatory order should be sustained; CLI-04-26, 60 NRC 399 (2004) to introduce entirely new instances of protected activity, the Staff may either issue a revised Notice of Violation or initiate a new enforcement action; CLI-04-24, 60 NRC 160 (2004)

ENVIRONMENTAL EFFECTS

the Commission is allowed to determine that in a particular situation the final environmental impact statement should address environmental impacts of fuel storage beyond the term of the license sought; CLI-04-22, 60 NRC 125 (2004)

the principle that economic benefits must be weighed against environmental costs does not transform those economic benefits into environmental impacts; CLI-04-22, 60 NRC 125 (2004)

ENVIRONMENTAL IMPACT STATEMENT

an agency must assess the environmental impacts of its actions without mandating any particular result related to that action; LBP-04-23, 60 NRC 441 (2004)

federal agencies must prepare an EIS as part of all major federal actions significantly affecting the quality of the human environment; LBP-04-23, 60 NRC 441 (2004)

the fact that NRC safety regulations do not require a measure does not necessarily mean there will be no environmental consequences that must be discussed in; CLI-04-22, 60 NRC 125 (2004)

See also Final Environmental Impact Statement

ENVIRONMENTAL ISSUES

uranium enrichment facility applicant's environmental report and the Staff's associated EIS are to include a statement on the alternatives to the proposed action, including a discussion of the no-action alternative; CLI-04-30, 60 NRC 426 (2004)

ENVIRONMENTAL JUSTICE

FEIS evaluation of the impact of in situ mining operations within an 80-kilometer radius of the site is adequate; LBP-04-23, 60 NRC 441 (2004)

the goal of this portion of the NEPA analysis is to identify and assess environmental effects on low-income and minority communities by assessing impacts peculiar to those communities and to identify significant impacts, if any, that will fall disproportionately on minority and low-income communities; LBP-04-19, 60 NRC 277 (2004)

ENVIRONMENTAL REPORT

deficiencies related to environmental assessment of impacts of proposed project on groundwater and surface water are cited in a contention; LBP-04-14, 60 NRC 40 (2004)

failure to discuss impacts of construction and operation of deconversion and disposal facilities that are required in conjunction with the proposed enrichment plant; LBP-04-14, 60 NRC 40 (2004)

petitioner must file NEPA contentions so that environmental issues are raised as soon as possible in the proceeding; CLI-04-22, 60 NRC 125 (2004)

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- petitioners contend that assessment of the potential environmental impacts of accidents involving natural gas transmission facilities is inadequate; LBP-04-14, 60 NRC 40 (2004)
- petitioners contend that the need for the uranium enrichment facility is not adequately described in; LBP-04-14, 60 NRC 40 (2004)
- EVACUATION PLANS**
- petitioner's request for a review of evacuation and emergency response planning has in effect been granted in part by NRC actions following the events of September 11, 2001; DD-04-3, 60 NRC 343 (2004)
- EVIDENCE**
- after intervenor's witness has had access, without objection, to safeguards information, it is too late to decide that the witness does not qualify as a security expert; CLI-04-21, 60 NRC 21 (2004)
- EX PARTE RULES**
- application to limited matters falling within the pre-license application presiding officer's jurisdiction and to appeals to the Commission of PAPO rulings; CLI-04-20, 60 NRC 15 (2004)
- EXEMPTIONS**
- a licensee may be exempted from the decommissioning funding requirements if the exemption is authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest; LBP-04-25, 60 NRC 516 (2004)
- EXTENSION OF TIME**
- if exigent circumstances warrant an extension of the petition deadline, NRC rules allow petitioners to file a motion requesting an extension of the filing deadline; CLI-04-35, 60 NRC 619 (2004)
- FAIRNESS**
- Staff shall consider the answer to a Notice of Violation and only then shall issue an order dismissing the proceeding or imposing, mitigating, or remitting the civil penalty; CLI-04-24, 60 NRC 160 (2004)
- FAULTS**
- intervenors claim that change to the groundwater flow due to combined groundwater pumping could cause leachant containing uranium to flow toward the Pipeline fault, thus contaminating overlying and underlying aquifers; LBP-04-23, 60 NRC 441 (2004)
- FEDERAL WATER POLLUTION CONTROL ACT**
- NRC licensing is in no way dependent upon the existence of a permit under; LBP-04-15, 60 NRC 81 (2004)
- FINAL ENVIRONMENTAL IMPACT STATEMENT**
- Commission decisions relating to a licensing proceeding supplement the FEIS; CLI-04-22, 60 NRC 125 (2004)
- on review, the Commission asks not whether every assumption contained in the FEIS was the best or whether it will turn out true, but whether the economic assumptions of the FEIS were so distorted as to impair fair consideration of those environmental effects; CLI-04-22, 60 NRC 125 (2004)
- Staff need not prepare a supplement unless it has first determined that a supplement is warranted; CLI-04-39, 60 NRC 657 (2004)
- supplementation is required if there exists significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts; CLI-04-39, 60 NRC 657 (2004); LBP-04-23, 60 NRC 441 (2004)
- the Commission is allowed to determine that in a particular situation the FEIS should address environmental impacts of fuel storage beyond the term of the license sought; CLI-04-22, 60 NRC 125 (2004)
- FINALITY**
- a Commission decision that is a final agency action is appealable only to the federal courts; CLI-04-18, 60 NRC 1 (2004)
- FINANCIAL ASSURANCE PLAN**
- applicants are not obliged to cover every imaginable circumstance; CLI-04-33, 60 NRC 581 (2004)
- FINANCIAL QUALIFICATIONS**
- Part 70 financial criteria can be met by conditioning the uranium enrichment facility license to require funding commitments to be in place prior to construction and operation; CLI-04-30, 60 NRC 426 (2004)

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FINDINGS OF FACT

a clearly erroneous finding is one that is not even plausible in light of the record viewed in its entirety; CLI-04-24, 60 NRC 160 (2004)
the Commission ordinarily defers to licensing boards' fact findings, as long as they are not clearly erroneous; CLI-04-24, 60 NRC 160 (2004)

FIRST AMENDMENT

any privilege afforded to journalists under the First Amendment is a qualified privilege that can be overcome by a showing of need and unavailability from other sources; CLI-04-34, 60 NRC 607 (2004)
information subject to a subpoena is not confidential when the reporter did not make any specific claim of confidentiality in his motion to quash, the reporter's source is not confidential, and the article specifically quotes the source by name, and the reporter has placed the information in the public domain; CLI-04-34, 60 NRC 607 (2004)
where the protection of confidential sources is not involved, the nature of the press interest protected by the privilege is narrower; CLI-04-34, 60 NRC 607 (2004)

FOREIGN OWNERSHIP

requirements for uranium enrichment facilities are incorporated in 10 C.F.R. 70.40 and Atomic Energy Act § 193(f); CLI-04-30, 60 NRC 426 (2004)

FUEL CLADDING

differences between MOX and LEU fuels with regard to tightness of fuel-clad bonding prior to ballooning and its impact on fuel relocation behavior during a design-basis loss-of-coolant accident are discussed; LBP-04-32, 60 NRC 713 (2004)

FUNDING

See Decommissioning Funding

GOVERNMENT PARTIES

contention admissibility requirements are the same for governmental and nongovernmental petitioners; LBP-04-14, 60 NRC 40 (2004)

GROUNDWATER CONTAMINATION

because of the close proximity of a proposed housing development to in situ mining operations, intervenors claim that any potential mining solution seepages, usually caused by an imbalance of injection rates and pumping rates, could create serious issues with drinking water; LBP-04-23, 60 NRC 441 (2004)
contention alleges that the license termination plan is deficient because licensee failed to provide documentation of the source, cause, and plan for remediation of the current high levels of tritium; LBP-04-27, 60 NRC 539 (2004)
contention that addresses licensee's failure to identify and characterize mixed waste in the groundwater onsite is inadmissible because it raises matters outside of the scope of a license termination plan proceeding; LBP-04-27, 60 NRC 539 (2004)
deficiencies in environmental report related to assessment of radiological impacts of proposed project on water are cited in contention; LBP-04-14, 60 NRC 40 (2004)
intervenors allege that additional vertical pathways for lixiviant excursions could be caused from the collapse of underground mine workings; LBP-04-23, 60 NRC 441 (2004)
intervenors claim that change to the groundwater flow due to combined groundwater pumping could cause lixiviant containing uranium to flow toward the Pipeline fault, thus contaminating overlying and underlying aquifers; LBP-04-23, 60 NRC 441 (2004)
pore volume is a parameter that describes how many times the contaminated volume of water in the rock must be displaced or processed to restore groundwater quality; CLI-04-33, 60 NRC 581 (2004)

HEARING PROCEDURES

a petitioner is not entitled to a Subpart G hearing based on the fact that there is a high degree of public interest in the proceeding, that it is controversial, or that discovery and cross-examination are allegedly required to assure public confidence in the proceeding and its decisions; LBP-04-31, 60 NRC 686 (2004)
alleging generalized aspersions on the tactics or motives of the parties, their employees, members, lawyers, or *pro se* representatives will not satisfy the "credibility" or "motive" elements that trigger Subpart G proceedings; LBP-04-31, 60 NRC 686 (2004)

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- because a witness is a paid employee or dedicated member of a party does not create a presumption that his or her credibility or motives are in such doubt that a Subpart G proceeding is required; LBP-04-31, 60 NRC 686 (2004)
- because initial selection of procedures is made before the identity of opposing party witnesses is known, the selection may be changed if the criteria are met; LBP-04-31, 60 NRC 686 (2004)
- complexity of an issue does not automatically trigger a Subpart G hearing; LBP-04-31, 60 NRC 686 (2004)
- “efficiency” is not a criterion for grant of a Subpart G proceeding; LBP-04-31, 60 NRC 686 (2004)
- in determining whether Subpart G procedures are appropriate, boards have discretion to consider the complexity of the technical issues, the experience of the parties and their counsel in NRC licensing proceedings, and the necessity for discovery; LBP-04-31, 60 NRC 686 (2004)
- interlocutory appeals as of right are allowed where a party claims that the board’s selection of the appropriate procedure was in clear contravention of Commission rules; CLI-04-31, 60 NRC 461 (2004)
- petitioner is entitled to Subpart G procedures if a contention necessitates resolution of a dispute of material fact concerning the occurrence of a past activity and the credibility of an eyewitness may reasonably be expected to be an issue in resolving that dispute; LBP-04-31, 60 NRC 686 (2004)
- petitioners will not be granted a Subpart G proceeding based on an assertion that the licensee will not comply with its duty to disclose documents; LBP-04-31, 60 NRC 686 (2004)
- the board has discretion to determine what procedures are most appropriate for the specific contentions before it; LBP-04-31, 60 NRC 686 (2004)
- the second criterion entitling a petitioner to a Subpart G proceeding involves issues of motive or intent of the party or eyewitness material to the resolution of the contested matter; LBP-04-31, 60 NRC 686 (2004)
- to obtain a Subpart G hearing, a party may challenge the credibility of potential eyewitnesses based on historical information in a similar or related proceeding, as long as it is probative of whether that credibility reasonably may be expected to be at issue in the current proceeding; LBP-04-31, 60 NRC 686 (2004)
- HEARING REQUESTS**
- the pendency of an NRC-commissioned independent engineering inspection of a plant does not entitle the public or petitioners to a delay in the deadline established in the NRC notice for the filing of contentions and requests for hearing; LBP-04-28, 60 NRC 548 (2004)
- HEARING REQUESTS, LATE-FILED**
- order approving agreement incorporates condition that any changes to licensee’s site reclamation plan that is the subject of a settlement agreement will constitute good cause for; LBP-04-30, 60 NRC 665 (2004)
- HIGH-LEVEL WASTE REPOSITORY**
- a good-faith standard must be applied to each participant’s document production; LBP-04-20, 60 NRC 300 (2004)
- DOE’s certification regarding the availability of its documentary material is stricken; LBP-04-20, 60 NRC 300 (2004)
- each potential party must establish procedures to implement the requirements in 10 C.F.R. 2.1003, and to have a responsible official certify to the pre-license application presiding officer that the procedures have been implemented and the documentary material specified in section 2.1003 has been identified and made electronically available; LBP-04-20, 60 NRC 300 (2004)
- the Director of NMSS, not the licensing board, will make the ultimate determination as to the docketing of DOE’s license application; LBP-04-20, 60 NRC 300 (2004)
- IN SITU LEACH MINING**
- because of the close proximity of a proposed housing development, intervenors claim that any potential mining solution seepages, usually caused by an imbalance of injection rates and pumping rates, could create serious issues with drinking water; LBP-04-23, 60 NRC 441 (2004)
- because the FEIS has taken a hard look at airborne emissions, supplementation on this issue is unnecessary; LBP-04-23, 60 NRC 441 (2004)
- intervenors allege that vertical pathways for lixiviant contamination of groundwater could be caused from the collapse of underground mine workings; LBP-04-23, 60 NRC 441 (2004)

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intervenors claim that change to the groundwater flow due to combined groundwater pumping could cause
lixiviant containing uranium to flow toward a fault, thus contaminating overlying and underlying
aquifers; LBP-04-23, 60 NRC 441 (2004)

INJURY IN FACT

for determining the obvious potential for offsite consequences in evaluating standing, licensing boards
may take into account not just the raw size of the source but at least any passive shielding that is
always present during installation, operation, or removal of that source; LBP-04-24, 60 NRC 475 (2004)
in cases involving the possible construction or operation of a nuclear power reactor, proximity to the
proposed facility has been considered sufficient to establish; LBP-04-17, 60 NRC 229 (2004);
LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

it may be appropriate for licensing boards to consider the method of operation of the facility and the
nature of the equipment or shielding that surrounds the source during operations; LBP-04-24, 60 NRC
475 (2004)

the "obvious potential" aspect of "proximity-plus" standing is not a concept that can be applied with
engineering or scientific precision, and any attempt to fix a boundary, no matter how thoughtful, can be
viewed by one side or the other as arbitrary; LBP-04-24, 60 NRC 475 (2004)

INTERESTED GOVERNMENTAL ENTITY

a licensing board may not waive or suspend the requirements governing contention formulation and the
late-filed submission of contention amendments or revisions for; LBP-04-14, 60 NRC 40 (2004)
a state, county, municipality, federally recognized Indian tribe, or agencies thereof may submit a petition
to the Commission to participate as an interested entity in a uranium enrichment facility licensing
proceeding; CLI-04-30, 60 NRC 426 (2004)

opportunity for state or local governmental entities or affected federally recognized Indian tribes to
participate in NRC proceedings is available only to those governmental representatives that have not
been admitted as a party under 10 C.F.R. 2.309; CLI-04-35, 60 NRC 619 (2004)

INTERESTED STATE

a State that has been admitted as a party cannot participate as; LBP-04-31, 60 NRC 686 (2004)

INTERVENTION

a hearing petitioner may not seek enhanced enforcement actions by raising factual or remedial questions;
CLI-04-38, 60 NRC 652 (2004)

a petitioner must file a timely written request to intervene, establish that it has standing, and offer at least
one admissible contention; CLI-04-23, 60 NRC 154 (2004); CLI-04-26, 60 NRC 399 (2004);
LBP-04-14, 60 NRC 40 (2004); LBP-04-16, 60 NRC 99 (2004); LBP-04-27, 60 NRC 539 (2004)

failure to establish injury-in-fact defeats standing; CLI-04-23, 60 NRC 154 (2004)

the contention rule is strict by design, insisting upon some reasonably specific factual or legal basis for a
petitioner's allegations; CLI-04-22, 60 NRC 125 (2004)

INTERVENTION PETITIONS

in a uranium enrichment facility licensing proceeding, petitions shall set forth with particularity the
interest of the petitioner in the proceeding and how that interest may be affected by the results of the
proceeding; CLI-04-30, 60 NRC 426 (2004)

when an entity seeks to intervene on behalf of its members, that entity must show that it has an
individual member who can fulfill all the necessary standing elements and who has authorized the
organization to represent his or her interests; LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253
(2004); LBP-04-19, 60 NRC 277 (2003)

INTERVENTION PETITIONS, LATE-FILED

nontimely filings, amended petitions, and supplemental petitions in a uranium enrichment facility licensing
proceeding will not be entertained absent a determination by the Commission or the board that the
petition should be granted, based upon a balancing of the late-filing factors; CLI-04-30, 60 NRC 426
(2004)

INTERVENTION RULINGS

interlocutory appeals as of right are allowed where a petitioner challenges a board decision "denying" a
petition to intervene in its entirety; CLI-04-31, 60 NRC 461 (2004)

INVESTIGATION

an NRC investigation is proper if it assists the NRC in exercising its statutory or regulatory authority;
CLI-04-34, 60 NRC 607 (2004)

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IRREPARABLE INJURY

additional potential costs associated with delaying Commission consideration of Intervenor's NEPA argument until after a final board decision do not warrant immediate Commission review; CLI-04-31, 60 NRC 461 (2004)

JOURNALISTS

Department of Justice guidelines do not vest any rights in a person challenging a subpoena; CLI-04-34, 60 NRC 607 (2004)

information subject to a subpoena is not confidential when the reporter did not make any specific claim of confidentiality in his motion to quash, the reporter's source is not confidential, and the article specifically quotes the source by name, and the reporter has placed the information in the public domain; CLI-04-34, 60 NRC 607 (2004)

where the protection of confidential sources is not involved, the nature of the press interest protected by the privilege is narrower; CLI-04-34, 60 NRC 607 (2004)

JURISDICTION

if Staff includes entirely new instances of protected activity in an enforcement proceeding, unmentioned in the Notice of Violation, then the proceeding would go beyond its permissible boundaries; CLI-04-24, 60 NRC 160 (2004)

termination for pre-license application presiding officer when an Atomic Safety and Licensing Board has been appointed to preside over the high-level waste repository licensing proceeding; CLI-04-20, 60 NRC 15 (2004)

the pre-license application presiding officer's authority is granted solely for the purpose of ruling on disputes over the electronic availability of documents, including disputes relating to claims of privilege or those relating to the implementation of recommendations of the Advisory Review Panel; CLI-04-20, 60 NRC 15 (2004)

LEAD TEST ASSEMBLIES

differences between MOX and LEU fuels with regard to tightness of fuel-clad bonding prior to ballooning and its impact on fuel relocation behavior during a design-basis loss-of-coolant accident are discussed; LBP-04-32, 60 NRC 713 (2004)

LICENSE AMENDMENTS

determinations on whether to grant applications are to be guided by the considerations that govern the issuance of initial licenses or construction permits to the extent applicable and appropriate; LBP-04-32, 60 NRC 713 (2004)

licensee must file an application for changes to technical specifications, fully describing the changes desired; LBP-04-32, 60 NRC 713 (2004)

LICENSE APPLICATIONS

all properly formulated contentions must challenge either specific portions of, or alleged omissions from, it; LBP-04-14, 60 NRC 40 (2004); LBP-04-15, 60 NRC 81 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

an application may be sufficiently complete for purposes of docketing and for starting the adjudicatory process even though the Staff subsequently asks for additional information; LBP-04-33, 60 NRC 749 (2004)

regulatory standards are the basis for NRC Staff review of; CLI-04-19, 60 NRC 5 (2004)

LICENSE RENEWAL PROCEEDINGS

emergency planning issues are outside the scope of; CLI-04-36, 60 NRC 631 (2004); LBP-04-15, 60 NRC 81 (2004)

everyday operational issues are not properly considered in; CLI-04-36, 60 NRC 631 (2004)

licensee's possession of a National Pollutant Discharge Elimination System permit is outside both the scope and jurisdiction of; CLI-04-36, 60 NRC 631 (2004)

NRC inquiry is narrow, focusing on the potential impacts of an additional 20 years of nuclear power plant operation; CLI-04-36, 60 NRC 631 (2004)

scope of litigable issues 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 analysis; LBP-04-15, 60 NRC 81 (2004)

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security-related contentions are beyond the scope of a license renewal proceeding; CLI-04-36, 60 NRC 631 (2004)

termination on mootness grounds when applicant emerged from bankruptcy under conditions that obviated the need to transfer the licenses; CLI-04-18, 60 NRC 1 (2004)

terrorism-related contentions are beyond the scope of a license renewal proceeding; CLI-04-36, 60 NRC 631 (2004)

LICENSE TERMINATION PLANS

a site characterization, identification of remaining dismantlement activities, plans for site remediation, and detailed plans for the final radiation survey must be included in; LBP-04-27, 60 NRC 539 (2004)

contention alleges that licensee failed to provide documentation of the source, cause, and plan for remediation of the current high levels of tritium contamination in the groundwater onsite; LBP-04-27, 60 NRC 539 (2004)

contention that addresses licensee's failure to identify and characterize mixed waste in the groundwater onsite is inadmissible because it raises matters outside of the scope of the proceeding; LBP-04-27, 60 NRC 539 (2004)

incorporation in a *Federal Register* notice that announces the opportunity for a hearing on amending a license is adequate notice; CLI-04-28, 60 NRC 412 (2004)

this stage is petitioners' one and only chance to litigate whether the survey methodology is adequate to demonstrate that the site has been brought to a condition suitable for license termination; LBP-04-27, 60 NRC 539 (2004)

LICENSEES

only statutes, regulations, orders, and license conditions can impose binding requirements; LBP-04-25, 60 NRC 516 (2004)

LICENSING BOARD DECISIONS

abuse of discretion is standard for review of a board evidentiary ruling; CLI-04-21, 60 NRC 21 (2004)

LICENSING BOARDS, AUTHORITY

considerable discretion is allowed in making evidentiary rulings, such as deciding whether a witness is qualified to serve as an expert; CLI-04-21, 60 NRC 21 (2004)

discretion to consider the totality of circumstances in assessing a final penalty; CLI-04-24, 60 NRC 160 (2004)

in determining whether Subpart G procedures are appropriate, boards have discretion to consider the complexity of the technical issues, the experience of the parties and their counsel in NRC licensing proceedings, and the necessity for discovery; LBP-04-31, 60 NRC 686 (2004)

the board has discretion to determine the type of hearing procedures most appropriate for the specific contentions before it; LBP-04-31, 60 NRC 686 (2004)

to control the prehearing and hearing process by consolidating parties and/or designating a lead party to represent interests held in common by multiple groups, in order to eliminate duplicative or cumulative evidence and arguments; LBP-04-14, 60 NRC 40 (2004)

LICENSING BOARDS, JURISDICTION

a licensing board appropriately looks to the Commission's hearing notice to ascertain its subject matter jurisdiction; LBP-04-15, 60 NRC 81 (2004)

issues based on supplementary filings for a license application that are essentially clarifications and updates submitted in response to Staff questions and that cause no large transformation of the application or the scope of the proceeding are subject to; LBP-04-33, 60 NRC 749 (2004)

licensee's possession of a National Pollutant Discharge Elimination System permit is outside of; CLI-04-36, 60 NRC 631 (2004)

LICENSING SUPPORT NETWORK

DOE's documentary material must be indexed by the LSN Administrator before DOE can make an initial certification; CLI-04-32, 60 NRC 469 (2004)

this combined system makes documentary material available electronically to parties, potential parties, and interested governmental participants to the proceeding for a license to receive and possess high-level radioactive waste at a geologic repository; CLI-04-32, 60 NRC 469 (2004)

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LICENSING SUPPORT NETWORK ADMINISTRATOR

this person shall not be in any organizational unit that either represents the NRC Staff as a party to the high-level waste repository licensing proceeding or is a part of the management chain reporting to the Director, Office of Nuclear Material Safety and Safeguards; CLI-04-32, 60 NRC 469 (2004)
this person within the NRC is responsible for coordinating access to and the integrity of data available on the Licensing Support Network; CLI-04-32, 60 NRC 469 (2004)

LIMITED APPEARANCE STATEMENTS

any person who does not wish, or is not qualified, to become a party to a uranium enrichment facility licensing proceeding may request permission to make; CLI-04-30, 60 NRC 426 (2004)

LOSS OF COOLANT

See Accidents, Loss-of-Coolant

LOW-ENRICHED URANIUM

differences between MOX and LEU fuels with regard to tightness of fuel-clad bonding prior to ballooning and its impact on fuel relocation behavior during a design-basis loss-of-coolant accident are discussed; LBP-04-32, 60 NRC 713 (2004)

MATERIALITY

contentions alleging deficiencies or errors in an application must also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment; LBP-04-14, 60 NRC 40 (2004); LBP-04-15, 60 NRC 81 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)
the subject matter of a contention must impact the grant or denial of a pending license application; LBP-04-14, 60 NRC 40 (2004); LBP-04-15, 60 NRC 81 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

MEMORANDUM

only statutes, regulations, orders, and license conditions can impose binding requirements; LBP-04-25, 60 NRC 516 (2004)

MIXED OXIDE FUEL

composition, fragmentation, particle size, and filling ratio are described; LBP-04-32, 60 NRC 713 (2004)
differences between MOX and LEU fuels with regard to tightness of fuel-clad bonding prior to ballooning and its impact on fuel relocation behavior during a design-basis loss-of-coolant accident are discussed; LBP-04-32, 60 NRC 713 (2004)
performance of emergency core cooling system during loss-of-coolant accidents is analyzed for lead test assemblies; LBP-04-32, 60 NRC 713 (2004)

MOOTNESS

termination of license transfer proceeding when applicant emerged from bankruptcy under conditions that obviated the need to transfer the licenses; CLI-04-18, 60 NRC 1 (2004)

MOTIONS FOR RECONSIDERATION

a petition must demonstrate a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid; CLI-04-38, 60 NRC 652 (2004)
a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid, is required for; LBP-04-22, 60 NRC 379 (2004)
correction of an erroneous decision that resulted from a misapprehension or disregard of a critical fact or controlling legal principle or decision should be addressed by; CLI-04-29, 60 NRC 417 (2004); CLI-04-36, 60 NRC 631 (2004); LBP-04-22, 60 NRC 379 (2004)
new arguments or evidence, or a new thesis, may not be presented unless the moving party can demonstrate that the new material's availability could not reasonably have been anticipated and its consideration demonstrates compelling circumstances, such as a clear and material error that renders the decision invalid; LBP-04-22, 60 NRC 379 (2004)
participants under 10 C.F.R. 2.315(c) may file such motions; CLI-04-30, 60 NRC 426 (2004)
petitioners must seek leave of the presiding officer to file; CLI-04-36, 60 NRC 631 (2004); LBP-04-22, 60 NRC 379 (2004)

SUBJECT INDEX

the Commission revisits its own already-issued decisions only if a party brings decisive new information to its attention or demonstrates a fundamental Commission misunderstanding of a key point; CLI-04-35, 60 NRC 619 (2004)

the Commission will sometimes entertain a reconsideration motion in order to clarify the meaning or intent of language in one of its decisions; CLI-04-37, 60 NRC 646 (2004)

MOTIONS TO COMPEL

any attempt to compel discovery by filing a motion with the board must be preceded by the moving party either conferring or attempting in good faith to confer with the other party in an effort to resolve the dispute without licensing board intervention; LBP-04-14, 60 NRC 40 (2004)

MOTIONS TO DISMISS

timeliness of a motion based on the ground that subsequent events have transformed the proceeding beyond the scope of the original notice is measured from the date of the transforming events, not the date of the original notice; LBP-04-33, 60 NRC 749 (2004)

NATIONAL ENVIRONMENTAL POLICY ACT

a rule of reason frees the agency from pursuing unnecessary or fruitless inquiries; CLI-04-22, 60 NRC 125 (2004)

an agency must assess the environmental impacts of its actions without mandating any particular result related to that action; LBP-04-23, 60 NRC 441 (2004)

even following initial approval of an action, the agency must take a hard look at the environmental effects of a proposal; LBP-04-23, 60 NRC 441 (2004)

federal agencies must prepare an environmental impact statement as part of all major federal actions significantly affecting the quality of the human environment; LBP-04-23, 60 NRC 441 (2004)

in considering alternatives, an agency must take into account the needs and goals of the parties involved in the application; CLI-04-22, 60 NRC 125 (2004)

new information necessitating a supplement to the final environmental impact statement must present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned; CLI-04-39, 60 NRC 657 (2004)

on review, the Commission asks not whether every assumption contained in the final environmental impact statement was the best or whether it will turn out true, but whether the economic assumptions of the FEIS were so distorted as to impair fair consideration of those environmental effects; CLI-04-22, 60 NRC 125 (2004)

petitioner must file contentions on the applicant's environmental report so that environmental issues are raised as soon as possible in the proceeding; CLI-04-22, 60 NRC 125 (2004)

the fact that NRC safety regulations do not require a measure does not necessarily mean there will be no environmental consequences that must be discussed in an environmental impact statement; CLI-04-22, 60 NRC 125 (2004)

the question of whether the new information or circumstance is significant ordinarily raises a factual dispute; LBP-04-23, 60 NRC 441 (2004)

the requisite hard look at the environmental consequences of major federal actions is subject to a rule of reason; LBP-04-23, 60 NRC 441 (2004)

use of misleading economic assumptions in an environmental impact statement could thwart NEPA's twin goals to inform the agency decisionmaker and the public-at-large; CLI-04-22, 60 NRC 125 (2004)

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT

licensee's possession of the permit is outside both the scope of the license renewal proceeding and the jurisdiction of the licensing board; CLI-04-36, 60 NRC 631 (2004)

NRC does not require a licensee to possess this permit; CLI-04-36, 60 NRC 631 (2004)

NATURAL GAS

petitioners contend that assessment of the potential environmental impacts of accidents involving transmission facilities in the environmental report is inadequate; LBP-04-14, 60 NRC 40 (2004)

NEED TO KNOW

a board may certify to the Commission for its consideration and determination any questions relating to access to restricted data or national security information arising in an adjudicatory context; CLI-04-37, 60 NRC 646 (2004)

application of this doctrine starts with the traditional discovery rules and then narrows their breadth to take account of the sensitive nature of security information; CLI-04-29, 60 NRC 417 (2004)

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- defining the “indispensability” standard by reference to the discovery standard, with appropriate balancing of the public safety and other factors unique to the case, is the proper course to follow for disclosure of security information; CLI-04-29, 60 NRC 417 (2004)
- NO SIGNIFICANT HAZARDS DETERMINATION
- requirement that an applicant submit this analysis concerns a procedural matter and thus is not material to the merits of the licensing proceeding and does not form the basis of an admissible contention; LBP-04-28, 60 NRC 548 (2004)
- NOTICE OF HEARING
- Federal Register* notice that announces the opportunity for a hearing on amending a license by incorporating a license termination plan is adequate; CLI-04-28, 60 NRC 412 (2004)
- interested parties must be apprised of the pendency of an action and afforded the opportunity to present their objections; LBP-04-33, 60 NRC 749 (2004)
- where the notice of opportunity to request a hearing mentions supplements to an application that were clarifications and additional material submitted in response to requests for additional information and were generally available on the agency’s Web site, the original notice was reasonably calculated to apprise interested parties of the scope and pendency of the proceeding and thus satisfied due process; LBP-04-33, 60 NRC 749 (2004)
- NOTICE OF VIOLATION
- in a whistleblower adjudication, Staff may update its NOV based on newly discovered facts; CLI-04-24, 60 NRC 160 (2004)
- NRC GUIDANCE DOCUMENTS
- Staff letters on generic topics merely describe one method of complying with NRC requirements and are not binding on an applicant; LBP-04-17, 60 NRC 229 (2004)
- See also Regulatory Guides
- NRC POLICY
- interlocutory review is sometimes taken as an exercise of the Commission’s inherent supervisory authority over agency adjudicatory proceedings; CLI-04-21, 60 NRC 21 (2004)
- settlement is encouraged because it not only can lead to reducing the costs and burdens of litigation, but can also bring more satisfying outcomes than those produced by litigation; LBP-04-24, 60 NRC 475 (2004)
- the Commission is disinclined to second-guess a board’s findings on a discovery dispute because the board is more familiar with the nature of the admitted contention; CLI-04-29, 60 NRC 417 (2004)
- See also Enforcement Policy; Policy Statements
- NRC PROCEEDINGS
- the Commission expects forthright pleadings from those who seek relief from the agency; CLI-04-34, 60 NRC 607 (2004)
- See also Civil Penalty Proceedings; Early Site Permit Proceeding; Enforcement Proceedings; License Renewal Proceedings; Operating License Amendment Proceedings; Subpart G Proceedings; Subpart L Proceedings; Termination of Proceeding
- NRC STAFF REVIEW
- enforcement orders do not amend NRC regulations or set a new review standard for other licensees or applicants; CLI-04-19, 60 NRC 5 (2004)
- evaluation of a license amendment application necessarily entails assuring its technical compatibility with the licensee’s current design and licensing basis; LBP-04-28, 60 NRC 548 (2004)
- license applications are measured against regulatory standards; CLI-04-19, 60 NRC 5 (2004)
- NUCLEAR REGULATORY COMMISSION
- to resolve certified questions, the Commission sometimes must consider matters that arguably touch on the merits; CLI-04-37, 60 NRC 646 (2004)
- NUCLEAR REGULATORY COMMISSION, AUTHORITY
- although the Commission has the authority to reject or modify a licensing board’s factual findings, it will not do so lightly; CLI-04-24, 60 NRC 160 (2004)
- although there is no legal bar to the Commission issuing advisory opinions in appropriate circumstances, it is reluctant to do so where answering the questions left open would be a mere academic exercise; CLI-04-32, 60 NRC 469 (2004)

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interlocutory review is sometimes taken as an exercise of its inherent supervisory authority over agency adjudicatory proceedings; CLI-04-21, 60 NRC 21 (2004); CLI-04-31, 60 NRC 461 (2004)
narrowly limiting a proceeding is within the scope of; CLI-04-23, 60 NRC 154 (2004)
NRC licensing is in no way dependent upon the existence of a Federal Water Pollution Control Act permit; LBP-04-15, 60 NRC 81 (2004)
reviewing courts have consistently upheld the right of the NRC to issue subpoenas to persons who are not NRC licensees; CLI-04-34, 60 NRC 607 (2004)
the Commission can issue subpoenas to require any person to appear and testify or appear and produce documents, or both, at any designated place; CLI-04-34, 60 NRC 607 (2004)
the Commission has discretion to impose a civil penalty as a sanction for a violation as long as a violation has been established and penalties may positively affect the conduct of the licensee or other similarly situated persons and are not grossly disproportionate to the gravity of the offense; CLI-04-24, 60 NRC 160 (2004)
the Commission is to retain authority and responsibility for the regulation of uranium enrichment facilities; CLI-04-30, 60 NRC 426 (2004)
the Commission's authority to define the scope of a hearing includes limiting the hearing to the question of whether the enforcement order should be sustained; CLI-04-26, 60 NRC 399 (2004)

OBJECTIONS

See Waiver of Objection

OPERATING LICENSE AMENDMENT PROCEEDINGS

the licensing board maintains jurisdiction over issues based on supplementary filings for the application when the supplements are essentially clarifications and updates submitted in response to Staff questions and there is no large transformation of the application or the scope of the proceeding; LBP-04-33, 60 NRC 749 (2004)

OPPORTUNITY FOR HEARING

a notice of proposed action published in the *Federal Register* must be reasonably calculated to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections; LBP-04-33, 60 NRC 749 (2004)

ORDER

See Confirmatory Order; Enforcement Orders

PARTIES

opportunity for state or local governmental entities or affected federally recognized Indian tribes to participate in NRC proceedings is available only to those governmental representatives that have not been admitted under 10 C.F.R. 2.309; CLI-04-35, 60 NRC 619 (2004); LBP-04-31, 60 NRC 686 (2004)

See also Consolidation of Parties

PERMITS

an NRC adjudicatory proceeding is not the proper forum for seeking to litigate and resolve controversies about other governmental agencies' permitting authority; LBP-04-17, 60 NRC 229 (2004)

PLEADINGS

asking intervenors to come forward with support for their request to supplement an EIS is a burden akin to a petitioner's initial obligation to come forward with sufficient basis for a contention; CLI-04-39, 60 NRC 657 (2004)

the Commission expects forthright pleadings from those who seek relief from the agency; CLI-04-34, 60 NRC 607 (2004)

PLUTONIUM

radioactive waste storage operation is limited to 200 grams; DD-04-4, 60 NRC 387 (2004)

POLICY STATEMENTS

substantive parameters for civil penalties and other enforcement actions are not established by; CLI-04-24, 60 NRC 160 (2004)

PORE VOLUMES

this parameter describes how many times the contaminated volume of water in the rock must be displaced or processed to restore groundwater quality; CLI-04-33, 60 NRC 581 (2004)

SUBJECT INDEX

PRECEDENTIAL EFFECT

of a final determination on a generic legal issue litigated in a particular proceeding should not hinge upon the presence or absence of wholly extraneous subsequent developments in that proceeding; CLI-04-18, 60 NRC 1 (2004)

PRE-LICENSE APPLICATION PRESIDING OFFICER

appeals from orders must be accompanied by a supporting brief and must be filed with the Commission no later than 10 days after service of the order; CLI-04-20, 60 NRC 15 (2004)

authority is granted solely for the purpose of ruling on disputes over the electronic availability of documents, including disputes relating to claims of privilege or those relating to the implementation of recommendations of the Advisory Review Panel; CLI-04-20, 60 NRC 15 (2004); LBP-04-20, 60 NRC 300 (2004)

authority is granted to regulate the conduct of the proceeding and the parties, to dispose of motions, and to strike a participant's certification to the extent that it triggers other actions during this prehearing process; LBP-04-20, 60 NRC 300 (2004)

authority is granted to restrict irrelevant, unreliable, duplicative, or cumulative arguments and to regulate the course of the proceedings and the conduct of the participants; CLI-04-20, 60 NRC 15 (2004)

ex parte and separation of functions rules shall apply to those limited matters falling within the jurisdiction of; CLI-04-20, 60 NRC 15 (2004)

general powers necessary to carry out its responsibilities are specified in 10 C.F.R. 2.319 and 2.321(c); CLI-04-20, 60 NRC 15 (2004)

jurisdiction shall terminate when an Atomic Safety and Licensing Board has been appointed to preside over the high-level waste repository licensing proceeding, except that, unless the Chief Administrative Judge or the Commission rules otherwise, the PAPO shall retain jurisdiction over those disputes pending before it at the time a licensing board is appointed; CLI-04-20, 60 NRC 15 (2004)

the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel was designated as the PAPO for high-level waste repository proceeding and is authorized to delegate that authority; CLI-04-20, 60 NRC 15 (2004); LBP-04-20, 60 NRC 300 (2004)

the Commission authorizes the PAPO to delegate his authority in whole or in part to any member or members of the Atomic Safety and Licensing Board Panel to serve singly or jointly on one or more boards; CLI-04-20, 60 NRC 15 (2004)

PRESIDING OFFICER, AUTHORITY

to control the prehearing and hearing process by consolidating parties and/or designating a lead party to represent interests held in common by multiple groups, in order to eliminate duplicative or cumulative evidence and arguments; LBP-04-14, 60 NRC 40 (2004)

PRESSURIZED-WATER REACTOR

differences between MOX and LEU fuels with regard to tightness of fuel-clad bonding prior to ballooning and its impact on fuel relocation behavior during a design-basis loss-of-coolant accident are discussed; LBP-04-32, 60 NRC 713 (2004)

PRIVILEGE

any privilege afforded to journalists under the First Amendment is a qualified privilege that can be overcome by a showing of need and unavailability from other sources; CLI-04-34, 60 NRC 607 (2004)

information subject to a subpoena is not confidential when the reporter did not make any specific claim of confidentiality in his motion to quash, the reporter's source is not confidential and the article specifically quotes the source by name, and the reporter has placed the information in the public domain; CLI-04-34, 60 NRC 607 (2004)

where the protection of confidential sources is not involved, the nature of the press interest protected by the privilege is narrower; CLI-04-34, 60 NRC 607 (2004)

PRIVILEGED INFORMATION

the claim and identification of such materials must occur within the time provided for such disclosure of the withheld materials; LBP-04-17, 60 NRC 229 (2004)

when a party withholds information otherwise discoverable under the rules, the party shall expressly make the privilege claim and describe the nature of what is not being disclosed to the extent that, without revealing what is sought to be protected, other parties will be able to determine the applicability of the privilege or protection; LBP-04-14, 60 NRC 40 (2004)

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PROOF

See Burden of Proof; Standard of Proof

PROTECTED ACTIVITY

an employee is protected when he or she raises safety-related issues, even if the context in which it is done is the resolution (rather than the raising) of another safety issue; CLI-04-24, 60 NRC 160 (2004)
an employee's activity regarding regulatory compliance need not be directly related to safety; CLI-04-24, 60 NRC 160 (2004)

an employee's failure to prepare the proper administrative document on the safety issue is irrelevant to whether he engaged in; CLI-04-24, 60 NRC 160 (2004)

employee involvement in exclusively remedial activities does not fall within the bounds of; CLI-04-24, 60 NRC 160 (2004)

employees are not required to predict that whistleblowing will subject them to their employers' wrath for the activity to be protected; CLI-04-24, 60 NRC 160 (2004)

employers are prohibited from taking adverse action against employees for providing safety-related allegations to employers, Congress, or the Commission; CLI-04-24, 60 NRC 160 (2004)

the term includes, but is not limited to, protected activities related to safety issues; CLI-04-24, 60 NRC 160 (2004)

whistleblowing activities are defined as acts of notifying an employer of an alleged violation and refusing to engage in any practice made unlawful by the Energy Policy Act or the Atomic Energy Act, if the employee has identified the alleged illegality to the employer; CLI-04-24, 60 NRC 160 (2004)

QUALIFICATIONS

licensing boards will give expert testimony appropriate weight commensurate with the expertise and; LBP-04-13, 60 NRC 33 (2004)

the party who offers a witness has the burden of demonstrating that the witness is qualified to serve as an expert; CLI-04-21, 60 NRC 21 (2004)

QUALITY ASSURANCE

simply pointing out that applicant does not control such measures at another licensee's facility does not raise a genuine material dispute; CLI-04-22, 60 NRC 125 (2004)

RADIATION PROTECTION PROGRAM

licensee fails to provide calculation protocols, formulas, or variables so that the adequacy of licensee's program can be verified; LBP-04-14, 60 NRC 40 (2004)

RADIOACTIVE EMISSIONS

because the FEIS has taken a hard look at airborne emissions from in situ mining operations, FEIS supplementation is unnecessary; LBP-04-23, 60 NRC 441 (2004)

RADIOACTIVE WASTE DISPOSAL

applicant's plan to transfer to DOE for disposal by DOE of applicant's depleted tails constitutes a plausible strategy for dispositioning the depleted tails; CLI-04-25, 60 NRC 223 (2004)

RADIOACTIVE WASTE STORAGE

limits on types and activity of radioactive material that licensee is authorized to possess are below the levels of concern about risk to the common defense and security; DD-04-4, 60 NRC 387 (2004)

RADIOLOGICAL CONTAMINATION

even if the entire surface of a spent fuel storage canister were contaminated and all contamination was released into the atmosphere at once, the estimated dose to an individual located at the boundary of the facility would be well below regulatory limits; CLI-04-22, 60 NRC 125 (2004)

RAFFINATE SLUDGE

licensee agrees to offsite disposal of; LBP-04-30, 60 NRC 665 (2004)

RECONSIDERATION

a misunderstanding, if any, that amounts to *dicta* is inconsequential in terms of; CLI-04-38, 60 NRC 652 (2004)

the Commission's alleged factual error, where it was not material to the Commission's decision even if it were true, is not a ground for; CLI-04-38, 60 NRC 652 (2004)

See also Motions for Reconsideration

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REDESSABILITY

because the NRC is not bound by judicial concepts of standing, judicial notions or interpretations of redressability do not strictly control a licensing board's assessment of redressability in an administrative proceeding; LBP-04-16, 60 NRC 99 (2004)

REGULATIONS

with limited exception, no rule or regulation of the Commission can be challenged in an adjudicatory proceeding; CLI-04-19, 60 NRC 5 (2004); LBP-04-14, 60 NRC 40 (2004); LBP-04-15, 60 NRC 81 (2004)

REGULATIONS, INTERPRETATION

"alleged" illegality in 10 C.F.R. 50.7(a)(1)(ii) indicates that an employee need not be correct in his or her legal assessment, but need only have a reasonable belief that the assessment is correct; CLI-04-24, 60 NRC 160 (2004)

although such guidance may conflict with or be inconsistent with a regulation, it cannot trump the plain meaning of the regulation; LBP-04-20, 60 NRC 300 (2004)

guidance consistent with the regulations and at least implicitly endorsed by the Commission is entitled to correspondingly special weight; LBP-04-20, 60 NRC 300 (2004)

it is a fundamental rule of regulatory construction that "may," when contrasted with "must" or "will," is permissive; LBP-04-31, 60 NRC 686 (2004)

"protected activity" in 10 C.F.R. 50.7 includes, but is not limited to, protected activities related to safety issues; CLI-04-24, 60 NRC 160 (2004)

the language and structure of the regulations is the starting point in construing their meaning; LBP-04-20, 60 NRC 300 (2004)

the opportunity for state or local governmental entities or affected federally recognized Indian tribes to participate in NRC proceedings is available only to those governmental representatives that have not been admitted as a party under 10 C.F.R. 2.309; CLI-04-35, 60 NRC 619 (2004)

the terms of 10 C.F.R. Part 40, Appendix A, Criterion 9, do not require that a licensee actually obtain cost estimates from an independent contractor, but they do insist that the estimates take into account the costs associated with hiring an independent contractor to restore a site; CLI-04-33, 60 NRC 581 (2004)

under 10 C.F.R. Part 40, Appendix A, Criterion 9, an applicant that has had its own experiences in the uranium recovery field may draw upon its own prior experience as a basis in estimating restoration costs; CLI-04-33, 60 NRC 581 (2004)

under 10 C.F.R. Part 40, Appendix A, Criterion 9, contractor overhead costs and profit are to be factored into the financial plan; CLI-04-33, 60 NRC 581 (2004)

when the meaning of a regulation is clear and obvious, the regulatory language is conclusive and a board is not free to go outside the express terms of an unambiguous regulation to extrinsic aids such as regulatory history; LBP-04-31, 60 NRC 686 (2004)

REGULATORY GUIDES

although such guidance may conflict with or be inconsistent with a regulation, it cannot trump the plain meaning of the regulation; LBP-04-20, 60 NRC 300 (2004)

challenges to the quality or quantity of the review by the Advisory Committee on Reactor Safeguards are not material to, and not a proper subject for, a licensing proceeding; LBP-04-28, 60 NRC 548 (2004)

disputes about whether an application demonstrates that it meets the preconditions of necessity or impracticability are not material to a 20% extended power uprate proceeding; LBP-04-28, 60 NRC 548 (2004)

documents interpreting the application of 10 C.F.R. 73.1(a)(1) and (2) to large Category I fuel cycle facilities are so remote from the security issues surrounding the proposed license amendment that they are not "indispensable" to intervenor seeking discovery; CLI-04-29, 60 NRC 417 (2004)

guidance consistent with the regulations and at least implicitly endorsed by the Commission is entitled to correspondingly special weight; LBP-04-20, 60 NRC 300 (2004)

such documents are only advisory and thus they need not apply in all situations and do not themselves impose legal requirements on licensees; CLI-04-29, 60 NRC 417 (2004)

REPLY BRIEFS

new arguments may not be raised for the first time in; CLI-04-25, 60 NRC 223 (2004)

petitioner's reply should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC Staff answer; CLI-04-25, 60 NRC 223 (2004)

SUBJECT INDEX

providing, for the first time, the necessary threshold support for contentions is not allowed in; CLI-04-35, 60 NRC 619 (2004)

REQUEST FOR ACTION

if petitioner has information supporting its claim that licensee's operation has caused human suffering on a vast scale, its remedy would not be a narrowly focused license renewal hearing, but a citizen's petition under section 2.206; CLI-04-36, 60 NRC 631 (2004)

when motions for reconsideration and amendment of contentions have failed, a petitioner may bring its concerns before the Commission under section 2.206; LBP-04-22, 60 NRC 379 (2004)

REQUEST FOR ADDITIONAL INFORMATION

a license application may be sufficiently complete for purposes of docketing and for starting the adjudicatory process even though the Staff subsequently asks for additional information; LBP-04-33, 60 NRC 749 (2004)

REVIEW

See Antitrust Review; Appellate Review; NRC Staff Review; Standard of Review

REVIEW, INTERLOCUTORY

additional potential costs associated with delaying Commission consideration of Intervenor's NEPA argument until after a final board decision do not amount to irreparable impact warranting immediate review; CLI-04-31, 60 NRC 461 (2004)

Commission policy disfavoring such appeals is largely due to its general unwillingness to engage in piecemeal interference in ongoing licensing board proceedings; CLI-04-31, 60 NRC 461 (2004)

mere expansion of issues rarely, if ever, has been found to affect the basic structure of a proceeding in a pervasive or unusual manner so as to warrant immediate review; CLI-04-31, 60 NRC 461 (2004)

petitions are authorized only where the board decision works immediate and serious irreparable impact or affects the basic structure of the proceeding in a pervasive or unusual manner, or the board refers a ruling, or certifies a question, that raises significant and novel legal or policy issues; CLI-04-31, 60 NRC 461 (2004)

the "basic structure" standard comprehends disputes over the very nature of the hearing in a particular proceeding, for example, whether a licensing hearing should proceed in one step or in two; CLI-04-31, 60 NRC 461 (2004)

the Commission has declined review even where it concluded that aspects of the Licensing Board's decision appear highly questionable; CLI-04-31, 60 NRC 461 (2004)

the Commission will consider novel issues when the board refers one of its rulings, or certifies an issue, as warranting immediate Commission attention; CLI-04-31, 60 NRC 461 (2004)

under longstanding NRC jurisprudence, mere potential legal error does not justify review; CLI-04-31, 60 NRC 461 (2004)

RISK ASSESSMENT

petitioners contend that assessment of the potential environmental impacts of accidents involving natural gas transmission facilities in the environmental report is inadequate; LBP-04-14, 60 NRC 40 (2004)

RULE OF REASON

an environmental assessment need not include every environmental effect that could potentially result from a major federal action, but rather may be limited to effects that are shown to have some likelihood of occurring; LBP-04-23, 60 NRC 441 (2004)

RULEMAKING

a petitioner who believes that revision of any NRC standards is necessitated may file a petition with the Commission for; LBP-04-22, 60 NRC 379 (2004)

RULES OF PRACTICE

a board must determine whether the necessary standing elements are met even though there are no objections to the petitioner's standing; LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

a Commission memorandum does not impose binding requirements on a licensee; LBP-04-25, 60 NRC 516 (2004)

a complainant in a DOL whistleblowing proceeding must show that one or more protected activities was a contributing factor in the adverse action; CLI-04-24, 60 NRC 160 (2004)

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- a contention alleging that a proposed license amendment is technically incompatible with a specified element of licensee's current design or licensing basis can be admissible and does not violate section 50.109; LBP-04-28, 60 NRC 548 (2004)
- a contention alleging that a seismic and structural analysis is necessary to determine whether the existing cooling towers are adequate to handle the increased loads of extended power uprate is within the scope of the proceeding; LBP-04-28, 60 NRC 548 (2004)
- a contention must provide a specific statement of the legal or factual issue sought to be raised, a brief explanation of its basis, a concise statement of the alleged facts or expert opinions, with supporting references, and sufficient information demonstrating that a genuine dispute exists in regard to a material issue of law or fact; CLI-04-36, 60 NRC 631 (2004); LBP-04-14, 60 NRC 40 (2004); LBP-04-15, 60 NRC 81 (2004); LBP-04-16, 60 NRC 99 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)
- a *Federal Register* notice that announces the opportunity for a hearing on amending a license by incorporating a license termination plan is adequate; CLI-04-28, 60 NRC 412 (2004)
- a license application may be sufficiently complete for purposes of docketing and for starting the adjudicatory process even though the Staff subsequently asks for additional information from the applicant; LBP-04-33, 60 NRC 749 (2004)
- a licensee may be exempted from the decommissioning funding requirements if the exemption is authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest; LBP-04-25, 60 NRC 516 (2004)
- a licensing board may consolidate parties and/or designate a lead party to represent interests held in common by multiple groups, in order to eliminate duplicative or cumulative evidence and arguments; LBP-04-14, 60 NRC 40 (2004)
- a licensing board will oversee the discovery process through status reports and/or conferences, and each party is expected to comply with the process to the maximum extent possible; LBP-04-14, 60 NRC 40 (2004)
- a misunderstanding, if any, that amounts to *dicta* is inconsequential in terms of reconsideration; CLI-04-38, 60 NRC 652 (2004)
- a party may challenge the credibility of potential eyewitnesses based on historical information in a similar or related proceeding, as long as it is probative of whether that credibility reasonably may be expected to be at issue in the current proceeding; LBP-04-31, 60 NRC 686 (2004)
- a petition for reconsideration must demonstrate a compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated, which renders the decision invalid; CLI-04-38, 60 NRC 652 (2004)
- a petition to intervene in a uranium enrichment facility licensing proceeding shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding; CLI-04-30, 60 NRC 426 (2004)
- a petitioner is not adversely affected by a confirmatory order that improves the safety situation over what it was in the absence of the order; CLI-04-26, 60 NRC 399 (2004)
- a petitioner is not entitled to a Subpart G hearing based on the fact that there is a high degree of public interest in the proceeding, that it is controversial, or that discovery and cross-examination are allegedly required to assure public confidence in the proceeding and its decisions; LBP-04-31, 60 NRC 686 (2004)
- a request for hearing must set forth with particularity the contentions sought to be raised; LBP-04-16, 60 NRC 99 (2004)
- a state satisfies regulatory standing requirements by averring in its request to intervene that the proceeding involves a facility located within its boundaries; LBP-04-25, 60 NRC 516 (2004)
- a State that has been admitted as a party cannot participate as an interested State; LBP-04-31, 60 NRC 686 (2004)
- a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify if scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue; CLI-04-21, 60 NRC 21 (2004); LBP-04-13, 60 NRC 33 (2004)
- all lead parties are to make available within 45 days of the issuance of a memorandum and order admitting parties and issues the name, address, and phone number of individuals likely to possess relevant discoverable information; LBP-04-14, 60 NRC 40 (2004)

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all properly formulated contentions must focus on the license application in question, challenging either specific portions of or alleged omissions from the application; LBP-04-14, 60 NRC 40 (2004); LBP-04-15, 60 NRC 81 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

alleging generalized aspersions on the tactics or motives of the parties, their employees, members, lawyers, or *pro se* representatives will not satisfy the "credibility" or "motive" elements that trigger Subpart G proceedings; LBP-04-31, 60 NRC 686 (2004)

although Energy Reorganization Act §211 does not specify a preponderance-of-the-evidence standard, the courts have found that the term "demonstrated" implies such a standard; CLI-04-24, 60 NRC 160 (2004)

although licensing boards generally are to litigate contentions rather than bases, the reach of a contention necessarily hinges upon its terms coupled with its stated bases; LBP-04-14, 60 NRC 40 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

although petitioner bears the burden of demonstrating standing, licensing boards must construe the petition in favor of the petitioner; LBP-04-16, 60 NRC 99 (2004)

although the Commission customarily follows judicial concepts of standing, it is not bound to do so, given that it is not an article III court; LBP-04-16, 60 NRC 99 (2004)

an allegation that the documentation of Licensee's current licensing basis is noncompliant is not material or within the scope of an operating license amendment proceeding unless petitioner shows that the alleged deficiencies have a plausible nexus to the grant or denial of the uprate application; LBP-04-28, 60 NRC 548 (2004)

an intervention petitioner must demonstrate that the issue raised is within the scope of the proceeding and material to the findings the NRC must make to support the action that is involved in the proceeding; LBP-04-14, 60 NRC 40 (2004); LBP-04-15, 60 NRC 81 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

an organization that wishes to intervene may do so either in its own right by demonstrating injury to its organizational interests or in a representational capacity by demonstrating harm to the interests of its members; LBP-04-16, 60 NRC 99 (2004)

any attempt to compel discovery by filing a motion with the board must be preceded by the moving party either conferring or attempting in good faith to confer with the other party in an effort to resolve the dispute without licensing board intervention; LBP-04-14, 60 NRC 40 (2004)

appellant bears the responsibility of clearly identifying the asserted errors in the decision on appeal; CLI-04-23, 60 NRC 154 (2004)

application of the need-to-know doctrine starts with the traditional discovery rules and then narrows their breadth to take account of the sensitive nature of security information; CLI-04-29, 60 NRC 417 (2004)

as soon as practicable after issuance of a memorandum and order admitting parties and issues, but no more than 30 days after that issuance, parties are to meet to discuss their particular claims and defenses and the possibility of settlement or resolution of any part of the proceeding, develop a plan for discovery, and make arrangements for the required disclosures; LBP-04-14, 60 NRC 40 (2004)

because a witness is a paid employee or dedicated member of a party does not create a presumption that his or her credibility or motives are in such doubt that a Subpart G proceeding is required; LBP-04-31, 60 NRC 686 (2004)

challenges to the quality or quantity of the review by the Advisory Committee on Reactor Safeguards of a regulatory guide that it approved is not material and not a proper subject for a licensing proceeding; LBP-04-28, 60 NRC 548 (2004)

consistent disregard for NRC procedural rules can result in reprimand, censure, or suspension of counsel; CLI-04-36, 60 NRC 631 (2004)

contention admissibility requirements are the same for governmental and nongovernmental petitioners; LBP-04-14, 60 NRC 40 (2004)

contentions may not seek to impose stricter requirements than those set forth by the regulations; LBP-04-14, 60 NRC 40 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

contentions that attack applicable statutory requirements or challenge to the basic structure of the Commission's regulatory process must be rejected; CLI-04-22, 60 NRC 125 (2004); LBP-04-14, 60

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NRC 40 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

contested issues must be within the scope of the proceeding as defined by the Commission in its initial hearing notice and order referring the proceeding to the licensing board; LBP-04-14, 60 NRC 40 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

courts routinely find it unnecessary to evaluate the standing of all participants on one side if one of them is found to have standing; LBP-04-24, 60 NRC 475 (2004)

defining the need-to-know ‘indispensability’ standard by reference to the discovery standard, with appropriate balancing of the public safety and other factors unique to the case, is the proper course to follow for disclosure of security information; CLI-04-29, 60 NRC 417 (2004)

discovery is generally available in operating license amendment proceedings if information a party seeks is reasonably calculated to lead to the discovery of admissible evidence; CLI-04-29, 60 NRC 417 (2004)

distribution of sensitive information must be limited to those having an actual and specific, rather than a perceived, need to know; LBP-04-21, 60 NRC 357 (2004)

each potential party must establish procedures to implement the requirements in 10 C.F.R. 2.1003, and to have a responsible official certify to the pre-license application presiding officer that the procedures have been implemented and the documentary material specified in section 2.1003 has been identified and made electronically available; LBP-04-20, 60 NRC 300 (2004)

‘efficiency’ is not a criterion for grant of a Subpart G proceeding; LBP-04-31, 60 NRC 686 (2004)

except for power reactors, for a neighbor to have presumptive standing depends upon proximity to the facility, the presence of a significant source of radioactivity at the facility, and that source’s obvious potential to cause offsite damage due to its radioactive properties; LBP-04-24, 60 NRC 475 (2004)

failure to comply with any of the pleading requirements is grounds for dismissal of a contention; LBP-04-14, 60 NRC 40 (2004); LBP-04-15, 60 NRC 81 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

failure to establish injury-in-fact defeats standing of the petitioners; CLI-04-23, 60 NRC 154 (2004)

federal courts have recognized that because agencies are neither constrained by article III nor governed by judicially created standing doctrines, the criteria for establishing administrative standing therefore may permissibly be less demanding than the criteria for judicial standing; LBP-04-16, 60 NRC 99 (2004)

for a contention to be admissible, it must provide a brief explanation of its basis; CLI-04-36, 60 NRC 631 (2004)

for a contention to be admissible, it must provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner’s position and upon which the petitioner intends to rely at hearing; CLI-04-36, 60 NRC 631 (2004)

for determining the obvious potential for offsite consequences in evaluating standing, licensing boards may take into account not just the raw size of the source but at least any passive shielding that is always present during installation, operation, or removal of that source; LBP-04-24, 60 NRC 475 (2004)

for interlocutory review, petitioner must show either irreparable harm or a pervasive or unusual effect on the basic structure of the proceeding; CLI-04-21, 60 NRC 21 (2004)

gaps in specific knowledge of intervenor’s expert witness may go to the weight of the expert testimony rather than to its admissibility; CLI-04-21, 60 NRC 21 (2004); LBP-04-13, 60 NRC 33 (2004)

holding Commission review in abeyance is appropriate where a related board inquiry might obviate the need for Commission review; CLI-04-32, 60 NRC 469 (2004)

if a petitioner requests a remedy that is beyond the scope of the hearing, then the hearing request must be denied because redressability is an element of standing; CLI-04-26, 60 NRC 399 (2004)

if an application requests that containment overpressure serve as a credit to assist in demonstrating that a facility will have adequate net positive suction head to deal with a loss of coolant accident, the appropriateness of the credit is within the scope of the proceeding; LBP-04-28, 60 NRC 548 (2004)

if exigent circumstances warrant an extension of the petition deadline, NRC rules allow petitioners to file a motion requesting an extension of the filing deadline; CLI-04-35, 60 NRC 619 (2004)

in determining stay motions, a presiding officer must consider whether the moving party has made a strong showing that it is likely to prevail on the merits, the moving party will be irreparably injured

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unless a stay is granted, the granting of a stay would harm other parties, and where the public interest lies; LBP-04-15, 60 NRC 81 (2004)

in determining the hearing procedures, boards have discretion to consider the complexity of the technical issues, the experience of the parties and their counsel in NRC licensing proceedings, and the necessity for discovery; LBP-04-31, 60 NRC 686 (2004)

in enforcement proceedings, a licensing board must consider as part of its standing inquiry whether the petitioner's concerns are beyond the scope of the proceeding; LBP-04-16, 60 NRC 99 (2004)

intervenor's have an obligation to review the record closely and to raise their arguments promptly; CLI-04-33, 60 NRC 581 (2004)

judicial standing requires a showing of an actual or threatened, concrete and particularized injury that is fairly traceable to the challenged action, falls among the general interests protected by the Atomic Energy Act, and is likely to be redressed by a favorable decision; LBP-04-16, 60 NRC 99 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

motions for reconsideration may not be filed except upon leave of the presiding officer or the Commission, upon a showing of compelling circumstances, such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated, that renders the decision invalid; CLI-04-36, 60 NRC 631 (2004)

new arguments may not be raised for the first time in a reply brief; CLI-04-25, 60 NRC 223 (2004)

NRC does not look with favor on amended or new contentions filed after the initial filing; CLI-04-36, 60 NRC 631 (2004)

NRC license renewal inquiry is narrow, focusing on the potential impacts of an additional 20 years of nuclear power plant operation, not on everyday operational issues; CLI-04-36, 60 NRC 631 (2004)

NRC strictly limits the contentions that may be raised in licensing adjudications so that individual licensing adjudications are limited to deciding genuine, substantive safety and environmental issues placed in contention by qualified intervenors; CLI-04-22, 60 NRC 125 (2004)

NRC's policy of encouraging settlement not only can lead to reducing the costs and burdens of litigation, but can also bring more satisfying outcomes than those produced by litigation; LBP-04-24, 60 NRC 475 (2004)

opportunity for cross-examination under Subpart L is equivalent to the opportunity for cross-examination under Administrative Procedure Act § 556(b); LBP-04-31, 60 NRC 686 (2004)

petitioner is entitled to Subpart G procedures if a contention necessitates resolution of a dispute of material fact concerning the occurrence of a past activity and the credibility of an eyewitness may reasonably be expected to be an issue in resolving that dispute; LBP-04-31, 60 NRC 686 (2004)

petitioner may not request additional measures beyond those set out in a confirmatory order or litigate matters that go beyond the scope of the proceeding as defined by the Commission in the confirmatory order; LBP-04-16, 60 NRC 99 (2004)

petitioner may not simply incorporate massive documents by reference as the basis for or as a statement of his contentions; LBP-04-15, 60 NRC 81 (2004)

petitioner must demonstrate that the issue raised in its contention is material to the findings the NRC must make to support the action that is involved in the proceeding; CLI-04-36, 60 NRC 631 (2004)

petitioner must demonstrate that the issue raised in its contention is within the scope of the proceeding; CLI-04-36, 60 NRC 631 (2004)

petitioner's reply brief should be narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC Staff answer; CLI-04-25, 60 NRC 223 (2004)

petitioners must examine the publicly available material and set forth their claims and the support for their claims at the outset; CLI-04-25, 60 NRC 223 (2004)

petitioners must file NEPA contentions on the applicant's environmental report so that environmental issues are raised as soon as possible in the proceeding; CLI-04-22, 60 NRC 125 (2004)

petitioners not having presumptive proximity-plus standing are entitled to demonstrate standing based on establishing a viable potential pathway for injury-in-fact; LBP-04-24, 60 NRC 475 (2004)

petitioners will not be granted a Subpart G proceeding based on an assertion that the licensee will not comply with its duty to disclose documents; LBP-04-31, 60 NRC 686 (2004)

providing any material or document as a basis for a contention without setting forth an explanation of its significance is inadequate to support the admission of the contention; LBP-04-14, 60 NRC 40 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

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regulatory guides are not mandatory requirements and therefore disputes about whether the application demonstrates that it meets the regulatory guide preconditions of necessity or impracticability are not material to a 20% extended power uprate proceeding; LBP-04-28, 60 NRC 548 (2004)

requirement that an applicant submit a no significant hazard consideration analysis concerns a procedural matter and thus is not material to the merits of the licensing proceeding and does not form the basis of an admissible contention; LBP-04-28, 60 NRC 548 (2004)

scope-of-proceeding issues are jurisdictional in nature; CLI-04-24, 60 NRC 160 (2004)

the adjudicatory process is not the proper venue for setting forth views regarding the direction regulatory policy should take; LBP-04-14, 60 NRC 40 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

the Commission affirms board rulings on admissibility of contentions if the appellant points to no error of law or abuse of discretion; CLI-04-36, 60 NRC 631 (2004)

the Commission continues to disfavor interlocutory appeals largely due to its general unwillingness to engage in piecemeal interference in ongoing Licensing Board proceedings; CLI-04-31, 60 NRC 461 (2004)

the Commission deems waived any arguments not raised before the board or not clearly articulated in the petition for review; CLI-04-33, 60 NRC 581 (2004)

the Commission ordinarily defers to licensing boards' fact findings, as long as they are not clearly erroneous; CLI-04-24, 60 NRC 160 (2004)

the Commission ordinarily will not consider on appeal either new arguments or new evidence supporting a contention, which the licensing board never had the opportunity to consider; CLI-04-22, 60 NRC 125 (2004)

the Commission reviews a licensing board's conclusions of law *de novo*, reversing legal rulings if they are a departure from or contrary to established law; CLI-04-24, 60 NRC 160 (2004)

the Commission revisits its own already-issued decisions only if a party seeking reconsideration brings decisive new information to its attention or demonstrates a fundamental Commission misunderstanding of a key point; CLI-04-35, 60 NRC 619 (2004)

the Commission will affirm a board's ruling on admissibility of contentions where the appellant fails on appeal to address adequately the board's grounds for refusing to admit the contentions, and/or fails to provide specific support for its contentions, and/or presents contentions that fall beyond the scope of the proceeding; CLI-04-36, 60 NRC 631 (2004)

the Commission will sometimes entertain a reconsideration motion in order to clarify the meaning or intent of language in one of its decisions; CLI-04-37, 60 NRC 646 (2004)

the Commission's standard for review of a board evidentiary ruling is abuse of discretion; CLI-04-21, 60 NRC 21 (2004)

the complexity of an issue does not automatically trigger a Subpart G hearing; LBP-04-31, 60 NRC 686 (2004)

the evidentiary touchstone in a nuclear whistleblowing case is the special evidentiary framework that Congress established in section 211 of the Energy Reorganization Act; CLI-04-24, 60 NRC 160 (2004)

the fact that NRC safety regulations do not require a measure does not necessarily mean there will be no environmental consequences that must be discussed in an environmental impact statement; CLI-04-22, 60 NRC 125 (2004)

the general rule is that a party may not challenge a Commission regulation in a licensing proceeding; LBP-04-24, 60 NRC 475 (2004)

the licensing board maintains jurisdiction over issues based on supplementary filings for the application when the supplements are essentially clarifications and updates submitted in response to Staff questions and there is no large transformation of the application or the scope of the proceeding; LBP-04-33, 60 NRC 749 (2004)

the moving party has the burden of demonstrating that likelihood of success on the merits and irreparable injury weigh in its favor; LBP-04-15, 60 NRC 81 (2004)

the pendency of an NRC-commissioned independent engineering inspection of a plant does not entitle the public or petitioners to a delay in the deadline established in the NRC notice for the filing of contentions and requests for hearing; LBP-04-28, 60 NRC 548 (2004)

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- the second criterion entitling a petitioner to a Subpart G proceeding involves issues of motive or intent of the party or eyewitness material to the resolution of the contested matter; LBP-04-31, 60 NRC 686 (2004)
- the subject matter of a contention must impact the grant or denial of a pending license application; LBP-04-14, 60 NRC 40 (2004); LBP-04-15, 60 NRC 81 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)
- timeliness of a motion to dismiss a proceeding on the ground that subsequent events have transformed the proceeding beyond the scope of the original notice is measured from the date of the transforming events, not the date of the original notice; LBP-04-33, 60 NRC 749 (2004)
- to establish standing, a petitioner must provide information on the nature of petitioner's right under the Atomic Energy Act to be made a party, petitioner's property, financial, or other interests in the proceeding, and the effect that any decision may have on petitioner's interest; LBP-04-14, 60 NRC 40 (2004); LBP-04-16, 60 NRC 99 (2004)
- to establish standing, a petitioner must show an injury in fact that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; CLI-04-26, 60 NRC 399 (2004)
- to intervene in a proceeding a petitioner must establish standing and set forth at least one admissible contention; CLI-04-23, 60 NRC 154 (2004); LBP-04-14, 60 NRC 40 (2004); LBP-04-16, 60 NRC 99 (2004)
- to obtain a hearing, a petitioner must demonstrate an interest affected by the proceeding; CLI-04-26, 60 NRC 399 (2004)
- when an entity seeks to intervene on behalf of its members, that entity must show that it has an individual member who can fulfill all the necessary standing elements and who has authorized the organization to represent his or her interests; LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)
- where a party who previously advanced contentions thereafter expressly declines to contest the position of the NRC Staff that certain contentions are inadmissible, those contentions are deemed abandoned; LBP-04-25, 60 NRC 516 (2004)
- whistleblowers will prevail if they demonstrate by a preponderance of the evidence that a protected activity was a contributing factor to an adverse personnel action unless the employer comes back with clear and convincing evidence that it would have taken the same unfavorable personnel action notwithstanding the protected whistleblowing activity; CLI-04-24, 60 NRC 160 (2004)
- with limited exception, no rule or regulation of the Commission can be challenged in an adjudicatory proceeding; LBP-04-14, 60 NRC 40 (2004); LBP-04-15, 60 NRC 81 (2004)
- RULES OF PROCEDURE**
- consistent disregard for NRC procedural rules can result in reprimand, censure, or suspension of counsel; CLI-04-36, 60 NRC 631 (2004)
- SAFEGUARDS INFORMATION**
- application of the need-to-know doctrine starts with the traditional discovery rules and then narrows their breadth to take account of the sensitive nature of security information; CLI-04-29, 60 NRC 417 (2004)
- boards and NRC Staff must take a hard look at requests for sensitive security documents to make sure disclosure is truly useful in litigating admitted contentions, and not simply an exercise of curiosity or of a party's hope that something useful may turn up; CLI-04-29, 60 NRC 417 (2004)
- defining the need-to-know "indispensability" standard by reference to the discovery standard, with appropriate balancing of the public safety and other factors unique to the case, is the proper course to follow for disclosure of; CLI-04-29, 60 NRC 417 (2004)
- distribution of sensitive information must be limited to those having an actual and specific, rather than a perceived, need to know; LBP-04-21, 60 NRC 357 (2004)
- in ruling on need-to-know requests, boards must keep in mind the delicate balance between fulfilling the Commission's mission to protect the public and providing the public with enough information to help the Commission discharge that mission; LBP-04-21, 60 NRC 357 (2004)
- in the area of reactor security plans, the expertise of the intervenor's witness is general rather than specific; CLI-04-21, 60 NRC 21 (2004)
- to gain access, a witness must possess the technical expertise to evaluate the information requested; CLI-04-21, 60 NRC 21 (2004)

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SANCTIONS

consistent disregard for NRC procedural rules can result in reprimand, censure, or suspension of counsel; CLI-04-36, 60 NRC 631 (2004)

SECURITY

a license renewal proceeding is not the appropriate forum for considering; CLI-04-36, 60 NRC 631 (2004)

calculation of costs associated with security for waste disposal; LBP-04-14, 60 NRC 40 (2004)

See also Common Defense and Security

SECURITY PROGRAM

sufficient measures are in place to defend the Indian Point plant from a broad spectrum of potential terrorist attacks; DD-04-3, 60 NRC 343 (2004)

SEPARATION OF FUNCTIONS RULE

application to limited matters falling within the pre-license application presiding officer's jurisdiction and to appeals to the Commission of PAPO rulings; CLI-04-20, 60 NRC 15 (2004)

SETTLEMENT AGREEMENTS

board reviews proposed agreement and finds that it is in the public interest and therefore terminates a civil penalty proceeding; LBP-04-26, 60 NRC 532 (2004)

order approving agreement incorporates condition that changes to licensee's site reclamation plan will constitute good cause for a late-filed hearing request; LBP-04-30, 60 NRC 665 (2004)

SETTLEMENT NEGOTIATIONS

NRC's policy of encouraging settlement not only can lead to reducing the costs and burdens of litigation, but can also bring more satisfying outcomes than those produced by litigation; LBP-04-24, 60 NRC 475 (2004)

SITE REMEDIATION

order approving settlement agreement incorporates condition that changes to licensee's site reclamation plan will constitute good cause for a late-filed hearing request; LBP-04-30, 60 NRC 665 (2004)

SITE RESTORATION

analysis of labor and equipment costs for restoration of groundwater quality; CLI-04-33, 60 NRC 581 (2004)

costs are closely linked to the amount of water that must be processed to restore the groundwater; CLI-04-33, 60 NRC 581 (2004)

SITE SAFETY ANALYSIS REPORT

failure to evaluate site suitability for below-grade placement of reactor containment is not an admissible issue in an early site permit proceeding; LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2004)

failure to provide adequate safety assessment of reactor interaction is not an admissible issue in an early site permit proceeding; LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2004)

SPENT FUEL STORAGE

petitioner failed to allege, with expert and technical backing, how a canister could become so contaminated that it would be harmful to workers at the applicant's site or be too dangerous to ship through interstate commerce, given the shippers' quality assurance procedures; CLI-04-22, 60 NRC 125 (2004)

STANDARD OF PROOF

a complainant in a DOL whistleblowing proceeding must show that one or more protected activities was a contributing factor in the adverse action; CLI-04-24, 60 NRC 160 (2004)

although Energy Reorganization Act § 211 does not specify a preponderance-of-the-evidence standard, the courts have found that the term "demonstrated" implies that standard; CLI-04-24, 60 NRC 160 (2004)

whistleblowers will prevail if they demonstrate by a preponderance of the evidence that a protected activity was a contributing factor to an adverse personnel action unless the employer comes back with clear and convincing evidence that it would have taken the same unfavorable personnel action notwithstanding the protected whistleblowing activity; CLI-04-24, 60 NRC 160 (2004)

STANDARD OF REVIEW

abuse of discretion is standard for review of a board evidentiary ruling; CLI-04-21, 60 NRC 21 (2004)

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an effort to show that the record evidence in a case may be understood to support a view sharply different from that of the board does not, in and of itself, establish the board's view as clearly erroneous; CLI-04-24, 60 NRC 160 (2004)

the Commission ordinarily defers to licensing board fact findings, as long as they are not clearly erroneous; CLI-04-24, 60 NRC 160 (2004)

the Commission reviews a licensing board's conclusions of law *de novo*, reversing legal rulings if they are a departure from or contrary to established law; CLI-04-24, 60 NRC 160 (2004)

where, in consultation with technical experts, a presiding officer reaches highly fact-specific findings following a review of technical information, the Commission will ordinarily defer to these findings, absent an indication of a clearly erroneous finding; CLI-04-39, 60 NRC 657 (2004)

STANDING TO INTERVENE

a board must determine whether the necessary elements are met even though there are no objections to a petitioner's standing; LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

a licensing board must consider whether the petitioner's concerns are beyond the scope of this proceeding; LBP-04-16, 60 NRC 99 (2004)

a petitioner is not adversely affected by a confirmatory order that improves the safety situation over what it was in the absence of the order; CLI-04-26, 60 NRC 399 (2004)

a petitioner must provide information on the nature of petitioner's right under the Atomic Energy Act to be made a party, petitioner's property, financial, or other interests in the proceeding, and the effect that any decision may have on petitioner's interest; LBP-04-14, 60 NRC 40 (2004); LBP-04-16, 60 NRC 99 (2004)

a petitioner must show an injury in fact that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision; CLI-04-26, 60 NRC 399 (2004)

a state may be a party to a licensing proceeding for a nuclear power plant located within its boundaries without addressing requirements for; LBP-04-28, 60 NRC 548 (2004)

although petitioner bears the burden of demonstrating standing, licensing boards must construe the petition in favor of the petitioner; LBP-04-16, 60 NRC 99 (2004)

although the Agency's "obvious potential" precedents are instructive as to distance, they do not set definitive restrictions; LBP-04-24, 60 NRC 475 (2004)

although the Commission customarily follows judicial concepts of standing, it is not bound to do so, given that it is not an article III court; LBP-04-16, 60 NRC 99 (2004)

because the NRC is not bound by judicial concepts of standing, judicial notions or interpretations of redressability do not strictly control a licensing board's assessment of redressability in an administrative proceeding; LBP-04-16, 60 NRC 99 (2004)

courts routinely find it unnecessary to evaluate the standing of all participants on one side if one of them is found to have standing; LBP-04-24, 60 NRC 475 (2004)

except for power reactors, for a neighbor to have presumptive standing depends upon proximity to the facility, the presence of a significant source of radioactivity at the facility, and that source's obvious potential to cause offsite damage due to its radioactive properties; LBP-04-24, 60 NRC 475 (2004)

federal courts have recognized that because agencies are neither constrained by article III nor governed by judicially created standing doctrines, the criteria for establishing administrative standing therefore may permissibly be less demanding than the criteria for judicial standing; LBP-04-16, 60 NRC 99 (2004)

if a petitioner requests a remedy that is beyond the scope of the hearing, then the hearing request must be denied because redressability is an element of; CLI-04-26, 60 NRC 399 (2004)

in cases involving the possible construction or operation of a nuclear power reactor, proximity to the proposed facility has been considered sufficient to establish the requisite injury-in-fact; LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)

in its request to intervene, a state must aver that the proceeding involves a facility located within its boundaries; LBP-04-25, 60 NRC 516 (2004)

petitioner may not request additional measures beyond those set out in a confirmatory order or litigate matters that go beyond the scope of the proceeding as defined by the Commission in the confirmatory order; LBP-04-16, 60 NRC 99 (2004)

petitioners not having presumptive proximity-plus standing are entitled to demonstrate standing based on establishing a viable potential pathway for injury-in-fact; LBP-04-24, 60 NRC 475 (2004)

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- residents residing beyond 3/4 mile must make a more specific showing than those residing closer; LBP-04-24, 60 NRC 475 (2004)
- state and federally recognized Indian tribes do not need to address standing requirements if the uranium enrichment facility is located within its boundaries; CLI-04-30, 60 NRC 426 (2004)
- to establish the requisite interest, a petitioner must allege a concrete and particularized injury that is fairly traceable to the challenged action and likely to be redressed by a favorable decision; LBP-04-16, 60 NRC 99 (2004)
- to meet the judicial standards, a petitioner must show an actual or threatened, concrete and particularized injury that is fairly traceable to the challenged action, falls among the general interests protected by the Atomic Energy Act, and is likely to be redressed by a favorable decision; LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)
- to obtain a hearing a petitioner must demonstrate an interest affected by the proceeding; CLI-04-26, 60 NRC 399 (2004)
- STANDING TO INTERVENE, ORGANIZATIONAL**
- an organization must demonstrate injury to its organizational interests or harm to the interests of its members; LBP-04-16, 60 NRC 99 (2004)
- an organization whose members reside within 15 miles of a plant and who assert concerns about a 20% increase in its maximum authorized power, alleging the potential for an accident and harmful consequences of an offsite radiological release, has standing; LBP-04-28, 60 NRC 548 (2004)
- when an entity seeks to intervene on behalf of its members, that entity must show it has an individual member who can fulfill all the necessary standing elements and who has authorized the organization to represent his or her interests; LBP-04-16, 60 NRC 99 (2004); LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2003)
- STATE GOVERNMENT**
- a state may be a party to a licensing proceeding for a nuclear power plant located within its boundaries without addressing standing requirements; LBP-04-28, 60 NRC 548 (2004)
- a state that has been admitted as a party cannot participate as an interested state; LBP-04-31, 60 NRC 686 (2004)
- regulatory standing requirements are established by averring in its request to intervene that the proceeding involves a facility located within its boundaries; LBP-04-25, 60 NRC 516 (2004)
- STATUTORY CONSTRUCTION**
- because a statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole; LBP-04-20, 60 NRC 300 (2004)
- remedial legislation such as whistleblower and antidiscrimination statutes should be broadly interpreted in order to accomplish its goals; CLI-04-24, 60 NRC 160 (2004)
- See also Construction of Meaning; Construction of Terms; Regulations, Interpretation
- STAY**
- a presiding officer must consider whether the moving party has made a strong showing that it is likely to prevail on the merits, the moving party will be irreparably injured unless a stay is granted, the granting of a stay would harm other parties, and where the public interest lies; LBP-04-15, 60 NRC 81 (2004)
- likelihood of success on the merits and irreparable injury are the two most important factors in determining motions for; LBP-04-15, 60 NRC 81 (2004)
- the moving party has the burden of demonstrating that likelihood of success on the merits and irreparable injury weigh in its favor; LBP-04-15, 60 NRC 81 (2004)
- STORAGE CANISTERS**
- petitioner failed to allege, with expert and technical backing, how a canister could become so contaminated that it would be harmful to workers at the applicant's site or be too dangerous to ship through interstate commerce, given the shippers' quality assurance procedures; CLI-04-22, 60 NRC 125 (2004)
- SUBPART G PROCEEDINGS**
- a party may challenge the credibility of potential eyewitnesses based on historical information in a similar or related proceeding, so long as it is probative of whether a witness's credibility reasonably may be expected to be at issue in the current proceeding; LBP-04-31, 60 NRC 686 (2004)

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- a petitioner is not entitled to a Subpart G hearing based on the fact that there is a high degree of public interest in the proceeding, that it is controversial, or that discovery and cross-examination are allegedly required to assure public confidence in the proceeding and its decisions; LBP-04-31, 60 NRC 686 (2004)
- alleging generalized aspersions on the tactics or motives of the parties, their employees, members, lawyers, or *pro se* representatives will not satisfy the "credibility" or "motive" elements that trigger; LBP-04-31, 60 NRC 686 (2004)
- because a witness is a paid employee or dedicated member of a party, does not create a presumption that his or her credibility or motives are in such doubt that a Subpart G proceeding is required; LBP-04-31, 60 NRC 686 (2004)
- because initial selection of procedures is made before the identity of opposing party witnesses is known, the selection may be changed if the criteria are met; LBP-04-31, 60 NRC 686 (2004)
- "efficiency" is not a criterion for grant of; LBP-04-31, 60 NRC 686 (2004)
- in determining which procedures are appropriate, boards have discretion to consider the complexity of the technical issues, the experience of the parties and their counsel in NRC licensing proceedings, and the necessity for discovery; LBP-04-31, 60 NRC 686 (2004)
- petitioner is entitled to Subpart G procedures if a contention necessitates resolution of a dispute of material fact concerning the occurrence of a past activity and the credibility of an eyewitness may reasonably be expected to be an issue in resolving that dispute; LBP-04-31, 60 NRC 686 (2004)
- the board has discretion to determine the type of hearing procedures most appropriate for the specific contentions before it; LBP-04-31, 60 NRC 686 (2004)
- the complexity of an issue does not automatically trigger formal procedures; LBP-04-31, 60 NRC 686 (2004)
- the second criterion entitling a petitioner to a formal proceeding involves issues of motive or intent of the party or eyewitness material to the resolution of the contested matter; LBP-04-31, 60 NRC 686 (2004)
- SUBPART L PROCEEDINGS**
- cross-examination by a party is available whenever the board determines that it is necessary for the development of adequate record for a sound decision or is required for a full and true disclosure of the facts; LBP-04-31, 60 NRC 686 (2004)
- opportunity for cross-examination is equivalent to the opportunity for cross-examination under Administrative Procedure Act § 556(b); LBP-04-31, 60 NRC 686 (2004)
- SUBPOENAS**
- Department of Justice guidelines are not binding on the NRC, but they may provide some internal guidance to DOJ in deciding whether to seek enforcement of a subpoena in federal court, should that eventually arise; CLI-04-34, 60 NRC 607 (2004)
- Department of Justice guidelines do not vest any rights in a person challenging; CLI-04-34, 60 NRC 607 (2004)
- reviewing courts have consistently upheld the right of the NRC to issue subpoenas to persons who are not NRC licensees; CLI-04-34, 60 NRC 607 (2004)
- the Commission has the authority to issue subpoenas to require any person to appear and testify or appear and produce documents, or both, at any designated place; CLI-04-34, 60 NRC 607 (2004)
- SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT**
- a final environmental impact statement must be supplemented if there exists significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts; LBP-04-23, 60 NRC 441 (2004)
- a supplement is compelled by only those changes that cause effects that are significantly different from those already studied; LBP-04-23, 60 NRC 441 (2004)
- asking intervenors to come forward with support for their request to supplement an EIS is a burden akin to a petitioner's initial obligation to come forward with sufficient basis for a contention; CLI-04-39, 60 NRC 657 (2004)
- the question whether the new information or circumstance is significant ordinarily raises a factual dispute; LBP-04-23, 60 NRC 441 (2004)
- TAILINGS**
- an approach for disposition that is consistent with section 3113 of the USEC Privatization Act constitutes a "plausible strategy" for disposition of the depleted tails; CLI-04-30, 60 NRC 426 (2004)

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TECHNICAL SPECIFICATIONS

licensee must file an license amendment application fully describing the changes desired; LBP-04-32, 60 NRC 713 (2004)

TERMINATION OF LICENSE

all power reactor licensees must submit an application for termination of their licenses for facilities undergoing dismantlement and decommissioning; LBP-04-27, 60 NRC 539 (2004)

TERMINATION OF PROCEEDING

board approval of a settlement agreement on a civil penalty results in; LBP-04-26, 60 NRC 532 (2004)

order approving settlement agreement incorporates a condition that changes to licensee's site reclamation plan will constitute good cause for a late-filed hearing request; LBP-04-30, 60 NRC 665 (2004)

proceeding was moot when applicant emerged from bankruptcy under conditions that obviated the need to transfer the licenses; CLI-04-18, 60 NRC 1 (2004)

vacatur of orders in license transfer proceeding that became moot is denied in the case of Commission orders devoted to antitrust law and policy; CLI-04-18, 60 NRC 1 (2004)

withdrawal of licensee's request is basis for; LBP-04-29, 60 NRC 663 (2004)

TERRORISM

a license renewal proceeding is not the appropriate forum for considering; CLI-04-36, 60 NRC 631 (2004)

such contentions are beyond the scope of NRC Staff safety review in license renewal proceedings; LBP-04-15, 60 NRC 81 (2004)

sufficient security measures are in place to defend the Indian Point plant from a broad spectrum of potential attacks; DD-04-3, 60 NRC 343 (2004)

TESTIMONY

gaps in specific knowledge of intervenor's expert witness may go to the weight of the expert testimony rather than to its admissibility; CLI-04-21, 60 NRC 21 (2004); LBP-04-13, 60 NRC 33 (2004)

THORIUM

Th-232 is source material that has a low specific activity and is very hard to disperse and thus the possession limits for a radioactive waste storage operation are set accordingly; DD-04-4, 60 NRC 387 (2004)

TIME LIMITS

timeliness of a motion to dismiss a proceeding on the ground that subsequent events have transformed the proceeding beyond the scope of the original notice is measured from the date of the transforming events, not the date of the original notice; LBP-04-33, 60 NRC 749 (2004)

TRANSPORTATION OF RADIOACTIVE MATERIALS

traffic patterns and accident rates for transport of yellowcake slurry have been adequately addressed in the FEIS; LBP-04-23, 60 NRC 441 (2004)

TRITIUM

contention alleges that the license termination plan is deficient because licensee failed to provide documentation of the source, cause, and plan for remediation of the current high levels of contamination in the groundwater onsite; LBP-04-27, 60 NRC 539 (2004)

URANIUM

See Depleted Uranium; Low-Enriched Uranium

URANIUM ENRICHMENT FACILITIES

a state, county, municipality, federally recognized Indian tribe, or agencies thereof, may submit a petition to the Commission to participate as an interested entity in a licensing proceeding; CLI-04-30, 60 NRC 426 (2004)

any person who does not wish, or is not qualified, to become a party to the licensing proceeding may request permission to make a limited appearance; CLI-04-30, 60 NRC 426 (2004)

applicant's environmental report and the Staff's associated EIS are to include a statement on the alternatives to the proposed action, including a discussion of the no-action alternative; CLI-04-30, 60 NRC 426 (2004)

environmental report fails to discuss impacts of construction and operation of deconversion and disposal facilities that are required in conjunction with the proposed enrichment plant; LBP-04-14, 60 NRC 40 (2004)

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petitioners contend that the materials license application seriously underestimates the costs and feasibility of managing and disposing of the depleted uranium hexafluoride; LBP-04-14, 60 NRC 40 (2004)
petitioners contend that the need for the facility is not adequately described in the environmental report; LBP-04-14, 60 NRC 40 (2004)
the Commission is to retain authority and responsibility for the regulation of; CLI-04-30, 60 NRC 426 (2004)

URANIUM HEXAFLUORIDE

contention alleging that a sound, reliable, or plausible strategy for disposal of large amounts of waste is lacking is admitted; LBP-04-14, 60 NRC 40 (2004)

VACATUR

of orders in license transfer proceeding that became moot, denial in the case of Commission orders devoted to antitrust law and policy; CLI-04-18, 60 NRC 1 (2004)

WAIVER OF OBJECTION

after intervenor's witness has had access, without objection, to safeguards information, it is too late to decide that the witness does not qualify as a security expert; CLI-04-21, 60 NRC 21 (2004)

WAIVER OF RULE

a party may petition that a regulation not be applied in certain instances by establishing a special circumstance; LBP-04-24, 60 NRC 475 (2004)

when a party challenges the sufficiency of the decommissioning bond and the absence of a decommissioning plan for a facility, instances where similar facilities were extremely costly to decommission may provide grounds for waiving the regulation setting the bond amount; LBP-04-24, 60 NRC 475 (2004)

WASTE CONFIDENCE RULE

petitioners may not raise issues that have been generically addressed by the Commission through; LBP-04-17, 60 NRC 229 (2004); LBP-04-18, 60 NRC 253 (2004); LBP-04-19, 60 NRC 277 (2004)
restrictions on considering environmental impacts do not expressly address how the agency evaluates a project's potential economic benefits; CLI-04-22, 60 NRC 125 (2004)

WASTE DISPOSAL

calculation of costs associated with security for; LBP-04-14, 60 NRC 40 (2004)

WATER POLLUTION

deficiencies related to environmental assessment of radiological impacts of proposed project on groundwater and surface water are cited in contention; LBP-04-14, 60 NRC 40 (2004)

WATER QUALITY

pore volumes is a parameter that describes how many times the contaminated volume of water in the rock must be displaced or processed to restore groundwater quality; CLI-04-33, 60 NRC 581 (2004)

WHISTLEBLOWERS

a complainant in a DOL whistleblowing proceeding must show that one or more protected activities was a contributing factor in the adverse action; CLI-04-24, 60 NRC 160 (2004)

although Energy Reorganization Act § 211 does not specify a preponderance-of-the-evidence standard, the courts have found that the term "demonstrated" implies that standard; CLI-04-24, 60 NRC 160 (2004)

an employee must give management at least some form of notice of the safety or regulatory compliance problem; CLI-04-24, 60 NRC 160 (2004)

discrimination cases are, by their nature, peculiarly fact-intensive and dependent on witness credibility; CLI-04-24, 60 NRC 160 (2004)

employers are prohibited from taking adverse action against employees for providing safety-related allegations to employers, Congress, or the Commission; CLI-04-24, 60 NRC 160 (2004)

protected activities are defined as acts of notifying an employer of an alleged violation and refusing to engage in any practice made unlawful by the Energy Policy Act or the Atomic Energy Act, if the employee has identified the alleged illegality to the employer; CLI-04-24, 60 NRC 160 (2004)

protected activity includes, but is not limited to, protected activities related to safety issues; CLI-04-24, 60 NRC 160 (2004)

the evidentiary touchstone in a nuclear whistleblowing case is the special evidentiary framework that Congress established in section 211 of the Energy Reorganization Act; CLI-04-24, 60 NRC 160 (2004)
the grounds for the Staff's finding of a violation must form the upper bound for the grounds available to the board when determining whether a violation has occurred; CLI-04-24, 60 NRC 160 (2004)

SUBJECT INDEX

to prevail, a complainant must demonstrate by preponderance of the evidence that a protected activity was a contributing factor to an adverse personnel action unless the employer comes back with clear and convincing evidence that it would have taken the same unfavorable personnel action notwithstanding the protected whistleblowing activity; CLI-04-24, 60 NRC 160 (2004)

WITNESSES

being a paid employee or dedicated member of a party does not create a presumption of doubt about his or her credibility or motives such that a Subpart G proceeding is required; LBP-04-31, 60 NRC 686 (2004)

Commission deference to licensing board fact findings is particularly great where the board bases its findings in significant part on the credibility of; CLI-04-24, 60 NRC 160 (2004)

to obtain a Subpart G hearing, a party may challenge credibility based on historical information in a similar or related proceeding, as long as it is probative of whether that credibility reasonably may be expected to be at issue in the current proceeding; LBP-04-31, 60 NRC 686 (2004)

WITNESSES, EXPERT

a person who possesses the technical competence necessary to evaluate relevant portions of a nuclear plant security plan and has extensive training and experience in fields closely related to nuclear plant security is qualified as; LBP-04-13, 60 NRC 33 (2004)

after intervenor's witness has had access, without objection, to safeguards information, it is too late to decide that the witness does not qualify as a security expert; CLI-04-21, 60 NRC 21 (2004)

in the area of reactor security plans, the expertise of the intervenor's witness is general rather than specific; CLI-04-21, 60 NRC 21 (2004)

licensing boards have considerable discretion in deciding whether a witness is qualified to serve as; CLI-04-21, 60 NRC 21 (2004)

practical, "hands-on" experience, while desirable, is not indispensable in all cases; CLI-04-21, 60 NRC 21 (2004)

qualification as an expert may be by knowledge, skill, experience, training, or education if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue; CLI-04-21, 60 NRC 21 (2004); LBP-04-13, 60 NRC 33 (2004)

technical competence to evaluate the components of a security plan ideally requires practical knowledge flowing from working with the security system; CLI-04-21, 60 NRC 21 (2004)

the party who offers a witness has the burden of demonstrating that the witness is qualified; CLI-04-21, 60 NRC 21 (2004)

the qualification standard allows for considerable board discretion; CLI-04-21, 60 NRC 21 (2004)

to gain access to safeguards information, a witness must possess the technical expertise to evaluate the information requested; CLI-04-21, 60 NRC 21 (2004)

unwarranted and inflexible barriers, such as too great an insistence on specific knowledge in selected aspects of the subject, should not disqualify a witness who possesses a strong general background and specialized knowledge in the relevant field; CLI-04-21, 60 NRC 21 (2004)

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